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# Introduction

**3 routes to enable court to exercise power to review administrative decision**

* **Original jurisdiction**
  + Sue government through ordinary civil law (e.g. parole board has perpetuated a tort)
  + References re constitutional questions
* **Appellate jurisdiction (rare)**
  + Enabling statute creates a right of appeal to courts (right to appeal to the court from the tribunal – must be in enabling statute e.g. *Forest Act*).
* **Inherent (supervisory) jurisdiction**
  + ***Judicial review*** invoking rule of law concerns (most often re individual adjudications)
  + 2 principles: 1) procedural fairness 2) substantive review
  + Jurisdiction as guardians of the rule of law – inherent right of the court to judicially review actions of the executive.

## SCC and the Rule of Law

**Modern RofL:** **3-part test from *Imperial Tobacco:* RofL =**

1. Supreme over private individuals *and* gov’t officials – must exercise **authority non-arbitrarily**
2. Requires creation & maintenance of positive order of laws
3. Requires relationship between state & individual that is regulated by law

**Linked to RoL and principle of judicial independence, access to justice via s. 96 courts.**

**As an UNWRITTEN PRINCIPLE, the rule of law constrains both *legislative* and *court* action:**

* Can have full legal force in certain circumstances (***Manitoba Language Rights, Secession Reference***)

**- But -**

* Cannot *strike down legislation* based on content (***Imperial Tobacco, Christie***)
* With ***carve-out*** for access to justice in s. 96 courts (***Trial Lawyers*** ***in obiter***)

***Crevier*** - superior courts have a **constitutional role and inherent jurisdiction to judicially review *administrative decision making* –** courts have role in upholding the Rule of Law.

# Tribunal Remedies

**2 Types of Remedies:** 1) Orders made by a tribunal; 2) Orders that courts make about tribunal orders.

## At the Tribunal (Incl. Charter Remedies)

**[1] LOOK TO TRIBUNAL’S ENABLING STATUTE**: Remedial options of tribunal based on statute itself (no s.96 inherent jurisdiction).

* ***No general/inherent jurisdiction –*** if tribunal makes order outside of scope of enabling statute, outside jurisdiction and order will be void (this is one way where their remedies can be more narrow than courts, but see below where broader)
* **Authorization can be:** listed or general (e.g***., McKinnon***); explicit or (with exceptions) implicit
  + **Orders for payment of money** – generally can only be ordered by tribunals with express statutory authority – ***never have implicit authority to order money damages (not damages but can impose monetary penalties)***
  + Tribunals ***don’t have equitable jurisdiction*** to order interim injunctions (may have statutory authority to seek an injunction in court)

**[2] NOVEL ADMIN REMEDIES: Potentially Broader Remedial Scope than Courts – Aspects that can affect Admin Remedies:**

* May be ***systemically oriented***, forward-looking (e.g. using remedies to “solve” a systemic racism issue within an organization)
* Can be ***diachronic*** (i.e., tribunal remain seised over time – tribunal can check if remedy is working later on)
* Can ***consider multiple parties*** (i.e., polycentric issues)
* Affected by ***unique nature of membership & expertise*** (e.g. *Competition Tribunal Act* – stipulated some members of tribunal be lay persons).
* Span the ***public-private divide***
* Different relationship to regulated communities; policy concerns & government priorities …affects remedial options
* **Unique Remedies:** a by-product of these factors (ongoing seizen, a broad mandate, different expertise, and trend towards crossing private-public divide).

***TRIBUNAL CAPABILITY TO CREATE NEW REMEDIES:***

**[1] Yes – Innovative admin (systemic) remedy – *McKinnon,* 2011 HRTO 263**: *Ab’l corrections officer facing systemic discrimination. MGT did nothing about the “poisoned environment*” **// Held:** HRT Arbitrator able to remain seised of the matter until orders implemented and complainants remedial right met with full compliance and conformity, and drafted new orders after initial steps were not complied with in good faith (tribunal is still limited to their enabling statute).

* **Remedies ordered**: Promotion of individual, relocated EE’s responsible for discrimination, damages, order to read judgment at parade (**1998**); ***then in 2002,* after non-compliance,** **crafted ministry-wide, systemic, specific orders**:
  + E.g. executive training of deputy minister, asst. deputy minister and regional directors;
  + 3rd party programme developer and monitor;
  + Final responsibility for compliance to lie w/deputy minister of correctional services
* **Able to make new remedies after first round ineffective if subjects failed to comply, and can craft orders with a more specific description/guidelines** (***McKinnon – broad enabling statute***)

**[2] No - *Moore v BC (Education)*, 2012 SCC**: *Discrimination against child on basis of disability. Child had to go to private school when public school closed diagnostic center* **//** **Held:** Found discrimination against child by looking at *HRC* and preamble to the BC *School Act* – ind awards for private school tuition reimbursement and pain and suffering were upheld; **BUT** ***overturned* thesystemic remedies on the school district (go back and re-work to assess funding priorities) and province (funding changes, amount, role in monitoring).**

* **The remedy must flow from the individual claim before the tribunal**: Court is adjudicator of particular claim before it and not a Royal Commission (not w/in HRT jurisdiction to look at broad policy considerations) – remedies it ordered too remote (***Moore***)

**Reconciling *McKinnon* and *Moore*:** McKinnon still in the poisoned workplace throughout vs. Moore already having graduated and there was no evidence of malicious discrimination **//** ***Moore*** involved core funding priorities and heightened political question.

***CHARTER REMEDIES*:** Charter remedy must still be a remedy provided for in statute (***Conway***)

* **Charter s. 24(1):** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to **a court of competent jurisdiction** to obtain **such remedy as the court considers appropriate** and just in the circumstances

**TEST** (***Conway***)**:** Whether tribunal/board is a “court of competent jurisdiction” **to grant specific remedies** under 24(1):

* Does the particular tribunal have ***jurisdiction to grant Charter remedies generally***? can it:

(a) decide questions of law, AND

(b) has that jurisdiction been removed by legislature according to enabling statute?

* Looking at the particular case, is ***the requested s. 24(1) Charter remedy available***? look at powers accorded in statute.
  + Bearing in mind the statutes mandate + purpose (***Conway*** *– ORB did not have jurisdiction to grant remedy sought*)

**[3] MORE EFFICACIOUS: faster, cheaper, more accessible.**

## Enforcing Tribunal Orders Against Parties

**\*Occurs after a tribunal makes a decision and imposes an order (assuming no challenge).**

* **Tribunal seeks to enforce own order**
  + ***Tribunal powers*** (rare and/or limited)
    - E.g. *Administrative Tribunal Act,* s.18 – allows certain tribunals to schedule a hearing, make a decision or dismiss an application is a part fails to comply w/ order.
  + ***Conversion into court order***: convert tribunal order to court order and if not followed can have contempt proceedings.
* **Party seeks to enforce tribunal’s order:** May bring action in court against another party to enforce tribunal’s order (e.g. Teachers seek enforcement of arbitration order that a school board set aside certain funds for professional development).
  + Difficult task of convincing the court to intervene this way.
* **Criminal prosecution (quasi-criminal) –** Hardly used (often last resort)
  + ***Criminal Code s 127* -** Offence to disobey a lawful order of a fed/prov tribunal
    - Only available if there is no other punishment provided by law (nothing in ES)

## Private Right of Action (For Monetary Relief)

**\*Use when seeking Monetary Relief**. Admin agencies can be sued (e.g. Negligence).

* Federal Court has original jurisdiction for all actions for damages against federal Crown
* Can do both JR and private actions separately but if successful with civil remedy the JR goes away and the order is left standing (***TeleZone***)
  + If your claim is fundamentally private can proceed without going through JR First. But must pick your remedy: damages or JR: “No amount of artful pleading in a damages case” will get you a JR-style public/admin law remedy (***Telezone***).
* ***Misfeasance in public office***: Tort exists but narrow scope – to succeed, P must establish **1)** Deliberate and unlawful conduct by someone in public office, and **2)** The public officer’s subjective knowledge that the conduct was unlawful and likely to harm the P (***Odhavji* SCC –** established there was such a tort).
  + Successful in ***McMaster*** – *Intentional neglect by prison staff and Correction services to get offender new shoes*

# Challenging Administrative Action

Be realistic about remedies.

**[1] Internal tribunal mechanisms**

* Slip rule – for clerical errors or minor mistakes (***e.g. s.53(1) ATA***).
* Reconsideration & rehearing – must look @ enabling statute to see if this power is available.
* Internal appeals /reviews – e.g. WCB appeal to WCAT (internal appeal/review) – look @ enabling statute.
  + E.g. ***Suresh*** + ***Singh*** have many layers.
* Tribunal Administratif du Québec (TAQ) – “super” tribunal that does judicial reviews to the TAQ instead of court.

**[2] External non-court mechanisms** (ex. Ombudsperson) **-** Only available after you exhaust internal steps

**[3] Going to court: Appeals or JR**

**Is an Appeal to the Courts Available?**

1. **Enabling statute:** Appeal to court must be expressly written into the statute // Suggests tribunal does not have the final word in something they have jurisdiction over.
2. **Scope of appeal:** Need to know scope of appeal (tribunal can have any scope (palpable error of fact, de novo, etc) and which court (BCSC, BCCA, Federal Court, etc)
3. **As of right or with leave?** Automatic right or apply to leave?
4. **Stay of proceedings:** Not automatic **//** Must apply and show will be adversely affected (e.g. if fined at tribunal is this stayed until appeal is over?)

**NB: \*** **General Rule**: Judicial Review; But sometimes a statutory appeal goes to the court (e.g. *BC Securities Commission* appeal to BCCA)

# Judicial Review

Based on inherent jurisdiction to oversee & check admin action in interest of RofL (***Crevier***). Cannot give damages and typically cannot compel action (although ***Insite*** and ***Loyola*** stretch the boundaries of that by merely granting ***Certiorari*** – it’s in effect making a decision).

* Constitutionally entrenched power of JR no matter how strong the privative clause is (***Crevier; Pasienchyk***).

### STEP 1: IS JUDICIAL REVIEW APPROPRIATE?

JR is always discretionary (except habeus corpus applications**)** (***Khela***). In BC court has discretion to ***refuse relief under s. 8 JRPA.***

* ***Modern Position*:** courts need to uphold ROL while avoiding undue interference with administrative powers (***Dunsmuir***). **Court should exercise discretion to JR judicially and in accordance with the proper principles (*Khosa*)**. But not exercising JR could compromise rule of law (***MiningWatch***).
* ***Historical deferential position:*** ***Domtar*** (*Different rules from diff. tribunals re: interp of same stat provisions (EE 2 week pay (CALP) vs Labour Court 3 days)*): Principle of the **ROL** must itself be ***“qualified”*** in certain situations out of respect for the autonomy and expertise of tribunals. Inconsistency of tribunal decision was not independent basis for JR.

**COURT HAS DISCRETION TO REFUSE JR - BUT** Must ***have reason*** for not granting JR (usually equity dictates) (***Khosa (SCC 2009*)):**

* Impugned decision is ***premature*** (interim procedural and evidentiary rulings by tribunals) – to get interim decision reviewed would have to show why cannot wait until end of proceedings (***Mining Watch; Khosa)***
* ***Delay/Acquiescence* (see also:** Limitation Period).
* Party to the application ***does not come with clean hands*** (Includes fraud, trickery, apparent purgery, or other unacceptable behaviour (***Homex***)).
* ***Issues are moot,*** no apparent practice benefit and the issue is academic only.
* Consider ***balance of convenience to parties*** – who is more disadvantaged by not exercise JR jurisdiction; Not exercising JR could compromise the rule of law (***Mining Watch (SCC 2010))***
* ***Altus Group* (2015 ABCA): “directly contradictory decisions by same tribunal** = unreasonable interpretations by 2nd panel”
  + Contradictory decisions by same tribunal are NOT reasonable

**THRESHOLD QUESTIONS:**

**[1] Is the tribunal a “Public body”? - can seek JR from agencies “public” enough (must look at the purpose the body serves) (*McDonald v Anishinabek Police –*** *Police service discharged M after he faced complaints // Police Services are not an admin agency under statute //* **Held:** police force is public enough**)**

* **Criteria if Body is “Public”** - ***McDonald* *factors:*** Source of powers; Functions and duties of body; Implied devolution of power: extent of govt's direct OR indirect control over the body; Body’s power over public at large; Nature of the body's members and how appointed; How funded; Nature of body's decisions ; Constituting documents or procedures indicate duty of fairness is owed; Relationship to other statutory schemes / parts of government, such that the body is “woven into the network of govy”
  + ***McDonald*:** authority flowed from complex of 2 statutes and non-statutes, D-M was fulfilling a public function & had public consequences so was **part of the machinery of government**
  + It’s ***the subject matter of the power not the source of power*** that determines whether it’s sufficiently public (***McDonald***)

**[2] Do you have standing to bring the application?**

* **Easy if you’re directly affected**
* **Public interest standing** (***Downtown Eastside* –** *No sex workers there to represent themselves*): Do not have to be the ONLY possible person who could perceivably bring the matter, must simply be A reasonable vehicle for bringing the matter forward.
  + **Test: 1)** There is a justiciable and serious issue to be tried; **2)** Applicant has a genuine interest in the subject matter; **3)** The proposed suit, in all the circumstances, must be a reasonable and effective means of bringing the suit forward.
* **Tribunal standing in challenges to their own decisions** **– TEST (discretionary): 1)** Anyone else to represent perspective if the tribunal didn’t? 2) Is this tribunal and decision in question more policy or more adjudicative (if more adjudicative then that is an issue) (***Ontario Energy Board v Ontario Power Generation* (2015 SCC)**).

**[3] Which court?**

* JR not in enabling statutes (exception remedy).
* If Federal Tribunal: JR to Federal Court – Federal court is a s.101 court, can only hear matters explicitly delegated to them.
* If Provincial Tribunal: BCSC - Since superior courts are s.96 courts of inherent jurisdiction, charter/constitutional review can be heard there

**[4] Deadlines:** Normal *Limitation Act* does not apply

* ***Federal Courts Act* 18.1(2) - 30-day** limitation period
  + Can be extended when no prejudice or hardship, reasonable explanation for delay 🡪 “or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.”
* ***BC Administrative Tribunals Act* s 57(1) - 60-day** limitation period
  + Can be extended when no prejudice or hardship, reasonable explanation for delay

**[5]** Consider whether **other means of redress are exhausted (i.e. internal reviews)?**

* ***Harelkin v UofR–*** *student in social work program, kicked out w/o clear reasons. H tried to skip appeal step past the University’s Senate* // **Held:** mustpursue right of appeal to Senate Committee in the statute first
  + **Can refuse JR if adequate alternative remedies are available**: exhaust internal avenues (***Harelkin***)
  + Cannot assume an internal appeal option will deny justice (***Harelkin***)
  + **Option must still be adequate**: Would what you would have potentially gotten through the alternative avenues have sufficiently remedied the defect/harm? (***Harelkin***) If in practice will get a de novo review, sufficiently expeditious (***Harelkin***) – look at: procedure on appeal, composition of senate members, efficiency, expediency and costs.
* **Dickson (dissenting):** there must be an “adequate alternative remedy.” Just because you have another appeal doesn’t mean that appeal will solve your problem.

### STEP 2: ACTUAL JR 🡪 Go to Procedural Fairness OR Substantive Review

### STEP 3: AVAILABLE JR REMEDIES – Seek JR only if these remedies are adequate

**Court can grant any relief entitled to in proceedings for relief (s. 2(2)(a) JRPA – BC Statute):**

* Cannot give damages and typically cannot compel action (although ***Insite*** and ***Loyola*** stretch the boundaries of that).
* **SEE THE UNIQUE REMEDIES A TRIBUNAL CAN MAKE (ABOVE) (*Moore, McKinnon*)**

**USUAL REMEDY = Relief in the nature of certiorari + mandamus** (quash decision (certiorari) + mandate tribunal to reconsider the matter in a procedurally fair way (mandamus)).

* ***Certiorari:* = quashing (ex post) decision of underlying tribunal**
  + **General rule:** If error goes to jurisdiction then certiorari will issue as of right, but if it’s an error of law then it’s discretionary (***Harelkin***, Dickson J. Dissent)
  + **ss. 5 and 6 *JRPA***: Court has power to set aside & direct to reconsider with directions.
* ***Prohibition* (preemptive):** **Prevent lower court from hearing a matter**.E.g. Prevent lower court (board or tribunal) from exceeding jurisdiction or prevent from exercising power (rare and typically only temporary)
* ***Mandamus***: **Mandate tribunal that some action must be taken** (e.g. reconsider decision w/direction // CANNOT mandate a tribunal to come to a particular decision)
  + ***Insite SCC:* Mandamus extended in a direction never seen before – SCC held that the Minister must exercise discretion to give Insite an exemption //** *Safe injunction site shut down for breaching CC.* 
    - **Note: *Insite*** is a “hard” case and ***typically the Court cannot tell a discretionary decision maker what to do.*** **BUT** significant Charter rights were at risk and no other appropriate remedy.
* ***Declaration:* Court statement of the law.s. 2(2)(b) *JRPA*** - Determine and state legal position of parties or law applicable to them. **2 types**: **(1)** public law (declare government act ***ultra vires***), and **(2)** private law (clarify law or declare party rights under statute). Not enforceable but they’re widely respected (e.g. in ***Khadr***)
  + ***Khadr:* Declaration - Pressure from the SCC decision helped Khadr eventually be returned to CND (through Fed Gov’t respecting decision and making a deal w/ US) //** *Trying to be returned to CND for the breach of his Charter rights. CND would have to ask the US govt to release Khadr* **// Held:** Declaration given -court declares his Charter rights were breached but refused to repatriate Khadr to CND.
* ***Habeas corpus:*** **Bring a detained person before court** to ensure detention (e.g. child welfare, prison, mental institution) is not illegal **//** If a person should not be detained they have to be let go.
* ***Injunction***: Enjoin the decision (**s. 2(2)(b) *JRPA*)**
* ***Quo Warranto***: Remedy effectively dead.

**RELEVANT PROVISIONS - *JRPA*:** JR Remedies here are still based on the above prerogative writs, although in BC the writs are abolished.

* **Application for JR as Petition:** 
  + **2(1)** An application for JR must be brought by way of a ***petition proceeding.***
  + **(2)** On an application for JR, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
    - **(a)** relief in the nature of ***mandamus, prohibition or certiorari***;
    - **(b)** ***a declaration or injunction*** in regard to a statutory power (see definition).
* **Petition:** Petition for relief **“*in the nature of”*** the old writs – old writs transformed to statutory remedies (& quo warranto abolished entirely) (**ss. 2, 12, 14, 18 JRPA**)
  + **s. 12(1)** ***abolishes the old writs*** and sub (2) establishes that they will be treated as application for JR under s.2.
  + Sufficient for party to ***set out grounds on which relief is sought*** and nature of that relief w/o identifying particular writs **(s. 14**)
  + Information in the ***nature of quo warranto*** abolished (**s.18)**
* **Remedial powers/limitations**: only available in relation to exercise of **“statutory power of decision”** = Right/power conferred by enactment to make decision deciding or prescribing a) legal rights, powers, privileges, immunities duties or liabilities of a person, or b) eligibility of person to receive a benefit or licence (**s. 1**).
  + **“Statutory Power”** is broader and includes any powers inferred by enactment to make rules and exercise statutory powers of decision. This includes compliance, policy, etc (**s. 1**).
    - **Statutory Power can be reviewed BUT ONLY “STATUTORY POWERS OF DECISION” CAN BE SET ASIDE.**
    - **E.G:** Securities commission making policy decisions would be their statutory power, but them investigating and charging someone and making a panel decision would fall under statutory power of decision.
* **Courts Remedial Powers:** 
  + **Cannot get anything more under petition for JR than you could get under prerogative writs (ss. 3-4)**

**Some expansion on writs:**

* + **Direct Tribunal to Reconsider -** Can direct a tribunal to reconsider a statutory power of discretion (**s. 5**) and that tribunal must listen to directions the court thinks are important (**s. 6**).
  + **Power to set aside -** Can set aside a stat power of decision but cannot replace it; instead of making a declaration (**s. 7**)
  + In BC **court has discretion to refuse relief** (**s.8**)
  + **Defects in Form -** Court can ***ignore technical irregularities and defects in form*** if no substantial wrong or miscarriage of justice (**s. 9 JRPA**)
* Court has the ***power to make interim orders*** (**s. 10 JRPA**)
* ***No time limit*** for applications of JR unless (a) an enactment otherwise provinces, and (b) the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay (**s.11 JRPA)**
* **DOES THE REMEDY DICTATE THE RESULT?:** The 3 person concurring decision in ***Loyola*** illustrates the ***possibility of the remedy (at times) really dictating the result*** – the tail that wags the dog (McLachlin, Rothstein & Moldaver simply did not want to send it back down); e.g. ***Insite*** requiring exercise of discretion in a particular way 🡪 Does not fit well with the old prerogative writs.
* **WHERE IT TOUCHES ON CROWN PREROGATIVE OVER FOREIGN AFFAIRS**: Court has jurisdiction and duty to determine whether exercise infringes Charter or other constitutional norms and has the narrow power to review and intervene on those matters to ensure the constitutionality of executive action (***Khadr*** – ordered declaration but not mandamus).
* **EXCEPTIONALLY, COURT CAN COMPEL EXERCISE OF DISCRETION**: ***Insite*** where infringement is serious and life threatening can issue order in nature of mandamus under s. 24 of Charter that’s subject to withdrawal if circumstances change.

# Federal Court: Judicial Review

**STILL INCORPORATE ANALYSIS OF WHETHER JR IS APPROPRIATE.**

**Statutory courts under s. 101** – do not have inherent jurisdiction so rely on only the powers given in constituting statute (***Federal Courts Act* (FCA))**

* Federal Court Canada (FCC) has Statutory authority to do JR of federal tribunals (look @ ***FCA***).
* FCC has ***concurrent jurisdiction w/provincial superior courts*** to hear civil claims brought against federal government.

**Federal Court of Canada’s (FCC) Exclusive Jurisdiction (subject to s.28):**

* **s. 18(1)(a)** - **FCC HAS EXCLUSIVE POWERS** - to issue injunction, certiorari, prohibition, mandamus, quo warranto or grant any declaratory relief for any ***“federal board commission or other tribunal”***
  + **s. 2 – “federal board commission or other tribunal” -** includes any body or persons deploying federal statutory powers or under royal prerogative.
    - **Federal decision makers under s.2 can include**: Prime Minister, major boards and agencies, local border guard, etc (***Telezone*)**
* **s. 18(1)(a)** **is missing habeas corpus** (limited to special circumstances) – provincial superior courts retain habeas corpus jurisdiction in relation to federal administrative action in circumstance where that remedy’s own requirements are met (***May v Ferndale*).**

**Federal Court of Appeal Jurisdiction - S.28 -** If the tribunal is listed in **s. 28 of *FCA*** (e.g. Tax Court, National Energy Board, CRTC, Copyright Board) ***then court of first instance on JR is Federal Court of Appeal* (not FCC)*.***

## Judicial Review before the Federal Court

### [1] Must exhaust all other remedies before JR (*Harelkin*/s. 18.5 FCA):

* **s. 18.5 FCA** *-* ***Completely ousts JR if it applies***, no need for analysis of what’s an “adequate” remedy 🡪 be sure to read enabling statute **(Rigid bar to JR)**
  + **Situations in which JR is ousted:** If there is a statutory appeal (enabling statute provides for such an appeal) from an administrative decision maker to the FCC, FCA, SCC, Court Martial Appeal Court, Tax Court, Governor in Council, or Treasury Board, ***there can be no JR of the same subject matter covered by that appeal*** (**s.18.5 FCA)**
* **For statutes that give choice between appeal to Governor in Council or to FCA**: Appeal to FCA for questions of “law or jurisdiction”, GIC if policy argument. **Can seek JR of GIC decision** to the FCC and can appeal to FCA and SCC if necessary; **BUT** if use statutory appeal to FCA, then JR is barred. Can appeal that decision to the SCC though (**s.18.5 FCA**)
  + **E.g**. CRTC under the *Telecommunications Act*. Allows GIC to “vary or rescind” CRTC decision **Or** to appeal to the FCA “on questions of law or of jurisdiction.” Appeal to FAC will mean there is NEVER JR (**s.18.5** is a bar). BUT were the CRTC decision appealed to the GIC, once that appeal is exhausted, JR could be sought of the GIC decision b/c the GIC is a “federal board, commission or other tribunal” it is subject to JR before a federal court. Thus, could JR the GIC decision.
  + **Note:** Federal Court of Appeal “stands in the shoes” of the Federal Court if doing Judicial Review itself.

### [2] Standing/Limitation Period:

* ***JR is as of right*** other than for proceedings under the ***Immigration Refugee Protection Act*** where must seek leave.
* 30 Day Limitation Period
* **Must have standing:** Individual is directly affected, the Attorney General, or has Public Interest Standing.
  + **Public interest standing:** Do not have to be the ONLY possible person who could perceivably bring the matter, must simply be A reasonable vehicle for bringing the matter forward (***Downtown Eastside Sex Workers v Canada* (2012 SCC))**

### **[3] Must fit into ONE of the following GROUNDS OF REVIEW (s. 18.1(4) FCA):**

***Khosa*** – Binnie for the majority – operate as grounds and **ARE NOT DISPOSITIVE** of the SofR (unlike the *ATA*). These are the grounds to get into federal court, but does not ***explicitly identify the SofR***. Legislature has the power to specify a SofR if manifests clear intent to do so.

* There is presently no consensus in the SCC about the relationship between the statute and the CL, as evidenced by the different approaches taken by the majority, minority, and dissent in ***Khosa***.
  + **MAJORITY: Where the leg language permits (as seen in the *FCA*)** the courts **a)** will NOT interpret grounds of review as SofR**, b)** will apply ***Dunsmuir*** principles to **determine the approach to JR**, and **c)** will presume the existence of a discretion to grant or withhold relief based on ***Dunsmuir*** teaching of restrain in judicial intervention in admin matters (Binnie – ***Khosa***).
    - **No conflict here between the statute and CL 🡪 Statute establishes grounds and CL establishes SofR.**
  + **Rothstein, MINORITY in *Khosa*:** Argues where Parliament does not provide for a deferential standard (as compared to what is seen in 18.1(4)(d)), then standard of correctness applies. Where parliament wanted a deferential standard, it used clear & unambiguous language. Where it didn’t want deference, it didn’t use that language.

**Federal Court MAY grant relief if federal admin agency (board, commission or other tribunal) (18.1(4)(a-f)):**

1. **(a)** ***Acted without jurisdiction*** (acting outside 4 corners of statute 🡪 no SofR specified, may resort to CL, where ***Dunsmuir*** says jurisdictional issues usually command a correctness standard (Binnie – ***Khosa***)).
2. **(b)** ***Failed to observe procedural fairness*** (no SofR specified, must resort to CL, where ***Dunsmuir*** says procedural issues are usually determined on correctness standard (Binnie – ***Khosa***)).
3. **(c) *Erred in law*** (Determining SofR depends on what statute is being interpreted, usually correctness std (Binnie – ***Khosa***))
4. **(d)** **\***Based decision or order on ***erroneous finding of fact*** that it made in a perverse of capricious manner (all this means is that supposed to show deference on findings of fact (does not establish a std, but this was argued by Rothstein J.), but still have to use the CL (***Dunsmuir*)** to make sense of this *–* Binnie for maj in ***Khosa*).**
5. **(e)** Acted, or failed to act, ***by reason of fraud or perjured evidence* (**CL would not allow statutory D-M to rely on fraudulent testimony – court would be expected to exercise its discretion in favour of the applicant (Binnie – ***Khosa***)); OR
6. **(f)** Acted in ***any other way contrary to law***: permits new grounds of review – e.g. error of discretion

## Remedies at Federal Court (s.18.1)

* **RELIEF - 18(1) (a)** to issue ***an injunction***, ***writ of certiorari***, ***writ of prohibition***, ***writ of mandamus*** or writ of ***quo warranto***, or grant ***declaratory relief***, against any federal board, commission or other tribunal; and **// (b)** to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the A-G of Canada, to obtain relief against a federal board, commission or other tribunal.
* **Power to correct technical defects** - **s. 18.1(5) FCA** - If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may
  + (a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and
  + (b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

# Procedural Fairness

* **STEPS:** 1) Threshold – any fairness? 2) Content – how much? 3) Application to case at hand.
* **STANDARD OF REVIEW** = **Correctness (or actually fairness)** **// Essentially:** was the person treated fairly (“yes” or “no”) 🡪 Courts are experts on procedure, therefore they can tell an admin tribunal whether procedure was or wasn’t fair.
* **RATIONALE**: transparent participatory processes promote important RofL values
* Argument that you did not have an opportunity to make your case. Procedure Matters: need faith in the system, predictability, fairness, etc.
* **OUSTED:** PF can be ***ousted by express language in statue*** (***Kane v Board of Governors***)

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| **PF REQUIRES**: the **(1) *right to be heard*** (know case against you and have opportunity to respond) (***Nicholson, Cardinal***) and **(2)** the ***right to an independent and impartial hearing*** |

## A) THRESHOLD: Is this the kind of decision that should attract some procedural rights? i.e. is there a duty of fairness in this context?

* **General common law duty of fairness on sliding scale (*Nicholson –*** *summary dismissal of police officer***)**
* PF lies as duty on every public authority (e.g. executive actors, tribunals, and officials acting pursuant to statutory authority) making admin decision ***not of a legislative nature*** and which affects the ***rights, privileges OR interests of an individual*** (***Cardinal –*** *mere fact that solitary was not “punishment” was not the test*)
* **Must look at all aspects of the decision to determine how much fairness a person is entitled to (*Knight***).
* **\*Consider if Charter Applies:** Applies more narrowly wherever there is a deprivation of life, liberty or security of the person – if found to violate s. 7 little chance of being saved under s. 1 (***Charkaoui*** – see below under Charter section) 🡪 **but PF applies only where s. 7 POFJ are invoked (*Suresh***)

**Taken together = duty of fairness *only* applies when:**

### [i] Must be a DECISION:

Final disposition - not an interim process/investigation (***Knight***).

**\*Some exceptions** where the interim decision is your only hope (***Re Abel***) or the consequences are very serious at the interim stage (***Irvine***)

* **(1)** ***Where “advice” of the preliminary stage is practically speaking the sole basis of the final decision (de facto final)***: look at the proximity between the advisory board and the ultimate decision-maker (***Re Abel*** - *convincing advisory board was his only hope of obtaining release - patient could not get medical records - decision quashed (Certiorari and mandamus)*).
* **(2)** ***No duty of fairness at the investigatory stage*** where there is a final tribunal style process that will deal with the merits of the claim and which will get PF (***Dairy Producers –*** *(multi-step investigation)**HRC appoint investigator, who writes report to board, then board has full hearing*); **BUT** if there are ***significant reputational costs and the potential for massive fines/quasi-criminal consequences*** then some fairness is owed (i.e. enough to allow counsel for applicant to be present) (***Irvine -*** *Anti-trust case;* seriousness of the conclusion “trickles down the entire structure”; there was a duty of fairness here but was fulfilled by having counsel present at the time of the investigation).

### [ii] that affect the “rights, privileges or interests” of an individual (not a group):

* **Rights privileges or interests that trigger duty of Procedural fairness**:
  + It is sufficient even if you just have a ***vested interest* (as opposed to a right) *in remaining in your current position*** (***Re Webb,* ONCA** – *lady and kids were already living in public housing, then kicked out. Had conversation w/ social worker* // **Held:** had a right to PF even **though** no “right” to be in the subsidized apartment, but talking to social worker was sufficient PF; pushes back against notion of requiring property rights to get PF);

**- OR -**

* + If ***casts slur on reputation and/or interests are “sufficiently directly and substantially affected”* –** e.g. applying for hospital privileges (professional licenses) and was rejected w/o reasons, meant entitled to some fairness (***Hutfield*, ABQB –** *Doc wanted hospital privileges, rejected 3 times; court considered right of patients to have full service doc*).
* **Must be an individual**. Self-regulatory body probably doesn’t have “rights, privileges, or interests” in the way contemplated (***Immigration Consultants*** – *power granted by gov’t can always be taken away. Minister revokes one body’s status as immigration counselors, waives the regular notice period for passing a reg.* **Held:**no PF has to be granted)
* Charter applies more narrowly wherever there is a deprivation of life, liberty or security of the person – if found to violate s. 7 little chance of being saved under s. 1 (***Charkaoui*** – see below under Charter section) 🡪 but PF applies only where s. 7 POFJ are invoked (***Suresh***).

### [iii] BUT not “legislative decisions”

**NB:** Although tribunal empowered by legislation, as long as the decision is adjudicative it will be fine.

* Decision must be a judicial/quasi-judicial/admin decision ***NOT legislative*** - there is a general CL duty of fairness for everything other than purely legislative decision (***Inuit;*** ***Nicholson***)
* **No procedural fairness re “purely legislative functions” or “purely ministerial decisions on broad grounds of public policy**” (***Re Canada Assistance Plan***)
* Cannot constrain essential democratic features such as legislative decision-making (***Re Canada Assistance Plan***);
* Cannot even rely on *Bill of Rights* – w/in legislative power to eliminate rights (no PF) (***Authorson*** – *veterans pension plan – instead of taking interest and putting back in pension, gov’t had been putting interest into general revenue – gov’t legislative away the benefits after (w/o back pay) - Parliament can pass any primary legislation regardless of how unsavory*)

**MINISTER AS DECISION MAKER:** Ministers of the Crown are frequently given admin law decision-making powers under an Act or regulations, and they are, in that context, acting as administrative law D-M’s. But that does not mean the minister is subject to JR for all purposes. He or she is not an admin DM when making policy choices, providing advice to Cabinet, or voting on legislation.

**CABINET AND MINISTERIAL DECISIONS** **are likely covered by legislative exemption.**

* If dealing with Cabinet decision (GinC), especially if policy based, absent extraordinary circumstances, will not get PF (***Inuit Tapirisat*** – *Appeal from G-in-C decision re cell phone rates in the north*)
* **Analysis** - Look at statutory scheme as a whole to see what degree of PF legislator intended to apply (taking into account policy discretion) (***Inuit Tapirisat*** – *was legislative b/c authorized Cabinet to overturn CRTC decision “****on its own motion****,” such decision was historically located with legislature & administrative structure doesn’t matter (i.e. fact that appeal from CRTC doesn’t matter* - *No PF rights when there is such a “policy trump”*))
* Dividing line between legislative and administrative functions not easy to draw (***Inuit Tapirisat***)

**NO CL REQUIREMENT OF PF WHERE DECISION IS LEGISLATIVE AND GENERAL IN NATURE:** For decision to be legislative body doesn’t have to be legislature (***Inuit Tapirisat***), but if the decision is specific and targeted then PF is owed (***Homex Realty***)

**SUBORDINATE LEGISLATION (E.G. BYLAWS/REGULATIONS):** **Generally considered legislative and no PF beyond what other legislation requires of it (*Homex; Immigration Consultants –* challenging a bylaw itself (not a decision that considers a bylaw)).**

* Look to substantive review of bylaw cannot be reviewed under procedural fairness (***Catalyst***).

**\*Exceptions:**

* ***“Bill of attainder” style cases*** – Piece of legislation aimed at a particular person are subject to PF (must give notice + opportunity to be heard) (***Homex Realty,* SCC *–*** *passage of bylaw (w/o notice) aimed at Homex, who will develop land into subdivision – bylaw allows muni to pull registered status of any subdivision which effectively affects only Homex*) – must consider context of what the body is trying to do? If it’s the culmination of an interpartes dispute between the party and the council/agency, then it’s quasi-judicial in character and attracts PF of requiring notice & an opportunity to be heard.
  + **Failed in** ***Homex***: Homex had a right to be heard, were not adequately heard, but relief refused for lack of clean hands.
* ***Regulations or policies*** are non-reviewable ***except*** in case of excess of jurisdiction or failure to comply with legislative or regulatory requirements; irrelevant if the statute was product of lobbying (***Immigration Consultants,* Fed Crt)**

**POLICY DECISIONS:** **Covered under legislative exemption from PF requirements:**

* No procedural protection for a purely ministerial discretion on broad grounds of public policy (***Martineau v Matsqui***).
* **Factors tending to indicate policy decision**: if decision dictated by financial, economic, social and political factors and/or constraints (***Immigration Consultants***)

**Examples:**

* Admin body making a legislative decision of general nature (***Knight v Indian Head***);
* Minister choosing among policy options allowed under environmental legislation (***Imperial Oil***).

**LAST RESORT ROL ARGUMENT FOR JR OF A LEGISLATIVE DECISION:** If it’s a policy decision but there is evidence that it’s an “egregious” case or excess of jurisdiction (bad faith or illicit purpose) such that court must intervene to uphold the rule of law (***Immigration Consultants***)

### Duty Suspended in Emergency

* Duty of fairness can be ***temporarily suspended*** or ***limited in urgent/emergency situations*** but cannot take procedural protection entirely away (***Cardinal*** – *hostage taking in prison*)
* Only delay, do not eliminate peoples PF rights.
* E.g. National Security Context – putting a person on a no fly list w/o giving a right to hear case (if they were on way to do something dangerous)

#### Nicholson v Haldimand-Norfolk (Regional) Police, 1979 SCC

*Summary dismissal of a probationary police constable 15 months into term of service. He was given no reasons for dismissal. Regulations provided police officers could not be penalized w/o a hearing and right of appeal, but the Board of Commissioners had authority “to dispense with the services of any constable within 18 months”* **// Held:** A general duty of “procedural fairness” applies to admin decisions **//** Must ask: how serious are the consequences to the individual? **//** There was an explicit statement that he was not entitled to PF, BUT N was still entitled to be treated fairly, not arbitrarily; he was entitled to be told why he was being dismissed and given an opportunity to make submissions. Board is still the “master of its own procedure” and a good faith decision is not reviewable **// Dissent:** thought it was purely admin decision and N has no rights.

#### Cardinal v Kent, 1985 SCC

**General common law principle of procedural fairness lies as a duty on every public authority making an administrative decision NOT of a legislative nature AND which affects the rights, privileges or interests of an individual. Process matters even if there is a fair outcome in the end //** *Kent institution segregates 2 prisoners (put into solitary). Director refused to release them into regular prison population, contrary recommendations by Segregation Board. Prisoners not informed of reasons, not given OTBH* **// Held:** Director should have informed prisoners of reasons and provided opportunity to male reps, challenge decision & information. BUT did not have to make independent inquiry as has discretion **// Remedy:** *habeus corpus* ***-*** segregation was unlawful, return them to general population **// Applicable acts/regs:** *Penitentiary Act* 🡪 Director can make decision if “necessary or desirable” to keep inmate separate. Segregation board can only provide recommendations whether someone should be reintroduced. *Regs* 🡪 it is only considered punishment if prisoner has been sentenced or deprived of certain privileges.

#### Re Canada Assistance Plan, 1991 SCC

**No procedural fairness re “purely legislative functions” (e.g. passing a law) or “purely ministerial decisions on broad grounds of public policy” (e.g. regulations made by the Minister – but must be policy) //** *Recession in Canada. Canada Assistance Plan (CAP) = feds agree to cost-sharing with provinces. S. 8 provides for continuation, amendment, termination. Federal deficit reduction: Bill C-69 (which is in violation of CAP) unilaterally reduces funding to BC, ON, AB (No notice)* **// Held:** Feds win, were allowed to unilaterally reduce funding.

* **Legitimate expectations**: can only have a legitimate expectation in process, not the final decision. Don’t create substantive rights. Can’t constrain essential democratic features – legislature is supreme, subject to constitution.
* Constitutional, quasi-constitutional statutes might bind future gov’ts – but this is not one.

## B) If Yes, how much Procedural Fairness entitled to – Content of Procedural Fairness (Baker)

**APPLY *Baker’s* 5 FACTORS:**Where on the spectrum are you in terms of PF?

May affect the degree to which a person affected by an administrative decision is entitled to participate in the decision-making process.

* These ***criteria are not exhaustive***: requirements driven by circumstances w/overarching requirement being fairness and the “just exercise of power”– **should situate factors in broader policy context** (***Mavi*** – *risk of rogue relatives falls on sponsors not the government*)
* All of the circumstances must be considered in order to determine the content of the duty of procedural fairness (***Knight***)

### [1] Nature of Decision being made & the process followed in making it

The more judicial it looks, the more PF – How close is it to court-like in terms of structure and what the legislature built?

* The closer the tribunal is to judicial decision making, the more PF is required (and vice-versa) (***Knight***)
* Look at **enabling statute** to see what procedures are expressly provided for & how close they are to adjudicative setting
* ***Factors leading to less PF***: Body is oriented toward policy making (***Baker***), decision involves lots of discretion and considering multiple policy-related factors (***Baker***)
* ***Factors leading to more PF:*** Body adjudicates or otherwise fulfills judicial role (***Baker –*** *decision here very different than judicial decision as involves discretion and consideration of multiple factors*)

### [2] Nature of Statutory Scheme & “terms of the statute pursuant to which the body operates”

How final is the decision and what is the role of the decision in the broader statutory scheme (look @ statute)?

* The ***more final the decision*** the more fairness that should be entitled - greater PF when no right of appeal or when decision determinative of issue and no further reconsideration available (***Baker***).
* **Reasons go both ways**: if there’s an appeal then need reasons to provide foundation; but if there is no appeal the decision looks more final and demands a greater level of PF.
* ***Factors leading to less PF***: Right of appeal within the statute (likely to court) (***Baker***), discretionary benefit (***Re Abel***), seeking exemption from general rule in statute/regulations (***Baker –*** *seeking**exemption from deportation* *on Humanitarian and Compassionate Grounds*)
* ***Factors leading to more:*** There’s no statutory right of appeal (***Baker***, ***Mavi***), no other remedies provided in statute (***Mavi***)

### [3] Importance of decision to individual(s) affected

The content of duty of fairness increase in proportion to the importance of the decision to the individual(s).

* **This is arguably the most “significant factor”** (***Baker*** – *was found to be exceptionally important towards Mrs. Baker and her family*)
* ***Factors leading to more PF***: Crucial impact on the individual – e.g. deportation (***Baker***), detention and potential deportation (***Charkaoui***), when a person’s ability to continue their profession is at risk (***Kane***), significant accumulation of debt (***Mavi*).**

### [4] The Legitimate Expectations of the Person Challenging the Decision

If person has ***legitimate expectation in a process***, then more entitled to that process (e.g. if has expectations for oral hearing b/c led to understand that would be the case, may be entitled to an oral hearing even though it would not otherwise be required)

* ***More PF:*** Existence of possibility of discretion is sufficient to create legitimate expectation that would receive notice and be permitted to make case for deferral of debt collection (***Mavi -*** *Legitimate Expectations exist here, b/c if this was a private K there would have been meaning by the wording of the undertaking*)
* **Arise out of:** Representations, promises, or undertakings or past practice or current policy of decision-maker, or other conduct of public authorities via oral or written representations re: procedure or substantive outcome of the administrative process (***Mavi***).
  + Representations must be clear, unambiguous and unqualified and not in conflict with decision-maker’s statutory duty (***Mavi***) – reliance isn’t required.
* **Outcome:** If a claimant has a legitimate expectation that a certain result will be reached in his or her case – more PF is required (but no legitimate expectation in actually getting that outcome) (***Baker***) (often around precedent if every other person in your circumstance got “X” result).
  + The fact that someone has received a particular outcome in the past does not generate expectation of that outcome (i.e. substantive rights), but it does cause greater expectation of procedural fairness (***Reference re Canada Assistance Plan***)
* **International treaty obligations**: that have not been incorporated (i.e. not ratified) into domestic law **cannot be** a source of legitimate expectations (***Baker –*** *Convention on the Rights of Child* here, but was not brought into CND leg, no legitimate expectations for Baker)

### [5] Choices of Procedure made by Agency itself:

If statute gives right for agency to choose own procedures or the tribunal has a particular expertise that bears on choice of procedure, then more deference to the agency **(“less PF”).**

* Noted that “important weight” must be given to decision makers choice of procedure (***Baker***), but this gives limited guidance.
* **E.g.** Procedures re: Notice, Discovery, Evidence, Oral or Written hearings, etc. Some legislation may require full judicial procedure (see what it says or does not say).
* **If the statute provides a code of procedure, then by ipso facto that defines the content of fair procedure**. However, some statutes provide no or only partial guidance. In such cases, the delegate can establish its own procedures.

**2 inquiries:**

**[1] *Statute and how much power tribunal*** has to make own procedure, OR

**[2]** Does tribunal have ***expertise around procedure*** that courts do not (e.g. labor tripartite tribunals)?

* Tribunal had considerable scope to decide own procedures in ***Baker*** (*less PF here based on this factor*)
* **Public resources concern**: High volume of cases and finite resources (e.g. immigration) might meant tribunal best suited to craft appropriate procedure
* Decision to enforce debt left to government 🡪 less PF in ***Mavi* (***Legislation gives discretion to enforce to ministry, and what they are doing is compatible w/ debt enforcement in private law (less PF)***)**

**General rule:** If person subject to pains/penalties or exposed to prosecution/proceedings or deprived of remedies/redress or is otherwise adversely affected, then should be told case against him/her and be afforded fair opportunity of answering the case (***Nicholson*)**.

### Where does this fall on the Spectrum & what types of procedural rights does this lead to: marshal Baker factors

**Case Examples (What PF was afforded):** Use on exam to give a concrete decision point of what you are arguing.

* ***Masters v. Ontario*** - the ***duty of fairness was met even without the hearing because the party had an awareness of material allegations*** against him and adequate opportunity to be heard.
* ***Homex* (***Muni by-law aimed at Homex)* ***–*** right to notice,had a right to be heard, were not adequately heard, but relief refused for lack of clean hands.
* ***Nicholson (****Police officer was dismissed by a board without hearing – cop on job 18 months)* **Held:** To be procedurally fair, the officer should have been told why he was dismissed and been given the opportunity to respond. ***Discretion as to whether it should be an oral or written hearing was left to the board.***
* ***Cardinal* (***Kent institution segregates 2 prisoners (put into solitary)*): Should have been informed of reasons, provided opportunity to make representations, challenge decision and information.
* ***Mavi,* 2011 (***Family gave undertaking to govt to pay for social assistance if sponsored family member required it, not given notice of accruing* debt) Not the same as being deported and separated in ***Baker*** but more significant than in ***Hutfield*** – **Required government to**: notify sponsor of claim, afford opportunity to explain in writing relevant personal and financial circumstances militating against collection, consider relevant circumstances considering undertakings were essential conditions precedent, and notify of government’s decision; ***but doesn’t extend to providing reasons*** (non-judicial nature of process, absence of right of appeal).
* ***Baker* (***Applied for exemption from deportation on Humanitarian and Compassionate Grounds*): Baker is owed more than minimal PF relating to participatory rights – **Required:** full and fair consideration of issues and let claimant have meaningful opportunity to present evidence, but it was enough that she was permitted to submit complete written documentation, and reasons provided (though accepted the immigration officer’s memo as sufficient reasons)
* ***Suresh –* (Charter) Entitled to be:**Informed of case to be met, Opportunity to respond, Opportunity to challenge Minister’s information, Written reasons.

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| Baker v Canada, SCC 1999 *Applied for exemption from deportation on Humanitarian and Compassionate Grounds (written application, had lawyer, supporting docs). Exemption denied – when counsel requests reasons they receive junior officer’s inflammatory notes which count as senior officer’s reasons for denial.*   * *Immigration Act* + *Regulations* give Minister discretion to deny exemption. * *Immigration Manual: Examination + Enforcement* – guidelines for criteria to consider under H&C apps. * *Convention on the Rights of the Child –* international document that CND had not ratified.   **Argument:** Based on these acts, guidelines, and international document, Baker ***argued she is entitled to***: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview.  **Analysis:** Fairness applies to H&C applications (past threshold) // Content of Procedural Fairness (where lies on spectrum) – see above.  **Held:** not entitled to an oral hearing. Fact that she was able to provided written submissions and provide reasons was enough (nothing could be said orally that would be different). In certain circumstances entitled to a set of reasons. Canada (AG) v Mavi, 2011 SCC 30 *Family gave undertaking to govt to pay for social assistance if sponsored family member required it, not given notice of accruing debt, claimed that they had reasonable expectation to expect notice of debt* **// Argument:** Caveat in Undertaking gave families legitimate expectation that the Minister would not enforce in certain circumstances, therefore do not have to pay enormous debts **// Analysis:** Entitled to PF (makes threshold) (default rule is PF is owed where individuals rights, privileges and interests are affected); Content depends on context – dealing w/ ordinary debt here and if you sponsor your relatives this is a meaningful commitment. Baker 5-part test is not exhaustive. |

## C) Application to the Case at hand: Did this person get the requisite level of PF?

Once decided how much fairness the person gets (above), **what is *minimum* procedure** required to ensure party knows the case against him/her & has opportunity to respond?

* **CONCLUDE:** On the balance of things, the person (did/didn’t) get the PF they should have been awarded.

### Content of PF:

* **Spectrum:** ***comparative exercise*** - Compare the situation to criminal law (e.g. Immigration detention, Charter s.11(d))) (full spectrum: a lot of fairness needed), human rights (still significant level), all the way down to licensing (little) and discretionary benefit for recreational activity such as a pass to a swimming pool (lowest) – w/reference to cases below.
* **General Principle**: Individual affected should have opportunity to present case fully and fairly, and have decisions affecting rights, interests or privileges made using fair, impartial and open process appropriate to statutory, institutional and social context of decision (***Baker***)

Look at what the person got and then consider whether any of the following were required by the duty of PF 🡪 ***discuss all of the possibilities below.*** **Depending on the degree of participation mandated by the requirements of PF, a petitioner may be entitled to various forms of participation, including the following:**

**(a) Notice** (most basic/starting point). **ASK:** who’s making decision, nature of decision to be made, when it will be made, where it will be made, why it’s being made, and how to be made?

* Ongoing duty, to be updated on the process.
* ***General Rule***: Notice must be adequate in all circumstances in order to afford to those concerned reasonable opportunity to present proofs and arguments, and to respond to those presented in opposition.

**(b) Disclosure** of info held by D-M. The high criminal standard of ***Stinchcombe*** (“all relevant material”) doesn’t apply to admin decisions (***May v Ferndale***) but generally decision maker must disclose information relied on.

* Typically, it’s not *whether* disclosure if required but rather *how much* disclosure – **TEST**: does the party have sufficient information to make informed submissions?
* **High Disclosure Requirements**: loss of livelihood, professional discipline, etc.
* **Limited:** Might be limited by privacy or security concerns (***Charkaoui***) or (maybe?) difficulty of proof (filter under court choice of own procedure)

**(c) Opportunity to Participate** (whether written or oral submissions)

**(d) Oral Hearing**: very rare (costly and time-consuming).

* **Not Necessary:** If this would not change the material before the D-M, then no oral hearing needed (***Baker –*** *oral hearing would NOT have added anything given written submissions were sufficient*)
  + ***Nicholson*** *- police officer was dismissed by a board without hearing*. **Held:** To be procedurally fair, the officer should have been told why he was dismissed and been given the opportunity to respond. ***Discretion as to whether it should be an oral or written hearing was left to the board.***
  + ***Masters v. Ontario*** - an oral hearing was not deemed necessary when an investigation team ordered a high-level bureaucrat reassigned after an investigative team found he had sexually assaulted seven women. **Held:** that the ***duty of fairness was met even without the hearing because the party had an awareness of material allegations*** against him and adequate opportunity to be heard.
* **Required**: if decision depends on findings of witness credibility (***Khan; Singh*** *– refugee need to est. fear of persecution*)
  + ***Singh*** was decided under s.7 of the *Charter* and the *Canada Bill or Rights* b/c the legislation specifically denied oral hearings. Where legislation does NOT preclude oral hearing, CL may require an oral hearing be held.
  + ***Khan v. University of Ottawa*** - *a law student appealing her grade* - **was entitled to an oral hearing** because her ***credibility was the pivotal issue*** and she was not given the opportunity to respond on that topic.

**(e) Right to Counsel**: There is no general right to counsel in administrative proceedings.

* **Factors:** 1) Complexity; 2) How serious are the repercussions?
* Constitutionally protected **(s.10(b**) ***Charter***) only where arrested or detained; no general constitutional right to counsel (***Christie***).
* Even if there’s a right, might be subject to limits - lawyers perceived to lead to cost and delay
* Where ***deprivation of life, liberty or security of person*** at stake the POFJ may require provision of counsel in administrative process (***New Brunswick Minister of H&CS v G(J)***)
* **E.g:** No access to counsel during examination at port of entry (airport) with notes later used in refugee determination. This is routine info gathering so not counsel needs to be present **//** Parents’ right to counsel during child custody hearing 🡪 right to counsel as it comes down to the best interest to child.

**(f) Right to Call Evidence and Cross-Examine Witnesses** - Parties must be afforded reasonable opportunity to present case.

* The decision to exercise the right is solely on the holder of the right, even if at their peril (***Innisfil***)
* If credibility is at issue or if this is the only way to test the reliability of the evidence (***Charkaoui***)

**(g) Timeliness and Delay:** Delay in providing a hearing, or in rendering a decision, may breach the duty of fairness and may even rise to the level of a Charter breach (***Blencoe***).

* **Normal remedy for delay**: is likely opt be an order of mandamus, requiring the tribunal to perform its duty expeditiously.
* **In considering whether to accept an argument for administrative delay, court should consider:** Time taken compared to inherent complexity of the issue, did the individual cause the delay or the tribunal, and the impact of the delay.

**(h) Reasons:** There will be times when reasons are required for PF (***Baker*)** but inadequate reasons ***unlikely to*** provide stand-alone basis for quashing a decision **(*Newfoundland Nurses’*) -** if reasons are provided at all it’s likely to pass FJ/PF 🡪 go to adequacy of reasons review under substantive review.

## The Charter Trump Card: How Fundamental Justice relates to Procedural Fairness

* **“Trump”:** Constitution (Charter) can trump legislation.
* While relatively few administrative tribunals make decisions that trigger s. 7 interests, some do, as in the case of tribunals with the power to determine physical liberty, such as [***Mental Health Act***](http://pm.cle.bc.ca/clebc-pm-web/manual/42771/reference/legislationPopup.do?id=80)review panels and [***Criminal Code***](http://pm.cle.bc.ca/clebc-pm-web/manual/42771/reference/legislationPopup.do?id=15) review boards (***Blencoe***).
* **Preliminary – Where it Applies to Admin. Bodies:** Charter applies to the Federal Parliament and Executive (Govt) (**s. 32(a)** ***Charter***) and to Provincial Legislature and Executive (Govt) (**s. 32(b) *Charter*)**
  + Charter ***applies to administrative agencies*** at federal and provincial level as these agencies are housed in the government.
  + ***Counterargument:*** Agency may argue they are independent from government (as argued by BCHRC in ***Blencoe*** which failed)
* **Body Must Be Public Enough for Charter to Apply**:
  + **Charter has applied to:** Community Colleges (***Douglas***)
  + **Grey Zone:** Hospital boards if effectuating gov’t programs (***Eldridge***), professional governing bodies, independent statutory tribunals (***Blencoe***), some university functions **(*McKinney* dicta)**.
  + **Charter does not apply:** Universities Generally (some exceptions) **(*McKinney***), Law Society of NFLD (***Harvey***), Hospital Boards (***Stoffman***), Businesses under BCA or CBCA.
* **Tribunals Able to Apply Charter**: looking at the enabling statute, does the tribunal have the ability to decide questions of law? (***Nova Scotia* (WCB)**, **SCC**)

### Applying the Charter: POFJ

**(a) Does the decision or legislation impair the applicant’s right to life, liberty OR security of the person (s. 7 *Charter*)?**

* **Life**: Right to live and be free of state conduct that increases risk of dying.
* **Liberty**: Freedom from physical restraint & freedom to make fundamental life choices.
* **Security**: Threat of physical harm and state imposition of severe psychological harm.
* POFJ include PF – same principles underlie s.7 and procedural fairness, though not necessarily identical (***Singh***)
* S. 7 applies to non-citizens (***Singh***)
* **Psychological Harm:** Would have to be something like parent facing removal of child, ability of sexual assault complainant to seek therapy w/o fear records disclosed, facing decision to take own life, whether to seek abortion, etc. (***Blencoe –*** *s.7 did not apply*)
* ***Charkaoui***: Detention pending deportation (liberty), and risk of deportation to torture (security)
  + Even in a national security matter you have certain PF requirements (right to hearing, before independent + impartial individual, etc)

**If none (neither life, liberty, or security) apply 🡪 go to CL Procedural Fairness Admin Principles (*Blencoe*) (above) or *Bill of Rights* if Fed Decision (below) (*Singh* –** on facts Beetz said was tailor-made for *Bill of Rights* b/c if s. 7 rights were engaged, then by actions of foreign government)

**(b) Relationship between PF and legislation at issue**: Does the legislation have clear language that dictates less stringent procedural safeguards are appropriate?

* While under the CL (above) judges CANNOT impose procedures in the face of clear statutory language that dictate less (or even no) procedural safeguards, **if s. 7 is engaged**: legislation must conform w/procedural requirements of POFJ in order to be lawful.

**(c) Was the Applicant Deprived of s. 7 Rights? If so, was this Deprivation in Accordance w/the POFJ (Use the *Baker* test)?** i.e. If s. 7 is engaged, what is the content of the procedural requirements of POFJ in the circumstances and did any limit on the s. 7 right respect the POFJ? – assess what the applicant got versus what POFJ require in circumstances.

* s. 7 requires fair process having regard to nature of proceedings and interests at stake 🡪 we do not balance individual and societal interests at this stage! (***Charkaoui***)
* In emergency can make changes to what POFJ require but cannot erode the essence of s. 7 (***Charkaoui***)

**Under [c] 🡪 POFJ (Charter s.7) informed by the Common Law PF: go to *Baker* analysis (*Suresh*):**

Oral Hearings; Duty to Disclose & Right to Reply; Reasons; Right to State-Funded Legal Counsel; Timeliness & Delay; Ex Parte, in Camera Hearings.

**IF LOOKING FOR GREATER RIGHTS ARGUE re: *Suresh* that this is a case where Charter Demands more than the CL**

1. **Nature of decision made & process**: ***Suresh*** - nature = *serious & process looks judicial until s. 53(1)(b) where there’s lots of discretion w/little guidance in statute.*
2. **Nature of statutory scheme & terms of statute in which body operates**: in ***Suresh*** more fairness (FJ) b/c cannot appeal the decision – no appellate procedure at all worrisome.
3. **Importance of decision to the individual(s) affected:** More safeguards b/c of torture (***Suresh***); FJ requires that individual whose liberty is in jeopardy must be given opportunity to know the case to meet and an opportunity to meet that case (***Charkaoui***)
4. **Legitimate expectations**: ***Suresh*** – succeeded in arguing *Convention Against Torture* created legitimate expectations will not send back to torture – doesn’t mean won’t get deported but does create greater fundamental justice.
5. **Choice of procedure by agency**: How much does legislation delegate to the executive to determine its own procedures (more = less FJ v. less = more FJ) (***Suresh***)

**CONCLUSION ON CONTENT OF FUNDAMENTAL JUSTICE: Compare to other cases - *Baker* (got more fairness in *Suresh* b/c faced torture)**

* **Oral Hearings:** s. 7 interests so important that generally an oral hearing is required (***Singh***); particularly where credibility is at issue.
* **Duty to Disclose and Right to Reply:** In ***Suresh***, no right to oral hearing but did have right to disclosure of materials on which minister would base decision (i.e. Officer memo discussing his terrorism risk) and the right to reply WRT the risk he presented to Canada and right of torture he would face.
  + Might be limited/parts redacted by concerns of privilege or national security (***Suresh***), but can argue s. 7 *Charter* right should counter privilege – if looking to pierce privilege better off arguing Charter v. CL
* **Reasons:** There will be times when reasons are required for PF (***Baker*)** but inadequate reasons ***unlikely to*** provide stand-alone basis for quashing a decision **(*Newfoundland and Labrador Nurses’ Union*) -** if reasons are provided at all it’s likely to pass FJ/PF 🡪 go to adequacy of reasons review under substantive review.
* **Right to State-Funded Counsel**: No overarching right (***Christie***) but in certain cases where decision impairs s. 7 interest state must provide counsel (***New Brunswick v G(J)***)
* **Undue Delay:** Possible, but very high threshold – must be extreme stigmatization & impairment of psychological integrity of applicant (**failed in** ***Blencoe*** – what caused stigma was media attn. NOT the delay); there probably has to be prejudice permitting to seek admin. law remedy (i.e. evidentiary prejudice)
* **Ex Parte, in Camera Hearings:** Closed door hearings in which neither the person named on the certificate nor his or her lawyer are present (seen in ***Charkaoui –*** *National Security issue - Certificate (which could result in deportation) gets reviewed by Federal Court (ex parte, in camera)*).
  + ***Charkaoui***: before ***can detain for significant period of time*** must accord fair judicial process including right to hearing before independent & impartial judge, decision by judge on facts and law, right to know case against you & to answer that case.
    - **Procedure failed on “facts”**: judge was impartial but hearing wasn’t based on facts & law because didn’t get to see both sides’ materials (knock on effects on legal argument); and no ability to know the case and have right to respond.
    - Note that ***he was not entitled to all information*** – national security concerns are relevant (incomplete information is not a showstopper) but must **find a substitute method** for person to defend themselves:
      * e.g. special advocate system (council who represent person who will be detained, but for purposes of hearing that counsel stands in shoes of detainee and represents that side of the argument).
  + ***Harkat v. Canada (C&I) (SCC 2014)*: TEST WHETHER A PERSON IN THIS SITUATION HAS GOTTEN ENOUGH INFORMATION THAT THEY CAN RESPOND:** “incompressible minimum” of information needed to know the case against you in national security context = Can you give meaningful instructions to your counsel?
    - Can you give meaningful guidance and info to special advocates so they can challenge info and evidence presented?
* **Multi-Tiered Regulatory Process**: can stumble at different levels – e.g. people directly affected by decision getting no say at leave to appeal to an appellate tribunal stage (***Singh*** – must get PF/FJ throughout) 🡪 i.e. might have right level of fairness at one stage but if don’t get needed procedural rights at the stage that leads to a decision then problematic.

**FAIRNESS ILLUSTRATIONS:**

* ***Baker* (5/10)**: **Required:** Full and fair consideration of issues and let claimant have meaningful opportunity to present evidence, but it was enough that she was permitted to submit complete written documentation, and reasons provided (though accepted the immigration officer’s memo as sufficient reasons)
* ***Suresh* (6/10) *–* (Charter) Entitled to be:**Informed of case to be met, Opportunity to respond, Opportunity to challenge Minister’s information, Written reasons.
  + **“Suresh Exception”:** there is still the possibility to deport people to torture under some extraordinary circumstances.

### Is the s. 7 infringement saved under s. 1? 🡪 will almost never be saved

**OAKES TEST:** Whether violation is justified under s.1 (as seen in ***Charkaoui***)

1. Pressing and substantial objective;
2. Proportional Means:
   1. Rational connection (whether the law was a rational means for the legislature to pursue its objective);
   2. Minimal impairment (whether could have designed law that infringes rights to a lesser extent – reasonable alternatives);
   3. Weigh negative impact of law on people’s rights against beneficial impact in terms of achieving goal for greater public good.

* Can balance individual and societal interests at this stage (***Charkaoui***)
* Rejected utilitarian argument in ***Singh*** (*not saved by s.1*)WRT having limited resources v. heavy volume of cases
* ***Singh*:** limitations on procedure in Act not connected to objective and the limitations are not proportionate to the harm.
* s. 7 rights are fundamental and rarely will violation of POFJ be upheld as reasonable limit demonstrably justified in free & democratic society (***New Brunswick v G(J)***)
* s. 7 rights are basic to our conception of a free & democratic society so are not easily overridden by competing social interests – maybe only in exceptional circumstances where concerns grave & challenges complex (***Charkaoui***)

### Charter Remedy:

**[1] Declaration of invalidity** - Any law inconsistent with the Charter is of no force or effect (**s. 52(1) *Constitution***)

**[2] s. 24(1) Charter** provides that court of competent jurisdiction can ***give whatever remedy it thinks appropriate*** in the circumstances

**S.24(1) TEST** (***Conway,* 2010 SCC**)**:** Whether tribunal/board is a “court of competent jurisdiction” **to grant specific remedies**:

* Does the particular tribunal have ***jurisdiction to grant Charter remedies generally***? can it:

(a) Decide questions of law, AND

(b) Has that jurisdiction been removed by legislature according to enabling statute?

* Looking at the particular case, is ***the requested s. 24(1) Charter remedy available***? look at powers accorded in statute.
  + Bearing in mind the statutes mandate + purpose (***Conway*** *– ORB did not have jurisdiction to grant remedy sought*)

## Alternative Route: *Bill of Rights* – ONLY FEDERAL GOV’T DECISIONS

Only applies to decisions of the Federal government

* **Ordinary legislation cannot oust BofR’s**, unless the statute says that it applies “notwithstanding the *Bill of Rights*” **//** Courts have read the BofR’s fairly narrowly.
* **ADV of *Bill of Rights* (although rarely argued):** unnecessary to show life, liberty or security of person at stake to obtain procedural protection – POFJ apply generally

***Bill of Rights* threshold:** any decision taken under statutory authority conferred by Parliament may potentially give rise to procedural rights

**Status in Hierarchy**: Quasi-constitutional document that sits below the constitution but above the statute. Overrides legislation absent express intention.

**Types of Decisions**: applies to all federal government decisions (not provincial) affecting an individual’s (not corporations) rights or obligations must be decided in accordance with the POFJ (**s. 2(e) *BoR***, ***Singh* (Beetz concurring judgment)**); can be based on deprivation of property (**NB**: no property right in Charter).

* These human rights/freedoms exist w/o discrimination: (**s. 1(a) *BoR***) right to life, liberty…enjoyment of property & the right not to be deprived thereof except by due process of law).
* **Substance of challenge: “**no law of Canada shall be construed or applied so as to deprive a person of a right to a fair hearing in accordance with the POFJ for the determination of his rights and obligations” (**s. 2(e) *BoR*)**

#### Singh v Canada (Minister of Employment + Immigration), 1985 SCC

*Singh was seeking refugee status, was denied, sought leave to appeal. Basically, the IAB can decide whether to grant leave to itself, but the individuals affected by the determination have no ability to be heard in this leave determination*

**Held:** Singh entitled to be heard.

* Threshold: Are refugee claimants physically present in Canada entitled to Charter protection? 🡪 **YES**
* Do *Immigration Act* procedures deny s.7 rights?
  + “life, liberty, and security of the person”? **🡪 YES**
  + Was there “deprivation”? **🡪 YES**
  + did they get “fundamental justice”? **🡪 NO** (Credibility questions require oral hearing. Process is adversarial)
* Saved by s.1 of the Charter? 🡪 **NO**

**Concurring Decision (Beetz J.):** reluctant to invoke the Charter, and thought this case was “tailor made” for the Bill of Rights.

#### Suresh v Canada, 2002 SCC

*Post 9-11 terrorism case. Refugee, given status, then deported for Tamil Tigers (terrorist) association, would potentially be deported to torture, NOT given report on which decision was made before his right to give written response* // **Held:** new deportation hearing ordered. The impugned legislation is constitutional. Final deportation order violated his s.7 rights, was not saved by s.1. BUT court specifically says that this decision does not mean people cannot be sent back where they will be deported.

**Procedure under *Immigration Act*:**

* **STEP 1:** Minister issues security certificate (for deportation) under **s.40.1** of *Immigration Act* Based on CSIS report
* **STEP 2:** Certificate referred to Federal Court for determination of its reasonableness (if reasonable, go below, if not, then no deportation)
* **STEP 3**: Oral deportation hearing: deportation for terrorism (if lose this H&C app then move to 4)
* **STEP 4:** **s. 53(1)(b)** notice & written submissions: deportation possible even if facing torture

#### Blencoe v. British Columbia (Human Rights Commission) [2000 SCC]

**Delay itself is not a failure of the principles of fundamental justice unless the delay hinders the fairness of the process //** *HRT hearing took 30 months to take place, which ruined politician’s reputation* // **Held:** S.7 does not apply, since Blencoe was not deprived of L,L or SoP **//** Here, admin law does not get you what the Charter was unable to.

#### Charkaoui v Canada (Citizenship and Immigration)

*C is permanent resident, and others are foreign nationals. Deportation of accused sleeper cell Al Queda. Ministers can issue “certificate of inadmissibility” → detention for “threatening” permanent residents or foreign nationals (which allows for deportation). The certificate gets reviewed by Federal Court (can be ex parte, in camera). There is limited disclosure to ind b/c of national security. NO appeal from decision of Fed CRT judge + no Judicial Review of decision.*

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

**Held:** s. 84(2) of *IRPA* was found unconstitutional.

**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 (court said he this occurred) **//** 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 and Bias

**EFFECTIVELY ONE GREAT BRANCH OF THE LAW OF PF.**

**Concerned with the nature of the tribunal/decision-maker the applicant is before**: public stands to lose faith in administration of justice if not confident they’re making their case before an independent & impartial decision maker.

* + ***Difficulty***: executive arm is not the judiciary & no one expects AL relationship from exec in the same way as a judge
* **Independence**: Means to get impartiality. Look at how things are built and relationships (structural factors). Looking at a tribunal’s ability to decide matters free of inappropriate interference or influence.
  + *Audi alteram partem*: hear the other side (to hear the other side must first know the case against them)
* **Bias: “the Evil” 🡪** partiality toward particular outcome (personal)
  + *nemo judex in sua causa debet esse*: no one should be a judge in his/her own cause
* **Impartial:** Ideal state – decision maker truly has an open mind (proper structure & free of bias are prerequisites)

## Test for all of them:

**Is the D-M sufficiently free of structural factors and/or bias that could interfere w/ his/her ability to make impartial decisions? (*Committee for J&L*).**

* **[1]** ***Modified*** for assessing lack of independence: are you sufficiently free of structural factors like those below.
* **[2]** Use ***Committee for Justice and Liberty*** (“straight up”) for assessing individual bias
* **[3]** ***Modified*** for assessing institutional bias: are you sufficiently free of factors in a substantial number of cases … (from ***Lippé***)

## LACK OF INDEPENDENCE 🡪 Do any of the structures give rise to a RAB?

**[1] Start with the enabling statute** - Degree of independence dictated by the enabling statute (***Ocean Port***). Look at powers of the Minister and other Cabinet members; nature of any penalties can impose; powers of the board; and indications of security of tenure.

**Judicial Independence (**a framework/starting point given this is what Courts get, not necessarily what a tribunal is awarded) requires 3 objective structural conditions **(*Ocean Port*):**

**a) Security of tenure:** cannot be fired b/c someone does not like your decisions (only removed for cause).

* ***Removal process*** – can the government remove a decision-maker for things like rendering a decision not in line w/government’s view? (e.g. ***Keen*** – *Keen, as president of nuclear safety board, was dismissed, called “liberal party hack.”* **// Held:** dismissal upheld – President held office “at pleasure” thus fairness requirements met)
  + - Should avoid situations of adjudicators facing possibility of being dismissed at pleasure of executive (***Rêgie***)
    - **BUT** “at pleasure” appointment upheld in ***Ocean Port*** (look at legislation)*.*
  + ***In admin tribunals***: there are part-time members, fixed term members, etc. Thus, not the same security of tenure as judges (generally).

**b) Financial security/remuneration**: Guaranteed salary. Pay enough so do not have to seek alternative pay and ensure their pay won’t be altered for arbitrary reasons.

**c) Administrative/institutional control**: Can the policy-maker siphon cases away or otherwise play favorites to influence the judge (e.g. through budget allocation)? 🡪 E.g. chair getting to decide who sat on panels in ***Ocean Port***

**d) Additional factor: Adjudicative Independence**: the ability of a decision-maker to decide, free of inappropriate interference by other decision-makers (***Beauregard –*** *no outsider (even other judges) should interfere with the way a judge decides his/her case*).

* + E.g. pressure to decide a certain way or substitution of another’s decision for one’s own.

**[2] BUT b/c it’s CL, can be OUSTED by express language or necessary implication**: if the ***statute states the level of independence*** (e.g. composition of tribunal, and service “at pleasure” as in ***Keen*** and ***Ocean Port***) then that’s the end of the inquiry.

* + The legislature should prevail in determining how much independence any tribunal should have.
  + A legislature can, if it wishes, create a process the CL would brand as unfair. Unless that statutory process is contrary to the Constitution, the statute governs.
  + If want independence in this case then would have to find a ***hook into the Charter*** 🡪 **Argue**: the provisions are penal in nature, look at interests at stake.
  + **GAPS:** Silent or ambiguous legislation can give rise to a CL argument of independence.
* **There’s no constitutional guarantee in the preamble of the *CA, 1867* nor is there an unwritten constitutional principle guaranteeing independence in administrative tribunals (*Ocean Port –*** *no const. application to the Liquor Appeal Board)*
  + ***Way around***: argue the ***decision-maker is really court-like in function*** & that need to look at how the tribunal is functioning on the ground (***Matsqui***)
    - **BCSC version of *McKenzie*** *(residential tenancy arbitrator appointment rescinded mid-term. Argued the tribunal, b/c of the nature of work, attracted unwritten constitutional guarantees.* **Held:** Won at BCSC, but by the time she got to the BCCA the legislature changed the statute, and the case was not heard**). *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).*** 
      * The court held that ***Ocean Port*** did not foreclose the constitutional principle applying in some administrative law contexts.
  + ***Counter:*** Argue that this approach died with **BCCA version of *McKenzie*** *-* her case ended at BCCA b/c statute amended to give arbitrators more independence and could only be fired for cause, ***but in obiter the court said that the BCSC got carried away in talking about independence.***
* It’s clear that the more of a policy-making role the tribunal performs the less likely there will be a high level of independence required.

**[3] If it’s not ousted, then go to *Matsqui*** (*FN tax assess board comprised of members appointed by band*) **questions:**

**Level of tribunal independence (i.e. security of tenure, financial security, admin control, etc) depends on** (***Matsqui Indian Band*, SCC**)**:**

* **[a]** ***The nature of the tribunal*** (e.g. *Nuclear Commission* in ***Keen*,** *landlord-tenant arbitrator* in ***McKenzie***, *liquor appeal board* in ***Ocean Port***)
  + Need to distinguish between adjudicative v. policy decisions; and even between different policy decisions (licenses v. nuclear safety)
* **[b]** ***The interests at stake*** (e.g. can the tribunal impose significant financial penalties, ***Ocean Port***); and
* **[c]** ***Other indicia of independence*** (e.g. if the tribunal members had to swear an oath of independence)
  + **Operational context**: it’s important to consider how the tribunal acts in practice rather than purely on paper (***Matsqui*)** 🡪 this has really only remained true in the FN context in ***Matsqui***! Otherwise, the analysis is intimately concerned with how things look on paper.
  + Multiple points of contact with the Minister does not constitution bias, also having fixed term appointments (*on liquor control board (“2 years”)*) are fine (***Rêgie***).

|  |
| --- |
| Ocean Port Hotel v BC, 2001 SCC **The sufficiency and structure of a tribunal’s independence is determined by statute and is generally not subject to the Charter requirement of judicial independence //** *Re alleged liquor license violations. Investigation, hearing, 2-day suspension imposed. OP appeals to Liquor Appeal Board (people there have “at pleasure” appointments) — de novo hearing. LAB confirms suspension. OP appeals to Court* **// Held:** decision in favour of Liquor Board. “Fundamental distinction between tribunals and court.” Nature of administrative tribunals: not distinct from executive. No freestanding constitutional guarantee of tribunal independence.   * Members of appeal board were part time, fixed term of one year, and removable at pleasure. Paid per diem, chair has discretion in establishing panels, Pyramid of power where ministers had control over investigators   ***Keen v Canada -*** Under *Nuclear Safety and Control Act,* s.10 the President is designated by the GinC (“at pleasure”), thus could be fired at any time from the President position. Was not entitled to any procedural fairness in being fired, including any allegations of bias. |

## BIAS

**Procedure:** Must raise bias, at first reasonable opportunity; Based on ***reasonable apprehension of bias*** (RAB), not proof of actual bias; must be substantial (more than mere suspicion) (Raised often (400 cases, 2007-2012))

* **2 types**: **1)** Perception of ***individual bias*** and; **2)** Perception of ***institutional bias* (lack of independence can be included in here; as well as more)**
* Must look at what the statute intended, as can statutorily impose bias (as long as statute is clear) (***Brosseau***).

**Reasonable Apprehension of Bias (RAB) must be** (***Committee for Justice and Liberty v NEB****)***: General Test for Bias (used for individual bias and modified for institutional bias)**

**(a)** reasonable apprehension

**(b)** held by reasonable and right-minded persons

**(c)** who have applied themselves to the question and obtained the required information

**(d)** are viewing the matter realistically and practically, and

**(e)** have thought the matter through --- then ask:

**(f)** is the decision maker sufficiently free of factors that could interfere with the ability to make impartial decisions? **Consider:**

* **Statutory scheme**: what have they built in terms of the statute and agency choice of procedure
* **Parties and relationships in question**: what’s the nature of the decision being made

### [1] Individual Bias

**MUST ALLEGE A PARTICULAR TYPE OF BIAS:** Onus is on party alleging bias (**Brar v BC College Vets**):

##### 1. Pecuniary/material interest in OUTCOME of matter being decided:

* ***Direct financial interest in outcome = RAB***: e.g. Judge was SH of company in case, decision set aside (***Dimes*,** HL)
* ***Indirect***: More flexibility when dealing w/ indirect financial interests.
* E.g. Only direct and certain financial interests can constitute pecuniary bias (***Energy Probe*** – **Held:** RAB not established **//** *Part Time member of Atomic Energy Control Board was pres. of co. that supplied cable for nuclear power plants. Deciding whether to renew licence.* ***Had sold in past (after competitive tendering process) but wasn’t doing it at the present and didn’t have any plans to sell – nature of the decision matters***!)
* ***Widespread group***: Pecuniary interest may be held to not give rise to RAB if decision-makers gain is no more than that of the average person in a widespread group of benefit recipients (e.g. just part of an industry that will see a gain).
* ***Statute can authorize bias*** (common in self-regulating bodies) (***Brosseau***)
* E.g. Collective insurance held by all lawyers, law society deciding whether to treat a particular lawyer’s misconduct.
* ***Non-pecuniary material interest***: Can give rise to RAB.
* E.g. Labor board considering case that would impact on ability of gov’t to terminate their own appointments (***Service Employees –* Deemed material interest**)

##### 2. Prior Personal Relationships with those involved in dispute:

Most important is ***looking at context*** of dispute to see if partiality to be expected – ***consider***: amount of time passed between active association w/person in dispute, necessity, particular community conceptions of what creates bias (e.g. aboriginal communities).

* E.g. Spouse’s connection to intervenor in case the judge is hearing = Judge connection was ***enough to signal RAB***, so judge could not sit on the case (***Re Pinochet –*** *Husband was a judge on an extradition decision, amnesty international was an intervenor. New hearing was ordered b/c found out that husband was on the board of AI and that his wife was connected to AI as well*)
* ***Brar v BC College of Vets***: *A member of the HRT advised the parties that the hearing had to be adjourned as she had not been reappointed* ***- No RAB*** when applicants lobbied to have tribunal member re-appointed after hundreds of days of hearings – she didn’t get job back (just long enough to hear the case), she didn’t encourage them to go to media.

##### 3. Prior knowledge/information about matter in dispute:

Focus on nature and extent of previous involvement. Depends on the level of involvement, what documents were seen, whether made it to the final litigation, etc.

* ***Wewaykum Indian Band*, SCC**: ***no RAB*** WRT Justice Binnie previous employment as associate deputy minister of justice – never counsel of record, never played role in claim after it was filed (file transferred), never played any role in policy, just a couple meetings and he only saw 11 documents.
* ***Mediation privilege***: Mediator biased if later becomes decision-maker b/c knows of things said in mediation process that may color views (worry if decision maker involved in mediation earlier on).

##### 4. Prior involvement in the matter (as a party)/context in dispute:

* Relationship with people putting in an application to the tribunal that makes the ultimate decision (***Committee for Justice and Liberty*** – **Held: RAB //** *Chair of NEB who was involved in a study group who put in app to board about a different pipeline at a different time (before chair), NOW was involved in determining other pipeline apps. Chair had written extensively on permits for pipelines*)).
* If it’s a policy decision, then bias less likely to matter (***Imperial Oil*** – ***No RAB* //** *Minister of Env was previously involved in decontaminating site; was sued by site’s new owners because still contaminated. Then, Minister ordered Imperial to undertake study & decontamination measures for the site (costing Imperial $$)* (not an adjudicative decision as in ***Committee***))*.*

##### 5. Attitudinal Predisposition toward an outcome:

Come to job ***w/ known predisposition***. Gleaned from decision-maker’s comments and attitudes in both the course of the hearing and outside the proceeding (Muddy when your attitudinal predisposition is the very reason you were put in that role)

* E.g. ***Cengarle***: on analyzing the tribunal’s interventions in law society discipline proceeding found they had descended into role of prosecutor (**intervention showed bias**).
* Counterargument if it’s an adjudicative hearing: simply taking judicial notice of broader social context (***R v S(RD)***)
* **E.g. of Situations giving rise to RAB**: *ex parte* communications (***Merchant***); cases which sexist, condescending or other irrelevant comments are made.
* **What is RAB:**
  + **(a)** ***Chretien v Canada***: *Justice Gomery’s colorful comments made to media about progression of inquiry (talking about evidence seen, saying there was shock and disbelief) that made it appear a punitive & shaming function rather than neutral fact-finding mission* **// Held: *Parts of report thrown out for RAB*** (e.g. part attributing blame).Chretien was successful in having the factual findings in the public inquiry set aside.
  + **(b)** ***Prior advocacy:*** ***Great A&P***: *Connie Backhouse was a complainant in sexual discrimination in Osgood Hall. Sat in on another case (separate from her own) dealing with a similar factual issue* // **Held:** Role as party in prior gender discrimination suit ***gave rise to RAB*** – left open Q of whether her scholarship can give rise to RAB (recognized expert in the field).

**CLOSED MIND TEST (part of attitudinal predisposition) (Different E Burden than RAB): Q whether the tribunal has a closed mind.**

The test is whether the D-M’s comments indicate a mind so closed that any submission by the parties would be futile (***Newfoundland Telephone***): look for policy-making and investigatory functions.

The degree to which the **prior, fixed view will be accepted by the court** is determined by the nature and function of decision making:

1. **Decision-maker is appointed with a known pre-disposition (i.e. elected on certain issue):** Standard or expectation of impartiality is considerably more relaxed in the case of DM’s exercising legislative or policy functions (anything less than a closed mind may be okay) (***Old St Boniface, Richmond Farmland Society***).
   * **E.g.** *DM has been elected and is making decisions directly on the issue that they had campaigned upon. RAB could not apply to this situation of municipal government* (***Old St Boniface, Richmond Farmland Society***)
   * Where a matter that comes before a municipal council is a matter of policy, a member of council will not be disqualified for being pre-disposed in one direction or another. What is necessary is simply that the councillor be willing to listen to the submissions; as long as the councillor is not impervious to submissions such that any arguments would be futile, he or she will not be disqualified on grounds of bias (***Old St Boniface***)
2. **Statements made during an investigative phase:** ***Nfld. Telephone (****re: Andy Wells (consumer advocate), found mind was utterly closed*) – multifunctional admin body may have varying standards depending on the function being performed. Admin bodies that perform investigations, policy making and adjudication may be afforded more freedom to hold fixed view during an investigation or policy making stage ***than at an adjudicative stage***, so long as no constitutional contraventions.

### [2] Institutional Bias

Premised on *delegatus non potest delegare* (person who’s appointed to make the decision has to be the one to actually make the decision)

**TEST FOR INSTITUTIONAL BIAS** (***Lippé’*s** adds a gloss on ***Committee for Justice and Liberty*** (still look **to RAB (above) then** add ***Lippe*)):** is the D-M sufficiently free of factors, in a substantial number of cases, that could interfere with his/her ability to make an impartial decision?

**2 steps (*Geza,* FC):**

1. Looking at institutional factors, will there be a RAB in mind of a fully-informed person in a substantial number of cases? Consider potential for conflict between interests of tribunal members & those who appear before them
2. If not, allege RAB on case-by-case basis.

* Focus is on the structure of decision-making: nature of the tribunal in question, the way it operates in practice and any safeguards that may exist to prevent bias
* Concept includes the ability to decide free of inappropriate interference by other decision-makers (***Beauregard***)
* ***Typical fact scenario***: Informal institutional strategies that admin bodies are using to try to create consistency 🡪 appears that policy promotion infringes on adjudicative independence

**2 MAIN STRATEGIES (but can argue RAB institutional bias even if does not full fit in 2 categories):**

##### (a) FULL BOARD MEETINGS (*Consolidated-Bathurst – company plans to close plant. Union/Co dispute in front of Ont Labor Rels Board*):

Meeting between all members of a tribunal. Used to promote consistency across tribunals v. independence of any individual member being compromised in the process.

**Test**: **Full Board meeting is permissible if it has the following safeguards** (***Consolidated-Bathurst –*** *Ont Labour Relations Board have Full Board Meeting (where Panel of 3 discuss matter with other members not deciding the case) to resolve matter (re: test in dispute). No minutes kept, attendance taken, or evidence produced.*): 1-2 are mandatory conditions imposed by *audi alteram partem*:

1. Discussion is ***limited to law or policy*** (not the facts of the particular case)

* ***Policy includes***: various legal stds. which may be adopted by board; issues that have impact going beyond resolution of dispute between parties; consider statutes, past decisions and perceived social needs.

1. Parties are ***given a reasonable opportunity to respond*** to any new ground arising from meeting (this includes policy that impacts on the case)
2. The following are ***positive safeguards***: Don’t take attendance, don’t hold votes, and don’t take minutes, full board meeting is convened at the request of the individual D-M.

***Sopinka in dissent***: Full Board meetings should not be allowed. It all comes down to what the effect of the full board meeting was on the decision (RAB can be considered a substantial effect, do not have to prove there was an actual change) **//** ***Gonthier for the majority***: It’s okay for the D-M to change their minds after the hearing but must have legitimately changed mind based on information and not have been coerced or pressured into doing so.

**WHAT WILL FAIL: if there is pressure on the D-M to decide against own conscience and opinions** (***Consolidated-Bathurst***, evidenced in ***Tremblay –*** *Unanimous draft decision prepared by two commissioners present at hearing reviewed by Commission president who proposed a contrary opinion. Wasn’t panel members who asked for meeting, it was president who asked as disagreed w/ the panel. Council member changed mind after meeting, resulted in President making tie-breaking vote* **// Held: systemic pressure amounted to RAB.** A decision maker should be free not to consult if they do not want to).

**Does the “consensus table” (Full Board Meeting) *give rise to a RAB,* LOOK FOR*:***

1. Who can initiate (president or legal counsel?)
2. Consultation process is mandatory after the president has looked at the draft decision
3. Took minutes. Vote by show of hands
4. “Prior commitment” by President to a different outcome.

* If the decided process is pursuant to internal directives (as opposed to statutory process) then they can be scrutinized by the court more (***Tremblay***)
* Staff and other members cannot be so involved as to control the process and wrest it away from the members who heard the case, and those who heard the case cannot delegate the decision-making to staff, regardless of their expertise (***Tremblay***).
* Cases give the sense that need to look at the institutional constraints facing the board: **in *Consolidated-Bathurst*** had large number of cases & FT and PT members w/different panels prompting need for coherence – fairness must have flexibility to take into account institutional pressures faced by modern admin tribunals & risks inherent in such practice.
* Merely having discussions with other people doesn’t vitiate independence (***Consolidated-Bathurst***)

##### (b) LEAD CASE (*Geza*):

**“Lead Case”:** Method of achieving consistency, policy development & increased efficiency.

* Not binding but it’s expected future panels will carefully consider its reasoning (***Geza***).

**TEST** (***Geza –*** *RAB found*): Reasonable person, informed of the facts & having thought the matter through in a practical matter, would conclude on a BofP that the Decision Maker was not impartial.

* ***Geza*** used *Baker* factors which may not be exactly correct when dealing with impartiality (note this).

**3 considerations when determining Lead Case Bias:**

1. **Standard of impartiality expected depends on context:** Look at relationships at issue, parties involved & statutory scheme.

* Nature of statutory scheme***:*** see how built and figure what executive intended.
* Is this a policy function or more adjudicative function (*IRB at adjudicative end so more independence expected*) (***Geza***)
* Expertise expected by the scheme: might be more forgiving of an appearance of bias
* Stage of the hearing/how they built the process: investigative (more bias OK) v. hearing stage (less bias OK)
* Relationships & parties involved: what’s the nature of the party chosen to adjudicate WRT level of experience supposed to bring?
  + Strong relationship between IRB and bureaucracy CIC (***Geza*** – *expressed concern about number Roma applicants*)
  + E.g. internal emails outlining policy concerns problematic (***Geza***)
  + Involvement of someone who helped select lead case in the subsequent decision (***Geza***)

1. **Recognize the particular administrative challenges**: need for consistency (otherwise face ROL problem) but not to point of sacrificing impartiality/independence. Sometimes cannot hold tribunal to the standard of a court.

* Important w/heavy case load but doesn’t override the improper surrender of adjudicative freedom

1. **Legal notion of bias**: belief there has been improper influence of the D-M: that the lead case influences individual decision-making in a structural way.

# Substantive Review

## What Standard of Review Applies? (*Dunsmuir*) 🡪 This is the TEST

**Threshold: Can we JR This? –** Constitutionally entrenched power of JR no matter how strong the privative clause is (***Crevier; Pasienchyk***).

### [1] Has a previous case decided the appropriate SoR in a satisfactory manner?

* **If there is a suitable precedent, use it.** 
  + **“Suitable” = (i) *Same tribunal on same points*** // **(ii)** If same tribunal dealing with similar question of law or fact, probably a decent precedent // If Not (i) or (ii), do SofR 🡪 **For Exam, even if there is a decent precedent, still do SofR analysis.**
  + Precedent that stated the std was “patent unreasonableness” likely would now be put under “reasonableness” bucket.
* **Pre-*Dunsmuir*** **decisions can provide satisfactory precedent** (***Northrop Grumman*** *– Previous jurisprudence established in a satisfactory manner that correctness applied to decisions of the Canadian International Trade Tribunal)*
* ***Agaira –*** What is “national interest”: SoR = Reasonableness and decision was reasonable (SoR met).
* Deference is appropriate when assessing whether a decision by an administrative decision-maker violates the [*Charter*](http://pm.cle.bc.ca/clebc-pm-web/manual/42771/reference/legislationPopup.do?id=1736), where there is no challenge to the constitutionality of the enabling legislation (***Dore*)**
* Dunsmuir is intended to be practical, so may not be necessary to go beyond this initial step (***Northrop Grumman*).**
* Prior jurisprudence might give context to the inquiry: e.g. if it’s accorded a high level of deference for a century (***Catalyst Paper***)

### [2] If no “suitable precedent”, determine the appropriate SoR:

* **ENSURE TO EXAMINE BOTH CORRECTNESS AND REASONABLENESS IN EXAM BEFORE MOVING ON.**
* Bright line test, either standard is correctness or reasonableness (***Dunsmuir*)**
* Start by ***assuming a deferential stance (reasonableness)*** if there is a privative clause and no statutory right of appeal – caught on in subsequent cases after Binnie’s concurring reasons in ***Dunsmuir***
* RofL in admin law is the idea of justification being fundamental “***Ethos of Justification.”*** Thus must have reasons for how you behave. This permeates the rule of law generally **(*CUPE*).**

##### FACTORS THAT WILL MOVE TOWARD CORRECTNESS (NB: Practically everything is reasonableness, thus difficult to argue correctness):

***Dunsmuir* outlined the nature of the question at issue that indicate correctness standard:**

**(a) Questions of “general law” of central importance to the legal system as a whole: e.g. Charter questions**

* **May be difficult to determine when correctness applies:** A labour arbitrator applying estoppel as a remedy within the context of a grievance under a collective agreement was applying a general legal concept to the arbitrator’s specialized area of expertise, yet was ***entitled to deference by the SCC* (reasonableness standard not correctness) (*Nor-Man***)***.***

**(b) Question is outside the adjudicator’s specialized area of expertise**

* Rothstein (concurring) in ***Khosa*** said Parliament/legislature signals this by not giving privative clause – should presume any question not **falling w/in the privative clause** is reviewable on correctness standard (if no private clause, treat the tribunal like you would treat a lower court).

**(c) Constitutional Question: e.g. Division of Powers and other constitutional questions (*Westcoast Energy; Dunsmuir*)**

**(d)** **“True” questions of vires and re: jurisdictional lines between 2 or more competing specialized tribunals** – JR for jurisdiction is constitutionalized (***Crevier, Pasienchyk***)

* True questions of jurisdiction are exceptional and none have come before SCC since *Dunsmuir* – ***AB (Info and Privacy Commissioner***). **This may be dead; no one wants to** **really talk about it BUT…**
  + In ***Northrop Grumman,* 2009**the court was deciding a jurisdictional question, which is rare (although the crt never says this explicitly: *issue was whether CITT can hear NG Oversea’s or not*).
* Rothstein in ***Alberta Teachers*** whether we have any true questions of jurisdiction – might be time to eliminate it (Cromwell in concurring reasons vehemently opposed this)
* Courts should be hesitant to brand as jurisdictional something that may doubtfully be so (***CUPE***)
* ***Bibeault*** (less deferential approach): Did the legislator intend the question to be within the jurisdiction conferred on the tribunal? Have to look to the statute conferring the **power to the tribunal**: Look at wording, purpose of statute, reason for existence and area of expertise of members/nature of problem before them.
* Not returning to “bad old days” of collateral question, preliminary question doctrine ***pre-CUPE***. Per ***CUPE,*** courts “should not be alert to brand as jurisdictional, and therefore subject to broader [judicial] review, that which may be doubtfully so”
  + Smells of the old ways to get around privative clause**: a)** collateral Q doctrine (***Bell v Ont (HRC)*** – have to ask something before going to merits of case); and **b)** asking the wrong Q doctrine (***Metro Life Insurance Co*** – faulty reasoning process)

##### FACTORS THAT WILL MOVE TOWARD REASONABLENESS (Deference):

* **“Reasonableness”: 1) Was the process they used to get to their decision and 2) was the outcome reasonable?** (***Dunsmuir***)
* **In many cases won’t have to consider all factors if some of them are determinative of the application of reasonableness standard** (***Dunsmuir***). I.e. Factors have to be considered as a whole, bearing in mind not all factors will necessarily be relevant for every case (Binnie – ***Khosa***)
* A court conducting a review for reasonableness inquire into the qualities that make the decision reasonable, referring to both the process of articulating the reasons and to outcomes (***Dunsmuir***).
* Both parties can be in agreeance that SoR is reasonableness.

**(a) Existence of Privative Clause (i.e. ouster + finality) is a *strong indication* of reasonableness review** (***Dunsmuir***). It’s important but the precise degree of importance depends on the judge you ask: (Rothstein (concurring) in ***Khosa*** said it is foundational and is the only way Parliament can indicate deference to the tribunal (signaling their view of its expertise) **//** Binnie (concurring) in ***Dunsmuir*** was not satisfied with the lack of recognition given to the privative clause).

* No decision ***can be completely immunized from judicial scrutiny*** (***Crevier***) (e.g. ***Anisiminic*, UK HL** decisions made outside jurisdiction are nullities)

***Strong (Full) clause has 2 elements under the CL***: all present in ***CUPE***

1. Finality clause (“this decision is final and conclusive…”)
2. Ouster clause (“this decision is not open to question or review in court…”)

* **E.g. *Employment and Assistance Act –*** decisions “not open to questions or review in any court.” (**Strong Clause)**
* ***Forest Service Providers Act – “***decision ... is final and conclusive and is not open to question or review in a court except on a question of law or excess of jurisdiction” (**Weak Clause)**
* ***National Defense Act –*** except under judicial review under the *Federal Courts Act,* decisions not subject to review of the court (**Weaker Clause)**
* **NB: *Administrative Tribunals Act*:** a strong clause is required for purposes of *ATA* discussion of **s. 58 v. s. 59** (“Privative clause” under ATA requires: 1) jurisdiction conferring clause, 2) finality clause + 3) ouster clause (**s.1 definition)**).
  + ***Jurisdiction-Conferring Clauses*:** in tribunal’s enabling statute jurisdiction will be given to the tribunal over certain matters (e.g. Parks in *Vancouver Charter* to Park Board; *Community Services Labour Relations Act* gives Labour Relations Board exclusive jurisdiction to decide questions arising under the act).
* Determine if Privative Clause is full or partial based on factors (e.g. ***Dunsmuir*)**
* If it lacks some of these elements or there is also a statutory right of appeal, then a reviewing court will give less weight to this (***Pushpanathan***)
* Privative clause was not a critical factor in ***Khosa* 🡪** Only concluded that there was no statutory right of appeal.
* ***Example* from *Dunsmuir* (*Public Service Labor Relations Act*) 🡪 Full Clause**
* **E.g.** **101 (1) …** every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court
* **101 (2)** No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.
* Existence directly implicates tension between ROL v parliamentary supremacy
* What’s protected by the clause: whatever the D-M has in terms of jurisdiction over particular parties, subject matter and remedies

**(b) Distinct and Special Admin Regime in which D-M has Special Expertise (*Dunsmuir –*** *labour relations used as an example: have policy side, adjudication, have existed for over 100 years, have own case law*).

**Analyze Expertise using** ***Pushpanathan* 🡪** Balancing of expertise of tribunal WRT question vs. that of court:

* **a)** Characterize expertise of tribunal (what are they expert at?);
* **b)** Consider court’s own expertise relative to that of tribunal, and
* **c)** Identify nature of specific issue before D-M relative to this expertise and decide who (court or tribunal) is more expert at the particular question.
* Look at purpose of the tribunal as determined by interpreting enabling legislation – e.g. in ***Khosa*** (for the majority) it’s purpose meant the tribunal had ability to determine wide range of appeals and decisions reviewable only if FC granted leave to commence JR.
* Assess any special expertise of the tribunal – if there are a range of expertise assume that it’s specified in the regs to be a requirement

**(c) Nature of the question: 2 steps:**

1. **If it’s a Q of fact, discretion, policy or mixed fact and law then reasonableness applies (*Mossop; Dunsmuir*):**

* ***Khosa***: Was discretionary decision providing exceptional relief that was fact and policy-driven (court was unanimous on notion of deference WRT findings of fact)
* E.g. Issuing Hunting Permit to disabled person – may be mixed fact and law or discretion (2010 exam example).
  + - Mixed fact and law = applying a particular situation to the law and determining whether they match.

1. **If it’s a Q of law, then consider:**

**a)** is it one of ***central importance to the legal system & outside expertise*** of admin. D-M (correctness STD applies), and

**b)** if it’s not, then it’s possible that it’s a ***Q of law the tribunal is well-suited to dealing with*** it (Binnie in ***Khosa***: w/or w/o privative clause tribunals entitled to some deference if legislature intended to allocate question to the tribunal – there might be more than one right answer even on legal questions)

* **E.g. of Q of law**: Whether adjudicator entitled to inquire into reasons for dismissal (***Dunsmuir***)
* If it’s a provision that is ambiguous such that no single interpretation could lay claim to being correct then there should be judicial humility (***CUPE***)
* Interpretation of ***home statute*** ***of the tribunal*** will usually attract reasonableness (***Alberta Teachers***); so too will closely connected statutes or with which would have particular familiarity (***Dunsmuir***) 🡪 ***if it’s interpreting home statute then err on side of reasonableness***
* The presumption of deference extends to ***a minister interpreting his or her own statute,*** or a statute closely connected to his or her function, in the course of making a discretionary decision. It also extends to a question of law about interpretation of limitation period provisions (***McLean***)
* **Not all Q’s of general law entrusted to HRT rise to level of central importance or fall outside expertise** (***Mowat*** – inquiry into costs inextricably intertwined with Tribunal’s mandate and expertise to make fact findings WRT discrimination)

**\*Possible to have segmentation where there are multiple grounds for review: 1 might attract different standard than the other (*Dunsmuir*), particularly where Charter + discretionary decision intersects (*Doré*)**

### [3] Apply the SoR:

##### APPLYING CORRECTNESS: DE NOVO REVIEW – Weigh in as though making decision at first instance.

* **Goal:** to reach the one “right” answer and judges get to say what it is (court does not have to respect what the tribunal says).
  + Tribunal is deemed inferior and no deference of respect.

##### Rationale = Promote just decisions and avoid inconsistent and unauthorized applications of law. Assumes that there is a right answer (*Dunsmuir*)

* **Values of Correctness:** Consistency, uniformity, predictability; stability; Right answer; Judicial expertise; No deference to other reasoning; Rule of law and unique role of the courts
* The court need **not put any effort into assessing the administrative decision-maker’s reasons** or casting those reasons in their best light (***Ryan*** confirmed in ***Dunsmuir***).
* **Policy:** 
  + **Arguments for a “Correctness” STD:** Jurisdictional questions, constitutionality // Judicial expertise // Predictability
  + **Arguments against a “Correctness” STD:** When is a tribunals contextual understanding ever not helpful? (what makes a court think that the tribunal should be completely ignored) // Do we need correctness review to ensure consistency, predictability?
  + **E.g.** The fact that “correctness” and statutory interpretation can be quite subjective, the SoR of correctness is becoming obsolete given the more pluralistic way that courts now think of JR, some of the theoretical context in which this is situated.

**\*Always start with Statutory Interpretation (Driedger’s Modern Principle) and determine if situation fits:** ***Northrop Grumman*** start with the preamble and then look to see what other statutes/regulations/agreements it incorporates and the purposes of all applicable provisions/statutes.

* Look at the scope of the statute/provision at issue, any applicable principles and definitions (***Northrop Grumman***)
* If the language of the provision at issue is ambiguous and capable of more than one meaning, then can look to the statutory scheme as a whole to decide on a meaning (e.g. *consumer protection mandate overrides CL choice of law principles in* ***Celgene***)
* ***Why it’s problematic:*** illustrated in ***Mossop*** that w/correctness standard judges still disagree on approach to the statutory interpretation exercise and the outcome (**STD:** *4 thought standard of review was correctness (but took different approaches), 1 thought standard was patently unreasonableness* **// Final Decisions:** *3/2 split on final outcome whether or not Mossop wins or loses – 2 thought HRT decision was correct, 3 thought was not correct*).
* **Majority (Lamer): Using Driedger’s** 
  + Pure statutory interpretation (purpose of leg) = question of law = SOR of correctness
  + Legislative intent is clear (absent Charter challenge). Therefore, tribunal erred in finding relationship counted as family status.
* **Concurring (LaForest): Using Driedger’s**
* SOR = correctness
* Text is clear: “family” = traditional family (uses textual analysis) 🡪 uses grammatical and ordinary meaning in Driedgers.
* ***Driedger’s Modern Principle (tool used in correctness standard):*** “The words of an act are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament.”

#### Canada (AG) v Mossop, SCC 1993

*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 agreement defines CL spouse as opposite sex, and Cnd HR Act intentionally left out sexual orientation as grounds of discrimination (even though they thought about adding it “leg history”). At CHRT, “family status” read to include same sex spousal relationships (admin decision at issue). JR to Fed CT Appeal (Mossop loses) – Appeal to SCC*

#### Canada (AG) v Northrop Grumman, SCC 2009

*Major military procurement bid – NG Overseas bids (even though has a CND division – did bid from overseas for tax reasons), doesn’t get it. Complains to Canadian International Trades Tribunal (CITT) about process. CITT agrees to hear it – Canada seeks JR on whether NG overseas can be heard* **// Issue:** Can CITTT hear Northrop Grumman overseas? Not a Cnd supplier (American)**// Outcome:** Court was deciding a jurisdictional question, which is rare; Parties agreed on correctness standard

* **Standing under CITTA (*Canadian International Trade Tribunals Act*):** Scope of the AIT: what is agreement about?: Looking at the agreement overall, it is a domestic free trade agreement **//** Relationship between suppliers & parties to trade: Parties are provinces and feds **//** Agreements per CITT Regs **//** Circularity Argument: SCC did not find circularity (Ford: there may not be an obviously correct answer here) **//** Other provisions of AIT: esp. Articles 518, 504 **//** Problems if AIT applies to non-Canadian suppliers **//** Jurisdiction of CITT & Federal Court:

##### APPLYING REASONABLENESS – Single standard that takes its colour from the context (i.e. not a spectrum) (*Khosa; Catalyst*)

Court looks into 2 things ***but in one organic process*** (neither process nor outcome trump) (***NFLD Nurses***): Bear in mind that reasonableness is a contextual inquiry where it must be assessed in the context of the particular type of decision making involved & all relevant factors (***Catalyst***).

**REASONABLENESS APPLICATION (*Dunsmuir*):** Although these requirements have been eroded lately.

1. **Process: Existence of justification, transparency and intelligibility w/in the decision-making process (e.g. didn’t consider irrelevant things)**

* Court must ***first seek to supplement reasons*** before subverting them. Reasons do not have to be perfect, they do not have to be comprehensive (***NFLD Nurses***).
* Do not re-weigh evidence or substitute own appreciation of appropriate solution (Binnie in ***Khosa***)
* If there are **no reasons at all** this is a PF problem, not standard of review (***Baker, Newfoundland Nurses*)**
* **Municipalities do not have to give reasons for bylaws** (***Catalyst Paper***), but municipal taxation bylaws can be judicially review (***Thorne’s Hardware***).
* ***Deficient reasons*** = Seek to supplement them first. Presumption of reasonableness (***Newfoundland Nurses*)**
* ***Implied / inferred reasons:***
  + ***Alberta Teachers***: can look at other tribunaldecisions (incl. subsequent ones) construing similarlanguage. Not carte blanche to reformulate.Directions re when you need to remit to tribunal.
  + ***Agraira***: if Minister says it’s reviewed all material submitted = look at what is submitted, infer reasons.
  + ***McLean***: don’t remit for reasons if “nothing to be gained” from explaining what’s “readily apparent”

1. **Outcome: Whether the decision falls w/in range of possible and acceptable outcomes that are defensible in respect of the facts and law**

* Range of outcomes circumscribed by purview of the legislative scheme that empowers the body (***Catalyst Paper –*** *review of a municipal bylaw*)
* So long as the process and outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome if the reasonableness standard applies **(*Dunsmuir*).**

**GENERAL COMMENTS ON WHAT REASONABLENESS IS:** Deference as respectful attention to the reasons offered *or which could be offered* (***AB Teachers*)**in support of a decision; ***means giving a margin of appreciation and respecting legislative choices***, expertise and different constitutional roles (***Dunsmuir***)

* Respect the fact that the admin tribunal was the one that got to make the decision.
* So long as process & outcome fit comfortably with principles of justification, transparency and intelligibility it’s not open to a reviewing court to substitute its own view of a preferable outcome (***Khosa*** – Binnie)
* **Court is really looking for justification:** if court can justify why they decided then the outcome should flow as reasonable – often depends on how you define a particular statutory scheme
* **Context matters** 🡪 Distinguish between quasi-adjudicative decisions v. bylaw passed by an elected body (***Catalyst Paper***)
* For an elected body, entitled to consider a broad range of economic, social, political and legal concerns w/o needing to give formal reasons or lay out a rational basis (***Catalyst Paper***)

**ANALYZE ANY REASONS OFFERED –** **1)** Stay close to the reasons (***Dunsmuir***) – Don’t reweigh factors the tribunal considered - start by positioning self within the tribunal’s reasons (illustrated in ***Nor-Man*** by Fish J) **AND** **2)** Look to whether they show an “ethos of justification” (***McLean v BC*, SCC)** – **transparency, intelligibility & justification (*Dunsmuir*)**

* **What is reasonable depends on Board’s Mandate/Purpose:** Reasoning based on a consumer protection mandate: tribunal is allowed to give effect to their own statutory scheme even if it conflicts w/how law might be otherwise (***Celgene,* 2011 SCC**)
* Do not construe CL or try and interpret the legislation.
* **An “arbitral remedy” can be reasonable even if legally incorrect 🡪 *Nor-Man,* 2011 SCC**: **(Fish J) illustrates getting into head of the arbitrator (potentially tribunal)** – **court cannot substitute their understand for a tribunals** - position self in context of labour relations where must exercise mandate in reasonable manner consistent with objectives & purposes of statutory scheme, principles of labour relations, nature of collective bargaining process, and factual matrix of grievance: even though arbitrator used the word “estoppel” arbitrator really meant to give an arbitral remedy along the lines of fairness that’s not based on legal doctrine: it was reasonable b/c arbitrator had 2 tribunal precedents using it in the same way.
* **COURT HELD:** that a labour arbitrator applying estoppel as a remedy within the context of a grievance under a collective agreement was applying a general legal concept to the arbitrator’s specialized area of expertise, and was therefore ***entitled to deference.***
* ***Nor-Man*** suggests that ***administrative D-M’s need not apply doctrines of general law in the same manner as courts,*** if they are asked to apply these doctrines within the realm of their specialized expertise.
* **Consider –** the extent that this can be applied beyond the labour context.
* **What municipal reasonableness looks like (when dealing w/ municipalities and bylaws) (*Catalyst Paper*):**
* **[1] Reasonableness of Bylaw:** only if the bylaw is one no reasonable body informed by the factors could have taken, will the bylaw be set aside.
  + - Courts have refused to overturn municipal bylaws unless they were found to be “aberrant”, “overwhelming” or if “no reasonable body” could have adopted them. This is part of the democratic institution and there are a range of social, economic and environmental issues that must be considered.
    - The substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature
    - This is a **high threshold to meet**, especially in light of ***Catalyst*** where there was a disproportionate impact from a tax levy on an individual corp, and yet the bylaw was still seen to fall within a range of reasonable outcomes.
    - Must reflect broad discretion provincial legislatures have traditionally accorded to municipalities.
    - In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them.
* **[2] Whether Municipality adhered to a reasonable process coming to enact the bylaw.**
* Muni councils must adhere to ***appropriate processes*** and cannot act for improper purposes (no duty to provide reasons but simply must follow the valid ways of enacting bylaws).

***Catalyst Paper* (Municipal/Democratic Reasonableness –** *JR of a municipal tax bylaw. Catalyst paying disproportionate tax to municipality –* Per***Thorne Hardware***a ***municipal taxation bylaw can be judicially reviewed* – Held:** bylaw fell w/in range of reasonable outcomes**)**: if it is a decision where contextually a high level of deference is demanded it might have to get to the std of, for example, only set aside if it’s one no reasonable body informed by these factors could have taken.

***Celgene Corp v Canada,* 2011 SCC***: US Pharma selling drugs to CND Doctors for clinical trials under special admin regime. Point of sale was w/in US (thus very expensive). CND Patented Medicine Prices Review Board ignored normal choice of law and has jurisdiction is medicine is sold in market in CND* **// Issue:** was this “sold in any market in CND?”**//**Review board determined they had jurisdiction **// SofR:** No precedent; on the facts there was somewhat a jurisdictional Q and tribunal interpreting own statute BUT parties agree that the SofR is correctness (but SCC seems to think it should have been reasonableness) **// Held:** Board’s decision upheld regardless of standard of review used **// Was it reasonable?: 1)** Look at process & outcome – reasoning based on consumer protection mandate (which is in CND); **2)** Court does own stat interp – where words “can support more than one meaning”

***Nor-Man Regional Health Authority,* 2011 SCC:** *Experienced labour arbitrator endorsed a union's interpretation of vacation benefit clauses in a collective agreement, but imposed estoppel on the Union on any claims to a remedy on behalf of EE b/c this has always been the way the regional health authority interpreted benefits. BUT promissory estoppel did not apply and there is no other way to be estopped* **// What SofR:** Reasonableness applies and reasonableness met.

**EXAMPLE OF MORE EXTREME END OF DEFERENCE**: ***Khosa, held IAD decision was reasonable*** – emphasizes the need to situate self in the reasons, defer to administrative exercises of discretion, and not to revisit weight assigned to factors relevant to exercise of discretion 🡪 Was okay that the tribunal reached an entirely different conclusion (than the criminal courts) WRT the expression of remorse as it related to prospects for rehabilitation (was a factual dispute and had different task from that of criminal courts)

* **Fish in Dissent disagreed:** Was a fatal flaw to reasoning that they made so much of the absence of willingness to admit he was street racing – “so much cannot reasonably be made so little” 🡪 Meant neither process nor outcome was reasonable (evidenced by disregard of sentencing judge’s findings w/o justification)
* Argues he isn’t re-weighing: an inordinate fixation on one factor to the exclusion of others amounts to a failure to consider relevant factors

**REASONABLENESS REVIEW OF DISCRETIONARY DECISIONS: Pulled into SoR analysis by L’Heureux-Dube in Baker 🡪** Decisions where the law does not dictate a specific outcome, or where the DM is given a choice of options w/in a statutorily imposed set of boundaries (***Baker***).

* **Identifying Discretion:** Authorizes admin action and/or decision aimed at individual or small group; Look for vague language (e.g. “humanitarian and compassionate consideration” in ***Baker***; “national interest” ***Agraira***), “at mercy,” or “may” as opposed to “shall” or “any outcome the Minister deems reasonable”; “at their discretion”; often exemptions are discretionary decisions (e.g. in ***Agraira v Canada***).
* **Discretionary Decisions Reviewable under SOR:** Discretionary decisions are part of the legal regime and can be reviewed by courts the same as other decisions. Are given considerable respect BUT discretion must be exercised in accordance with boundaries imposed in statute, the principles of RofL, admin law, fundamental values of CND society and principles of Charter (***Baker*)**
* **Unreasonable Exercise of Discretion:** Any of the following ***will not be a reasonable exercise of discretion*** (traditional abuse of discretion still inform what is “reasonable”): Improper purpose/considerations, bad faith, dictation of outcome/influence by inappropriate person, inappropriate delegation of powers, fettering the appropriate decision maker’s powers (tying hands before making decision).
* **Court cannot re-weigh factors as part of reasonableness review** (***Suresh*** overruling ***Baker*)**: Rather, a court is limited to ensuring the tribunal considered *relevant* factors in a reasonable way and did not consider irrelevant factors (weighing of considerations is for the D-M) 🡪 This would not align with staying close to reasons as part of reasonableness analysis.
* Having tribunal reasons makes a difference, as it’s a source of determining whether relevant factors were in fact considered

**REVIEWING REASONS:** Balance between making tribunals accountable by demanding justification vs. remaining deferential/respectful.

* It is only where ***there are no reasons*** in circumstances where they are required that an issue of procedural fairness arises. Where ***there are reasons, the adequacy or quality of those reasons*** is a question of reasonableness (***Baker, Newfoundland Nurses*).**
* Reasons are the primary form of accountability of the D-M to the public and reviewing court (***Khosa*** – Binnie)
* Justification, transparency and intelligibility require the court to look at reasons (***Khosa***)

**[1] Procedural Fairness Review:** as a matter of PF, does the decision require written reasons (if not see PF section)? (***Baker***)

**Required when:**

* Significant impact for individual or statutory right of appeal, or “other circumstances” (***Baker***)
* BUT, not always required (***Mavi***)
* If required, and there is anything by way of reasons then the duty of fairness is satisfied (***Newfoundland Nurses***)
* There is a low threshold that should apply in determining whether reasons have been provided as a matter of PF (see PF section). Questions concerning “quality” of reasons is a matter of substantive review (below) (***Newfoundland Nurses***).

**[2] Alternative route is to challenge that the reasons are deficient (are reasons but not good ones) (Reasonableness)**: Review the ***quality of reasons*** under substantive review – **Ultimate question:** do the reasons demonstrate a justifiable, transparent and intelligible decision-making process?

* ***Analysis*:** Deference to a decision requires respectful attention to the reasons offered, or which could be offered in support of a decision – may require looking beyond the reasons to the wider record of E and arguments to assess reasonableness (Dyzenhaus as cited in ***Baker, Alberta Teachers, Newfoundland Nurses***)

**(a) Organic exercise of again looking at the reasons read together with the outcome to determine whether result falls w/in range of possible outcomes 🡪 lack of adequate reasons is insufficient as a standalone basis to quash if the outcome nevertheless falls w/in range of reasonable outcomes (*Newfoundland Nurses*)**

* Court must ***first seek to supplement reasons*** before subverting them. Reasons do not have to be perfect, they do not have to be comprehensive (***Newfoundland Nurses***).
* Decision is presumed to be correct even if the reasons are imperfect (***Newfoundland Nurses***).
* Test is satisfied if you can understand why the tribunal made the decision it did & determine whether the result is w/in range of reasonable outcomes (***Newfoundland Nurses***)
* Context of tribunal matters in assessing reasonableness: e.g. w/labour tribunal speed, efficiency and informality important b/c the next Collective Agreement bargaining process never far away so reasons do not matter as much (***Newfoundland Nurses***)

**(b) If reasons as they stand are deficient, can you nevertheless infer additional reasons to supplement? (*Agraira, Alberta Teachers, McLean*)**

* If cannot find anything in other decisions (see ***Alberta Teachers***); the materials (see ***Agraira***), or counsel’s decisions (see ***McLean*)** to infer reasons, then can potentially send the matter back down to the tribunal.
* D-M referenced having reviewed and considered the evidence submitted in its entirety 🡪 ***SCC inferred reasonable reasons***: *consideration of departmental guidelines* in ***Agraira.*** There were no other precedents (this case gives large le-way to infer reasons and parts from ***Alberta Teachers*** as there was no precedent to rely on for reasons here).
* **If Minister says its reviewed all material submitted –look at what’s submitted, infer reasons** 🡪 “Had the Minister expressly provided a definition of the term ‘national interest’, it would have been one which related predominantly to national security and public safety, but did not exclude other important considerations from guidelines & analogous sources.”
* **NB: Unsure what the limit is for inferring reasons.**
* Absence of clarity WRT when you can or cannot infer reasons, so just argue!
* ***Extreme end of willingness to imply:*** no reasons offered by the Commissioner but a basis for the Commission’s reasons can be apparent from the arguments advanced by counsel (***McLean –*** *used respondent’s arguments*)
* **Practical Q**: is there anything to be gained by remitting it back down to get reasons? (***McLean***)
* When a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal (***McLean***; ***Agraira***).
* Potentially the courts are confused by what is to result from this.

**CONCLUDE: *with whether the reasons (express or implied) demonstrate a justifiable, transparent and intelligible decision-making process.***

**JR of Reasons on an Issue Not raised before the tribunal:** It is okay to find implied reasons if there is a reasonable basis for the decision (***Alberta Teachers –*** *Could not wrap up decision in 90-days, this was a complicated case, it would be impossible for commissioner to know when matter would be done*).

1. ***Whether court should JR at all:***open to the court to exercise discretion to judicially review an issue not raised at the tribunal if it can imply reasons (***Alberta Teachers –*** *no reasons to extend 90-day deadline, nothing brought up about this at tribunal*) 🡪look for reasons that would provide a “reasonable basis for the decision.”

* The implied reasons are what will be reviewed under 3 (e.g. **Other decision of the same tribunal can help determine “implied reasons”**: can include reasons in a decision of the same tribunal considering a similar question – even if the tribunal’s decision occurred subsequently to the decision currently under JR: ***Alberta Teachers -*** *relied on a case that came out after the adjudicators decision but before the SCC decision*) - this part seems problematic)
* “The existence of other decisions of a tribunal on the same issue can be of assistance to a reviewing court in determining whether a reasonable basis for the tribunal’s decision exists” (***Alberta Teachers***).
  + Had the benefit of the Commission’s reasoning from its decisions in other cases involving the same issue.
* Where it can imply reasons, court should b/c avoids the cost and hassle of remitting back to tribunal, undermining cost-effective resolution that is the premise of admin. law (***Alberta Teachers***)
* **Cromwell in *AB Teachers* dissent**: says court has no business reviewing ghost set of reasons.

1. **SoR: apply *Dunsmuir*** 🡪 as with all SoR, most will end up reasonableness.
2. **Did the tribunal’s Implied reasons meet the SoR?**

* Do the implied reasons satisfy the values of justification, transparency and intelligibility?
* Can imply from other tribunal decisions and considering similar language (***Alberta Teachers***).
* If you imply reasons, should be finding that they provide a reasonable basis (cannot find implied reasons are unreasonable); otherwise remit the matter back to the tribunal to give them a chance to provide reasons (***Alberta Teachers***)

|  |
| --- |
| ***Alberta (I&P) v Alberta Teachers’ Association,* 2011 SCC:** *Teachers association allegedly violated privacy rights. Commissioner missed own deadline to give reasons, supposed to give them in 90 days, only tells parties that he intends to extend period after 22 months, reviewing court says decision is no good, since it was not rendered within 90 days, this is a case of invisible reasons, because there was an implied decision to extend the deadline* **//** Should there have been any JR at all of an issue not raised at tribunal? **🡪** Yes, can JR even though JR is a discretionary remedy. Adjudicator’s decision/reasons *implied* **// SoR = Reasonableness //** Did adjudicator’s implied reasons on issue not raised meet SoR? 🡪 **Yes, implied from other tribunal decisions considering similar language.** |

### How the Charter and Substantive Review Interact?

**Admin law and the Charter are seen somewhat equal seeing as they are both fundamentally constitutional analyses.**

**Sections of the Charter to Consider:**

* **S.2 🡪** Provides that everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;(c) freedom of peaceful assembly; and (d) freedom of association.
  + **S.2** has been used in admin to challenge the **actions or decisions of delegate** (***Multani, Dore, Loyola, TWU*)**
* **S.7 🡪** That everyone has the right to life, liberty and security of the person and the right not to be deprived thereof EXCEPT in accordance with the POFJ (***Suresh*).**
* **S.15 🡪** Provides that everyone is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
  + **S.15 can be engaged with respect to specific powers or functions exercised by delegates and can be used to challenge statutory provisions as well as the actions and decisions of delegates** (***Martin***)
* **S.8 🡪** Everyone has the right to be secure against unreasonable search or seizure. S. 8 can be engaged with respect to delegates' powers to force production of documents or evidence, or to allow the entry of premises to conduct inspections or searches

**(A) Procedural Fairness (PF) – use *Baker* to determine minimum content of POFJ if have a s. 7 argument (see above) (*Suresh*)**

* Already have Charter s. 7 POFJ incorporated in PF 🡪 use the PF framework in ***Baker*** to determine the minimum content of POFJ (***Suresh***). Same principles of procedural fairness apply under s.7 and PF in admin law.
* S.7 principles require at a minimum, compliance with duty of fairness principles (what you would get under admin law).
* Open Q as to whether POFJ require more in the circumstances b/c ***Suresh*** court was careful to say they weren’t constitutionalizing CL PF

**(B) Substantive Review of the Enabling Statute (*Conway*) or an Admin. Act/Decision (*Doré*)**

* **Charter applies fully to admin tribunals**: Must act consistent w/Charter and its values in exercising statutory functions, have general jurisdiction to consider provided can determine questions of law and that hasn’t been removed, and they are a ***court of competent jurisdiction*** to give remedies under s. 24(1) provided that’s permitted by enabling statute (***Conway*)**.

##### (i) Substantive review of tribunal’s *constitutional analysis of a statute* (including its home statute):

* Tribunal has jurisdiction to review for constitutionality (of provision(s)) if: (***Conway*** using ***Martin*** language)

**(a)** **Enabling statute** expressly (in statutes terms) or implicitly (look at statute as a whole) permits it ***to decide Q’s of law;***

* In ***Martin the tribunal was found to be able to decide Q’s of law b/c:*** s. 185(1) of the Act allowed the tribunal to “determine all questions of fact and law arising pursuant to this Part.” Furthermore, the act allowed appeals to the Court of Appeal on “any question of law” which suggests the tribunal can deal with those matters initially.

**(b)** The jurisdiction to consider Charter questions has ***not been removed*** by the legislature in the enabling statute

* **JR (Standard of Review)** Will be on a **standard of correctness** where the court will engage in a full Charter analysis (i.e. infringement + justification under ***Oakes***) (***Doré***)
* **Remedy: s.52(1) –** Court can provide a general declaration of invalidity of any legislative provision to the extent that it is inconsistent with the constitution. No ability to invalidate provisions that are not inconsistent. Unlikely (if not impossible) for an entire act to be invalidated.
  + ***Martin*** – *P argued provision (s.10B) in Workers Comp enabling statute violated s.15 as they excluded chronic pain from the purview of the regular workers’ compensation system and provided, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program, beyond which no further benefits are available* **// Held:** tribunal could have disregarded the provisions if they found them to be unconstitutional. Court here then struck down provisions in act as were seen as violation of s.15(1) and not saved by s.1.

##### (ii) Substantive review of tribunal’s *decisions / interpretations / actions* within jurisdiction, where “Charter values” are at stake (*Doré*): use the “richer” administrative law approach [i.e. the *Multani* concurring opinion won out].

* **“Charter Value”** = Charter values can be broader and less precise of a Charter Right. Not really sure what a Charter Value is compared to a Charter Right (***Doré*)**. Charter right may be seen as an individual right versus values is a broader right beyond the individual.
* **On JR:** The task of the reviewing court applying the ***Doré*** framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the Charter protections at stake and the relevant statutory mandate (***Loyola***).
* **Do not, in this context, have to do the precise Charter Right analysis. Instead, do admin law process:**

**[1] Step 1:** What’s the SoR – apply ***Dunsmuir*** – **most will be reasonableness** (e.g. satisfactory precedent, home statute, and expertise in applying facts in the particular Charter context, which was FOE in ***Doré***) – particularly where it’s a discretionary decision (***Doré, Loyola***)

* Deference is also appropriate when assessing whether a decision by an administrative decision-maker violates the Charter, where there is **no challenge to the constitutionality of the enabling legislation** (***Doré***).

**[2] Step 2:** Did it meet the SoR 🡪 distills the balance and proportionality parts from ***Oakes*** and infuses the administrative law analysis: **i.e. do this at the same time as the reasonableness inquiry under *Dunsmuir***

**(a)** Consider and define ***the statutory objectives*** (***Loyola*** = respect for difference and promote respectful dialogue in Quebec; ***Doré*** = promote civility and professionalism among legal profession).

**(b)** Ask how ***the Charter value at issue is best protected*** in view of the statutory objectives?

**(c)** Did the ***administrative act disproportionately*** (i.e. more than it needed to) ***impair the Charter value at issue***? – if so, it’s an unreasonable decision.

* Ensure decision interferes w/relevant Charter guarantee no more than is necessary given the statutory objectives (***Doré***)
* Must demonstrate that gave “due regard” to importance of rights at issue (***Doré***)
* **In *Loyola* slim majority found**: The Minister’s decision requiring that all aspects of Loyola’s proposed program be taught from a neutral perspective, including the teaching of Catholicism, limited freedom of religion more than was necessary given the statutory objectives. ***As a result, it did not reflect a proportionate balancing and should be set aside.***
* \*Do not do a full analysis asking whether the Charter right was infringed
* Still possible court might ignore ***Doré*** and do full Charter analysis as did the minority in ***Loyola***

##### (ii)(a) Ability to give Charter remedies under s. 24(1): remedies for acts/decisions that violate the Charter

* **Prerequisite**: Must have general jurisdiction to apply the Charter decided as above w/whether can decide questions of law and that ability isn’t taken away by the legislature. Then court can provide a remedy it sees as just (e.g. damages, constitutional exemption, declaration of violation, or any other remedy).
* **Then on a case-by-case basis**: Look at statute to determine whether it has the jurisdiction to grant the type of remedy sought (did not have in ***Conway -*** *remedy of absolute discharge for dangerous offenders not w/in jurisdiction of Ont Review Board***)**
* The ***Conway*** decision affirms the application of the *Charter* to administrative tribunals but **limits the scope of available remedies under s. 24(1)** to those that have been specifically granted by the legislature.

#### Conway 🡪 Merger of 3 streams (Cuddy, Cooper and Martin)

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

* ***Cuddy Chicks,* 1991 SCC –** If and only if the tribunal has the power to interpret law, the agency has the ability and must apply Charter to its enabling statue. Cannot declare statutory provision invalid but can refuse to give effect. SofR = Correctness. Must determine whether interpretation violated the Charter.
* ***Cooper,* 1996 –** CHRT did NOT have power to apply Charter s.15 to its own legislation b/.c it did’t have explicit/implicit power to consider Q’s of law. ***Cooper* (dissent):** Charter is “not some holy grail which only judicial initiates may touch. The Charter belongs to the people.” Human rights tribunals should be able to interpret the Charter.
* ***Martin,* 2003 –** Dissent in ***Cooper*** essentially won. Canadians are entitled to assert rights and freedoms in most accessible forum.

**History and different approaches:**

* Some cases used a **Charter-Based Approach** (***Slaight; Multani*)**
* Some cases did a **mixed approach** (***Slaight* dissent; *Baker*):** Step 1: Admin law – unreasonable exercise of discretion? Are admin law principles adequate? Step 2: Charter – two step analysis (was the right infringed and was it justified under s.1?) **🡪** Used in ***Slate*** by Lamar.
* Some cases **take admin law approach** (***Multani* (**Deschamps and Abella) and ***TWU*** (Champlain), ***Khadr***).
  + If challenging the statute itself, use the Charter Analysis. But if challenging the acts (decision) use the admin law analysis (***Multani***).
  + S.1 analysis does not make sense when dealing with acts or decisions. How do you talk about rational connection in the context of a decision (***Multani***).
  + Admin law is just as demanding as the Charter and is simply a better fit.

#### Multani, 2006 SCC

*Boy drops his religious dagger in school yard (Kirpan). School says he cannot carry Kirpan at all. Appeal to School Board says that he should sew dagger into his clothes so it doesn’t fall out. School appeals that to governing board. From there goes to counsel of commissioners and upholds school’s decision. At JR wins at QBSC, loses at QBCA, then goes to SCC* **// Charter review (religious freedom, equality):** of the school board’s decision (not the home statute etc) **// Held:** Council decision violated s.2(b) and was not saved by s.1

* **Charron (Charter Approach)**: If charter rights are at stake use the Charter. When dealing with a Charter right the best way to protect is to stay true to the Charter analysis. Use Charter b/c: more structured approach and incorporates social values.
* **Deschamps and Abella (Admin law Approach)**: use admin approach for decisions. Reasonableness standard – **Held:** decision here was not reasonable.

#### Dore v Barreau du Quebec, SCC 2012

**How to review an admin law/Charter rights question? Admin law SoR or Charter Oakes test? //** *Lawyer disciplined for writing intemperate letter to judge (also reprimanded)* **//** What is being challenged is the decision to impose the suspension (an act and not the statute being looked at). Constitutionality of the statute was not at issue (if was would be dealing w/ correctness).

#### Loyola, SCC 2015

*Catholic religious teaching in high school in contravention of mandatory “impartial” religion/ethical education policy. Minister denied giving exemption (which was requested), said that Catholic teaching was not “equivalent” to the neutral program* **//****Issue:** Did the Minister properly exercise his discretion w/ regard to Charter values/rights? What approach – Charter or Admin law?

* **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:** The issue is a 3 person concurring minority does the whole case without ever talking about Dore and does a straight up Charter analysis, even though we are talking about an act/decision.

# Statutory Reform in BC: *Administrative Tribunals Act*

**Matters under ATA would go to BCSC (not federal court).**

* **How the ATA Works:** ATA does not create a new tribunal, simply lies on top of existing tribunals that exist in BC. This is provincial legislation so does not apply to federal tribunals. Applies differently to different tribunals.

**Step 1:** Does the admin. ***tribunal’s enabling legislation adopt the ATA***? Which parts? [as required by definition of “tribunal” in s. 1]

* **REFER TO CHART HANDED OUT IN CLASS!**

**Step 2:** Navigate the applicable parts of the *ATA*

* Interpretation matters: **note s. 1 definitions:**
  + **"Tribunal"** means a tribunal to which some or all of the provisions of this Act are made applicable;
  + **Privative clause (as defined in s.1 ATA): Must include jurisdiction conferring clause, finality + ouster (i.e. full privative clause in order to trigger privative clause provision of *ATA* in s. 58**

### Summary of the ATA

**5 Main focuses of ATA:** Independence, accountability, and appointments; institutional design & statutory powers for tribunals; Dispute resolution; Charter & Human Rights Jurisdiction; and Standard of Review.

**Part 2 (appointments):** got rid of pleasure appointments, everyone is hired on term and merit base process. This is an institutionalization of a certain degree of independence and merit based appointment process.

* **CHAIR OF TRIBUNAL INITIAL TERM AND REAPPOINTMENT - s. 2** – Must be after merit-based process (i.e. not political) and security of tenure – initial term of 3-5 years and then additional terms of up to 5 years (shows there is some transparency into process, these are NOT at pleasure appointment, and get at least 3 years which is fairly good for security of tenure for the chair)
* **MEMBER ABSENCE - S**.**5 –** If you are absent or expected to be absent, can replace that person so that would prevent having to stop whatever hearings that person is actually involved in.
* **POWER AFTER RESIGNATION OR TERM EXPIRES - s. 7** - can authorize member to continue under a particular matter (important after *Brar* facts). BUT has to be the chair that authorizes that person to continue.
* **TERMINATION FOR CAUSE - s. 8** - can terminate for cause [important b/c it’s not at pleasure 🡪 provides more independence].
* **RESPONSIBILITY OF CHAIR - s. 9** - chair responsible for effective mgmt. & operation & allocation of work – important for tribunal independence (though still consider who appoints chair & who the chair is responsible to)
* **MEMBER REIMBURSEMENT FOR TRAVEL - s. 10** - Treasury board decides what you get paid (again NOT the minister so theoretically bolsters independence b/c money is coming from general revenue)

**KEY ATA PROVISIONS:**

* **Ideas:** consistency between tribunals (everyone has similar powers) & giving them the powers to actually discharge their mandates.
* **Part 3 - Clustering:** affects independence.
* **E.g.** Could cluster tribunals based on sector (maybe all health related tribunals are clustered). There are no clusters now but questions around who is clustered and how.
  + **In ONT:** Env land tribunal cluster (5 tribunals) based on expertise. Also another cluster based on vulnerable clients (as opposed to expertise).
* **Policy Considerations:** is the point about saving resources or providing the best access to justice?
* **Part 4 - Practice and Procedure**: ATA made more uniform and enhanced powers for tribunals to run their “own show.” Want finality, certainty, and credibility.
* **Transparency pieces in ss. 11-13**:
* **GENERAL POWER TO MAKE RULES - s. 11(1)** - tribunal can make its own rules WRT own procedure (if you think of last Q of *Baker* test being whether tribunal has power to determine own procedures then it does if subject to s. 11) – sub (2) gives examples and the tribunal must publish those rules so people can know them
* **PRACTICE DIRECTIVES TRIBUNALS MUST MAKE - s. 12 –** usual time for completing application & procedural steps, and usual time w/in which final decision to be released (s. 12(1)
* **MAY ISSUE PRACTICE DIRECTIVES - S. 13** – pretty much guidance to the public WRT the tribunal’s expectations and must publish those
* **Tribunal empowerment:**
* **s. 14 – Tribunals have general power to make orders**
* **s. 15 – Power to grant interim orders**
* **s. 16 - Power to grant consent orders (these are important b/c tribunals don’t have inherent jurisdiction that would otherwise give these powers)**
* **Parties Rights (ss.19-21, 30, 32, 34)**
* **ORGANIZATION OF TRIBUNAL - s. 26** – it’s the chair who gets can organize panels & panels have all jurisdiction of tribunal. Can hire people to carry out what is needed (many tribunals before didn’t have tribunals).
* **STAFF OF TRIBUNAL - s. 27** – have staff as necessary who are public employees
* **FACILITATED SETTLEMENT - s.28 -** The chair may appoint a member or staff of the tribunal or another person to conduct a facilitated settlement process to resolve one or more issues in dispute. May make consent of weaker party to process a condition of actually doing it.
* **Hearing powers:**
* **FAILURE TO COMPLY WITH TRIBUNALS ORDERS - S. 18 -** after giving notice to party, tribunal may do the listed things: schedule hearing, keep going w/o their presence, dismiss application
* **s. 33 – Can allow interveners**
* **ss. 35-42**: Combine similar hearings, decide which information is admissible, adjournments, examine witnesses.
* **Appeals:**
* Filing notice of appeal with tribunal: s. 22 (have to pay money)/23 (don’t have to pay $) – notice of appeal
* **s. 24 - Time limits**
* **s. 25 – Appeal does not operate as a stay**
* **Part 5: Jurisdiction over Legal Questions 43-46.3:**
* **DISCRETION TO REFER Q’S OF LAW - s. 43** - Discretion to refer Q’s of law to court (and then matter would come back before it). (If s.43 applies then by default s.44 does not apply to the tribunal).
* **TRIBUNAL W/O CONST. JURISDICTION - s. 44 -** Those tribunals that do not have jurisdiction over constitutional Q’s (includes Charter & federalism). Statutory reform trumps the CL (thus look above to *Conway* and *Dore* as statute would override if apply).
* **TRIBUNALS W/O CHARTER JURISDICTION - s. 45** - Tribunals that do not have jurisdiction over Charter Q’s (e.g. those that are subject to s. 45 (i.e. 45 applies) but not s. 44 would have jurisdiction over federalism issues).
* **NOTICE TO A-G -** s. 46 – These tribunals have to give notice to AG if going to deal with constitutional questions
* **DISCRETION TO DECLINE JURISDICTION TO APPLY THE HUMAN RIGHTS CODE - ss. 46.1-46.3** - talk about *HRC* jurisdiction
  + **s. 46.1** – Discretion to decline jurisdiction to apply the *Human Rights Code* (e.g. ***Figliola –*** *Dealing with Human rights tribunal* ***//* SCC Stated:** it is patently unreasonable for the Human Rights Tribunal not to dismiss a complaint of discrimination that has already been litigated before another tribunal of competent jurisdiction) (only applies to the Human Rights tribunal, Labour Relations Board and Securities Commission).
  + **s. 46.2** – Limited jurisdiction/discretion to decline jurisdiction to apply *HRC*
  + **s. 46.3** – Tribunal has no jurisdiction to apply *HRC*
* **ss. 47-53 more decision making powers**
* **s. 47 - Power to award costs**
* **s. 48 – Maintain order at hearings**
* **s. 49 – Contempt proceeding powers**
* **s. 50 – Decisions**
* **Enforcement options - s. 54** - can file certified copy of decision w/court – can turn it into a court decision
* **IMMUNITY PROTECTION FOR TRIBUNAL MEMBERS - s. 56** – if you’re a decision maker you don’t face civil liability for decisions you make
* **Surveys and Reporting (ss. 59.1, 59.2):** This is the bureaucratization of tribunals and making them operate more like government departments.

### Standard of Review under the ATA: 3 Standards of Review still exist in BC (i.e. Patent Unreasonableness Applies)

**ENSURE S.58 OR 59 APPLY TO THE TRIBUNAL (SEE THE CHART)**

**Summary:** under s. 58 *ATA* [privative clause] the decisions of expert tribunals are to be reviewed on a standard of patent unreasonableness **versus** s. 59 [no privative clause] SoR to be correctness for all questions except the exercise of discretion (patent unreasonableness) and findings of fact (reasonableness) (***Pacific Newspaper Group***)

* The *ATA* relies on the CL as the idea of “patently unreasonable” comes out of the common law. When dealing w/ ATA these are standard of review provisions (stronger that Federal Court Act). BUT hard to completely outs the CL given the *ATA’s* reliance on CL language.
* **Time limit on JR – s.57 -** Have 60 from the time of the final decision you are challenging have 60 days to bring JR.

**[1] Step 1: Does the statute have a strong privative clause as defined in *ATA*?**

* **Jurisdiction conferring** “sole and exclusive jurisdiction to hear…”
* **Finality** – “any decision of the board is final and conclusive…”
* **Ouster** – “this decision is not open to question or review in court…”

**[2] Step 2: apply the standard of review dictated by the relevant section:**

**[a] s. 58 *ATA* Privative Clause Containing (*Pacific Newspapers*):**

* **Q1:** Is question at issue in the expert tribunals exclusive jurisdiction (which is jurisdiction protected by a privative clause – relative to the courts the tribunal must be an expert tribunal)? (**s. 58(1)**) if yes, go on;
* **Q2**: Apply the standard described based on the type of question that it is:
  + **Fact (s. 58(2)(a))** 🡪 Patently Unreasonable std (***Pacific Newspapers***)
    - **Questions of mixed fact and law** 🡪 In general, under patently unreasonable std. **UNLESS** can pull out a general question of law outside tribunals exclusive jurisdiction = correctness std.
  + **Law (s. 58(2)(a))** 🡪 Patently Unreasonable std (***Pacific Newspapers***)
  + **Discretion 🡪** Patently Unreasonable **(s. 58(2)(a))** 🡪 A discretionary decision is P.U. if the discretion (**s.58(3)**):
    - **(a)** Is exercised ***arbitrarily or in bad faith***,
    - **(b)** Is exercised for an ***improper purpose***,
    - **(c)** Is based entirely or predominantly on ***irrelevant factors***, OR
    - **(d)** Fails to take ***statutory requirements*** into account.
  + **PF questions (s. 58(2)(b))** = must be decided whether the tribunal acted **fairly** (fairness) (apply ***Baker***)
  + **Everything else (s. 58(2)(c)) 🡪 Correctness Std**
    - **i.e.** Questions of law in respect to which the tribunal does not have exclusive jurisdiction.

**[b] s. 59 *ATA* No Privative Clause**

* **Default SoR (s. 59(1))** 🡪 Correctness
* **Findings of Fact (s. 59(2))** 🡪 Court must not set aside UNLESS i) there is no evidence in support or ii) unreasonable (reasonableness std)
* **Discretion** 🡪 Patently unreasonable (**s. 59(3), *Figliola -*** *it is patently unreasonable for the HRT not to dismiss a complaint of discrimination that has already been litigated before another tribunal of competent jurisdiction***)**. A discretionary decision is P.U. if the discretion (**s. 59(4)):**
  + **(a)** Is exercised ***arbitrarily or in bad faith***,
  + **(b)** Is exercised for an ***improper purpose***,
  + **(c)** Is based entirely or predominantly on ***irrelevant factors* (*Figliola –*** *tribunal’s exercise of discretion not based on relevant factors*), OR
  + **(d)** Fails to take ***statutory requirements*** into account.
* **PF questions (s. 59(5))** = must be decided whether the tribunal acted **fairly** (apply ***Baker***)

**Patent unreasonableness in the ATA? (*Pacific Newspapers*)**

It’s at the high end of the deference “spectrum” and **retains its pre-*Dunsmuir* character** – **Patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective – rooted in the immediacy or obviousness of the defect – described as “clearly irrational” or “evidently not in accordance with reason.” (*Pacific Newspaper Group*, BCCA) BUT *Khosa*** makes clear that it’s open to the legislature specify a standard of review if manifests clear intent to do so.

* PU will live on in BC but the content of what it means and the precise degree of deference it commands will be calibrated according to general principles of administrative law (Binnie in ***Khosa***) – **i.e. *ATA* specifies SoR but not the content of that SoR** (so the content will continue to evolve through broader admin law cases) (Rothstein J. in ***Khosa*** said this was troubling)
* A PU decision is one that does not accord with reason or is clearly irrational. It is not for the court on JR to re-weigh the evidence; second - guess the conclusions drawn from the evidence considered; substitute different findings of fact or inferences drawn from those facts; or conclude that the evidence is insufficient to support the result. **Only if there is no evidence to support the findings or the decision is “openly, clearly, evidently unreasonable” can it be said to be patently unreasonable.**
* It doesn’t mean that if there is not a specified SoR in the *ATA* it loses out on deference: rather, still get a degree of deference in matters relating to special role/function/expertise unless they’re ousted by statutorily mandated SoR’s (which are NOT grounds of review) (Binnie in ***Khosa***)