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| **Threshold: Do you get any procedural fairness at all? – pg. 14-19** |

Judicial Review: Procedural Fairness

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| 1. **Duty of fairness *only* applies to decisions + that affect the rights, privileges or interests” of an individual + but *not legislative decisions***    * **STANDARD OF REVIEW IS CORRECTNESS**    * Starting point = ***Nicholson*** collapses the distinction between DoF + natural justice, DoF applies to all administrative justice + usually involves the right to be heard/right to an independent + impartial hearing      + **The duty of fairness is concerned with ensuring public authorities act fairly in the course of *making* decisions, not with the fairness of the actual decisions they *make***    * Then = ***Cardinal*** confirms that this CL principle is a duty on every public authority making an administrative decisions + not legislative + affects RPI      + **This duty is on a sliding scale,** duty can be postponed/limited but not eliminated by *emergency*    * Look to the 3-part test from ***Knight*** re: if you get procedural fairness      + **Test: What is the nature of the decisions? What is the relationship between the administrative body and the individual? What is the impact of the decision on the individual?** 2. **Factor #1: Nature of the decision – preliminary vs. final/administrative vs. legislative**    * General rule is that you get PF for final decisions, not interim decisions + legislative decisions do not attract a DoF      + ***Re Abel*** = decision isn’t technically a final decisions but *practically speaking* he only means of achieving a result, may be entitled to PF      + ***Dairy Producer’s Co-Op*** = no PF at preliminary/interim stages of the process b/c final hearing will be conducted      + ***Irvine v. Canada*** = no PF at the investigatory stage b/c don’t want to “unduly burden and complicate” the law enforcement investigate process    * How far does the exemption for DoF for legislative decisions go?      + ***Inuit Tapirisat*** = no automatic sheltering of ministerial decisions, might be sheltered when the decision is very akin to legislative decisions (see broad discretion + polycentric policy considerations)      + ***Homex Realty*** = again to automatic sheltering for municipal decisions (subordinate legislation), again might be sheltered when the decision is very akin to legislative decisions (see broad discretion + polycentric policy considerations), here it was not sheltered b/c this bylaw was particularly aimed at Homex      + ***Immigration Consultants*** = regulaitons + policies are fully exempt/not reviewable, no JR or PF b/c they are legislative decisions (doesn't matter if the action results from an Act of Parliament or regulation made by the Executive) – same idea in ***Martineau*** 3. **Factor #2: Relationship between body + individual – doctrine of legitimate expectation**    * ***Ref. Re Canada Assistance Plan*** = if the relationship gives rise to legitimate expectation of being treated in a certain way then DoF means that you have a right to be shown that the *expectation was considered in making the decision,* not the result      + Again, no LE re: purely legislative functions or purely ministerial decisions on broad grounds of public policy 4. **Factor #3: Impact of the decision on the individual – rights, interests, privileges**    * Recall, can only have a DoF when the decision impacts the RPI of an individual    * ***Re Webb*** = even if you don't have a *right* to something, once you get it you might then have a *vested interest* in keeping it, content of PF is contextual    * ***Re Hutfield*** = if someone’s interests are “sufficiently, directly, and substantially affected” then maybe even JR of PF at the application stage |

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| **Content: How much procedural fairness do you get? pg. 19-20** |

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| 1. ***Baker*** – **non-exhaustive 5-part test**    * The nature of the decision being made + process followed in making it  * Classify it a judicial, quasi-judicial, administrative b/c closer to judicial = more PF * How discretionary? More discretionary = less PF   + The nature of the statutory scheme + terms of the statute pursuant to which the body operates * Where does this decision fall in the formal decision-making process? Closer to final = more PF, closer to preliminary = minimum PF * Internal appeal mechanisms = less PF * Limited on appeal to findings of fact at first level of inquiry = more PF   + **The importance of the decision to the individual(s) affected** * Most important factor to consider * Content increases in proportion to the importance of the particular decision to the person it affects   + The legitimate expectation of the person challenging the decision * Based on conduct of the authorities, LE *may* extend to content b/c idea of holding government to its word * Can’t have a LE in an outcome by if you re led to expect a particular result = more PF   + The choices of procedure made by the agency itself     - Content affects the decision-maker = we need a *workable standard*, does the DM have ability to choose procedure/have expertise?     - Must respect choices made by agency esp. when *enabling* statute gives choice/expertise = less PF  1. ***Mavi*** – **application of *Baker* + expansion**    * Also looks at that this is a debt situation, undertaken in writing, burden on taxpayers    * Legitimate expectations existed due to government *representations* about repayment, don't need to prove reliance 2. **Case law re: how much fairness you get**    * ***Nicholson*** – reasons + an opportunity to respond, board is master of its own procedure so good faith decision is not reviewable    * ***Cardinal*** – should have gotten reasons + opportunity to respond, *no* independent investigation necessary    * ***Ref. Re Canada Assistance Plan*** – right to know the LE were considered in the decision making    * ***Re Webb*** – informal conversations with the social worker was enough for notice of case/opportunity to respond (PF is very contextual)    * ***Re Hutfield*** - should know why he’s denied privileges + opportunity to defend himself    * ***Re Abel*** – qualified right to disclosure, counsel can access his medical records (again very contextual)    * ***Homex*** – had a right to be heard but no JR b/c didn't come w/clean hands    * ***Baker*** – right to be heard was satisfied by the written submissions, no right to an oral hearing, reasons of 2nd officer were enough to be the reasons of the 1st as well    * ***Mavi*** – notice, opportunity to make written submissions, consider relevant circumstances, no reasons |

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| **Application: What is the *minimum* procedure required to ensure the party knows the case against her + has the opportunity to respond? – pg. 24-25** |

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| 1. **Content deals with how much PF someone is entitled to – not the level of *ideal* fairness but the *minimum* to which an individual is entitled – can contain a variety of things (pg. 24-25)**    * **Notice** = the most basic (addresses the who/what/where/when/why/how of a decision), usually set down in tribunal’s rules of procedure/legislation, idea is that notice was reasonable: **provide those concerned a reasonable opportunity to present, proof, argument, respond to those present in opposition**    * **Disclosure** = DM has to disclose info. relied on b/c individual must meet case against her: **depends on what is at stake + particular circumstances of the case**    * **Oral hearings** = costly + rare: **required when a decision depends on a witness’ credibility**as per ***Singh***    * **Right to counsel** = Charter right does not extend to administrative proceedings, usually in context or oral hearings, can be limited: **might be required when s.7 rights to LLSOP** **engaged due to the POFJ**    * **Right to call evidence/cross-examine** = usually part of an oral hearing, can be limited though    * **Timeliness/delay** = can rise to the level of a deprivation of **s.7** rights or result in an abuse of process or impair fairness of the hearing 2. **Case law re: how much fairness you get**    * ***Nicholson*** – reasons + an opportunity to respond, board is master of its own procedure so good faith decision is not reviewable    * ***Cardinal*** – should have gotten reasons + opportunity to respond, *no* independent investigation necessary    * ***Ref. Re Canada Assistance Plan*** – right to know the LE were considered in the decision making    * ***Re Webb*** – informal conversations with the social worker was enough for notice of case/opportunity to respond (PF is very contextual)    * ***Re Hutfield*** - should know why he’s denied privileges + opportunity to defend himself    * ***Re Abel*** – qualified right to disclosure, counsel can access his medical records (again very contextual)    * ***Homex*** – had a right to be heard but no JR b/c didn't come w/clean hands    * ***Baker*** – right to be heard was satisfied by the written submissions, no right to an oral hearing, reasons of 2nd officer were enough to be the reasons of the 1st as well    * ***Mavi*** – notice, opportunity to make written submissions, consider relevant circumstances, no reasons |

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| **Charter + Bill of Rights: pg. 20-24** |

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| 1. **Does the Charter apply?**    * Only **s.7 + s.1** really apply to administrative law, remember that the ROL cannot override legislation re: content – ***Re Secession Reference***  * Applies to the statute itself – **is the structure set up by this statute valid under the Charter?**   + ***Bill of Rights*** – quasi-constitutional, is rarely used but can create room for arguments broader than under the Charter * Includes a property enjoyment right, limited to federal laws though  1. **Test: is the individual’s right to life, liberty, security of the person as per s.7 engaged?**    * If yes, Charter analysis is activated    * If no, common law principles of PF or the ***Bill of Rights*** 2. **How do you conduct a Charter analysis of an administrative structure?**    * Recall, that one’s **s.7** rights cannot be deprived except in accordance with the POFJ or saved by **s.1**    * **POFJ** = very similar to the content of PF  * Oral hearings, duty to disclose and right to reply, reasons, right to state-funded counsel, timeliness and delay, *ex parte*/*in camera* hearings   + ***Singh*** – structure of the ***Immigration Act*** re: making a claim for convention status was challenged, person claiming status was no present past the interview stage, Minister got notice/opportunity to be heard when M refuses + it goes up – majority said this engaged **s.7** and was not saved by **s.1** – Beetz concurring said you could get to the same place w/the BOR or the CL PF   + ***Suresh*** – **incorporation of common law PF framework into conception of POFJ**, again the structure re: convention refugee claims is challenged, POFJ require *at minimum accordance with the DoF principles* * Can inform content of POFJ through the ***Baker*** factors, if this test isn’t met then obviously it’s not in accordance with POFJ * **“Greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness.”**   + ***Blencoe*** – majority first did a Charter analysis, determined if it was violated, if yes move to **s.1** – if no, move to the administrative principles * Delay in and of itself doesn't violate the POFJ or warrant an admin remedy   + ***Charkaoui*** – **s.7** rights are engaged b/c national security doesn't excuse the procedures from compliance with POFJ in a way that erodes the essence of these rights – **ideas of POFJ are the same as those recognized as PF in admin law**   + ***Harkat*** – there is an incompressible minimum of information that must be given in order for the accused to know the case against them in a national security context * Case-by-case basis  |  |  |  | | --- | --- | --- | | **Subject to *Charter*** | ***Charter* Grey Zone** | **Not Subject to *Charter*** | | All govt entities (life fact)  Community colleges (***Douglas, Kwantlen***) | Hospital boards – if “effectuating govt programs” (***Eldridge***)  Professional governing bodies  Some university functions (***McKinney*** - *obiter*)  Collateral effects (***McKinney***)  Independent statutory tribunals (***Blencoe***) | Universities (***McKinney, Harrison***)  Hospital boards (***Stoffman***)  Law Society of Nfld. (***Harvey***)  ***CBCA*** and ***BCBCA*** corporations | |