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| **Rule of Law** |

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| **What is the “rule of law”?**   * Rule of law is a “trump card” for courts to evaluate tribunals * Governs the relationship between the legislature, executive and the judiciary + relationship between government and individuals * Fundamental idea = the law should always authorize the use and constrain the risk of the arbitrary use of public power (legality focus) * HOW? – constrains the actions of public officials, regulates the activity of lawmaking, seeks to minimize harms that may be created by law itself |

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| **Four Ways of Looking at the Rule of Law** |

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| **Albert Dicey – Institutional**   * How should the rule of law be exercised?   + Common law + Parliament + the Constitution (unwritten in England)   + Independent common law judges are a source of protection and control over administrative agencies     - Administrative agencies are inherently lawless and therefore dangerous to the rule of law     - The courts have an institutional role to act as the principal external check on executive and agency powers     - They must ensure the administrative bodies don't overstep the jurisdiction given by the statute     - Courts have a fundamental role to protect and vindicate the private autonomy of affected individuals * Rule of law has 3 features   + Absence of arbitrariness- especially in the administrative/executive branches   + Formal legal equality – everyone in the political community should be subject to the law   + Constitutional law – binding law of the land |

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| **Lon Fuller - Relationship**   * Law is focused on facilitating productive social interactions through procedural protection   + HOW? – people comply with the law b/c it’s in their interest to do so * Administrative agencies are not inherently lawless (different than Dicey)   + Capable of adhering to the law   + One way in which the relationship between the state and people is fostered * Rule of law has eight principles   + General   + Public   + Clear   + Constant through time   + Non-contradictory   + Congruent as applied   + Prospective   + Capable of being performed * Focus on the law being a stable structure in society that allows individuals to predict legal responses to their behaviour by state officials through advance knowledge |

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| **Joseph Raz - Structure**   * Closer to Fuller than Dicey but more of a focus on institutions + judicial independence (no moral content)   + How is power exercised? vs. How do we foster social interactions (Fuller)? * Rule of law has 3 basic principles   + Certainty – people must be able to be guided by the system   + Generality   + Equality – must apply equally to everybody * HOW? – the system of law must:   + Be prospective and open with clear/stable rules   + Emphasize judicial independence   + Promote access to justice + meaningful remedies   + Limit judicial + police power * Remember, Raz wants a rule of law that controls power |

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| **Ronald Dworkin – Individual Rights Focus**   * Rights conception – all people must have individual dignity + respect when interacting with the law   + Focus is on the legal subject as one with autonomy, dignity, liberty and equality * Law as interpretation – different than Fuller who sees law as an underlying structure   + Judges are authors in a chain novel   + Role is to give past chapters (precedent) the best reading/application possible   + Principled approach     - BUT – this isn’t judges’ monopoly despite them being the default keepers of political order + collective morality * If Parliament delegates power to tribunals then that is fine (different than Dicey) |

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| **SCC on the Rule of Law** |

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| **What did the rule of law look like pre-*Charter*?**   * Seminal case out of QC   ***Roncarelli v. Duplessis***, **(SCC 1959)**  Facts:   * FR was a Jehovah’s witness in Montreal, QC gov + Catholic church were not into the JWs, hundreds were put into jail, FR posted bail for a number of them * D was the premier and Attorney General, told R to stop posting bail, R continued * D ordered the head of the Liquor Commission to cancel R’s permit * This forced his restaurant to close   Analysis:   * Legislature sets the scope of administrative power, the agency must act within that jurisdiction, courts check for arbitrary exercise of this power Legislature sets the scope of administrative power, the agency must act within that jurisdiction, courts check for arbitrary exercise of this power but deference to the legislature * Here, the enabling statute gives A the power to refuse to grant any permit   + A lot of discretion here – **how is this to be exercised in accordance with the rule of law?**   Dissent:   * “…I am unable to find that the Legislature has, either expressly or by necessary implication, laid down any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted.” * Power is unlimited by its enabling statute + not limited by a separate idea of the ROL   Majority: “…as representing the provincial government his decision became automatically that of Mr. A and the Commission.”   * Not allowed b/c the statute gives A + not D the power * Decision is quashed   Takeaway:   * Rand then continues into a substantive ROL analysis   + “…no such thing as absolute and untrammelled “discretion”…no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statue.” * No untrammelled discretion + exercise of discretion must be in good faith * BUT – carve out for express language |

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| **What did the rule of law look like post-*Charter*?**   * Starting point is in the preamble to the ***Constitution Act***, 1982 * ROL can be used to fill gaps as per ***Provincial Judges’ Remuneration Reference***, **(SCC 1998)** * “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.” |

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| **Rule of Law as an “Unwritten Principle”**   * Series of cases explores and refines the concept of the rule of law * ***Re Manitoba Language Rights***, (SCC 1985) - ROL used to find that MB’s failure to meet the mandatory requirements of bilingual enactment of provincial laws rendered all subsequent unilingual legislation invalid   + MB failed to follow their own constitutional documents, thereby acting without legal authority, arbitrarily, allowed officials to act outside the law   + SCC characterized the ROL as the principle of legality * ***Secession Reference***, (SCC 1996) - four unwritten principles of the Constitution are federalism, democracy, constitutionalism and the ROL, and respect for minorities   + Can actually have the force of law (this has been reined in as per ***Imperial Tobacco*** and ***Christie***) * ***Imperial Tobacco*,** (SCC, 2005) – 3-part test for the rule of law (modern definition) * Supreme over private individuals and government officials who must exercise authority in a non-arbitrary manner * Requires the creation and maintenance of positive laws * Requires that the relationship between the state and individual is regulated by law   + This formulation of the rule of law is linked to the principle of judicial independence and access to justice through the **s.96** courts * ***Christie***, (SCC 2007) – ROL formulated in the *Secession Reference* is reined in   + Cannot use the unwritten principles to override the written Constitution + valid statutes   + Remedy for dislike of certain laws lies in the ballot box and not with the courts re: rule of law * ***Trial Lawyers***, (SCC 2014) – fees can be unconstitutional if they cause undue hardship |

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| **Regulations and Rulemaking - Delegation** |

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| **What is the distinction between rulemaking and adjudication?**   * Rulemaking is prospective (*ex ante*), adjudication is retrospective (*ex post*) * Systemic implementation of regulations in line with written guidelines that are designed to apply to everyone * General, focused on the big policy picture * Individual examination of a particular case or order * Focused on the specific issue at hand |

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| **How do rulemaking, adjudication, and delegation work together?**   * The legislature delegates rulemaking and adjudicative powers to administrative tribunal via an enabling statute * Discretion → a wide range of discretionary power to decide what is right can be delegated * Hard laws: binding on anyone in front of the administrative agency * Soft laws: not binding, merely policy + guidelines * Advantages: More easily adaptable to changing circumstances because it involves less time-consuming and costly procedures * Disadvantages: Issues from a democratic legitimacy perspective |

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| **Two Ways of looking at Rulemaking and Delegation** |

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| **Kenneth Culp Davis**   * “Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness." * Idea of the “sweet spot of discretion” * Rulemaking is a good tool for structuring discretion   + HOW? – it is prospective, expertise-based, and transparent |

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| **Lorne Sossin**   * Public participation in the rulemaking process is great for democracy and discourse * This can revitalize the welfare state through a more engaged citizenry * Rulemaking process should therefore be as transparent as possible |

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| **Why Delegate this Power?** |

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| **The legislature will delegate through a statute the power to fill in the details re: policy + broad principles for action for 5 main reasons**  Expertise – main reason   * Impossible for legislature to have the sufficient expertise to understand every detail necessary for regulating a complex welfare state – central to the standard of review * Power to make requirements as the world changes is important to increase flexibility – altering legislation is very difficult and time-consuming   Time   * Legislature also lacks the time necessary to make all the decisions * No time to think through all the different ways in which specific provisions should be structured, relate to other provisions, and may apply in specific cases   Information   * Related to the issue of time * Legislature also lacks information necessary to make all the decisions * They will never have information about the future – someone can contravene the policy behind a rule in a myriad of different ways   Flexibility   * It is extremely difficult and time consuming to alter legislation so administrative rules are a tool that can be used to make new requirements as changing situations require * Especially useful re: important/rapidly changing areas like securities regulation   Costs   * Self-explanatory |

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| **What are the underlying value behind delegation?**   * Trust – some tribunals are trusted more than others (apparent correlation between financial expertise → trust) * More discretion requires more trust * Reliance * Best interests * Difficult for the principal to determine if the agent is actually acting in her best interest * Public good + general welfare |

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| **Risks of Delegation** |

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| **What is the principal-agent problem?**   * Agent is the administrative actor * Principal is the legislature acting on behalf of the ultimate principal: the public * Problem = there is the potential that those making the rules/soft laws are not following the wishes or expectations of those who delegated the power to do so in the first place |

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| **What risks arise from delegating power to make rules/soft laws**  **1)** Agent may follow its own views and values – legislature does not have the time to review the decisions   * A usually thinks it is acting in the public’s best interest, just in the way it believes is best   **2)** Agent may not even be acting in the public’s best interest   * May be influenced by inducements, too lazy etc. |

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| **How do we control these risks?**   * There are four main approaches   **1)** Structural Approaches – legislature’s choice in which body should exercise delegated power   * More likely to delegate the more it trusts the agent making the rules to follow the legislature’s policy decisions * L will try to steer choices by what type of body they delegate to * Control the resources + appointments to the administrative body * Giving different mandates will lead to different results     **2)** Legislative Review **–** L can directly control the discretion of the A by reviewing the resulting rules and soft laws   * Legislature itself OR a committee OR Cabinet (power to approve, veto amend) * Challenges: doesn't deal with the problem of expertise/information and can actually make the problem of time worse * Runs the same risk as the L just doing it themselves in the first place * No public accountability     **3)** Judicial Review of Substance – independent 3rd party to monitor the resulting rules/soft laws   * It can keep the agent within the bounds of power delegated to it by the principal (ROL re: jurisdiction) * Challenges: courts are reluctant to engage in substantive JR (ballot box) * Judicial review is random/biased due to its time-consuming and expensive nature * Courts often lack the appropriate expertise to review rules - regulations and soft law are also difficult to evaluate/review * Concern that judges’ discretion over policy would just create another principal/agent problem * See ***Thorne’s Hardware***: that it would take an “egregious case to warrant such action” as striking down an order based on economic policy and politics * Court won’t likely enquire into their validity * See ***Enbridge***: courts do review the substance of rules made by other agents * The standard of review is correctness, whether the agent had the jurisdiction make the rule (*ultra vires* framework) – is the regulation within the grant of power?     **4)** Process Requirements – control them through the process the A must take to make the rules   * Focus on the extent of public participation (consultation) – how does this affect the general public? How much would it cost affected parties to comply? * Focus on promoting deliberation – growth of shared values and goals through the exchange of ideas and debate * Advantages → reduces possibility that those making the rules act on their own view of public interest,   + Transparency * Challenges → costly   + Time-consuming, another avenue for interest groups to exert pressure * Can be ignored by those making the rules * Public itself can make mistakes – information cascades * See ***AG Canada v. Inuit Tapirisat et al*.:** body making a decision does not have to be the legislature in order for the decision to be legislative in nature * See ***Canadian Society of Immigration Consultants v. Canada***: legislative decisions are not subject to the duty of fairness that applies to certain regulation-making processes   + Opened the door to the possibility of applying the doctrine of legitimate expectations to the regulation-making process * General approach of Canadian courts is not to impose common law procedural requirements on the making of rules – legislative decisions (*ex ante*) * **Most public participation in Canada comes from the provision of notice of the proposed rule and the chance for the public to comment on it – “notice and comment” requirements** |

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| **The Canadian approach to controlling these risks (generally)**   1. No CL procedural fairness requirements for “legislative” decisions 2. No CL procedural requirements on the making of rules 3. No omnibus process statute 4. Some specific statutory requirements – e.g., notice & comment in Securities Acts, Cabinet Directive on Regulatory Management |

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| **What does strategy #3 look like in practice?**   * Recall, this focuses on trying to control the risks of delegation through **judicial review of substance**     ***Thorne’s Hardware Store Ltd. v. The Queen*, ( SCC 1983)**  Facts:   * Challenge to an Order-in-Council made by the federal governor in council (Cabinet) under enabling statute of the ***National Harbours Board Act*** * This extended the boundaries of the Port of Saint John in NB * Now TH has to pay harbour dues * Challenged on the basis it was made in bad faith b/c this was done to bring Imperial Oil’s new port within the boundaries of the harbour to continue to exact tolls * Argued that this was done to “increase revenues of the National Harbour Board and that such a purpose was not within the scope of Cabinet’s power under this Act.’ * **s.7** – gives the board jurisdiction over this harbour + the power to set boundaries * **s.14** – gives the governor-in-council power to impose and collect tolls   Analysis:   * SCC can strike down an OIC on the basis of “jurisdictional or other compelling grounds” * Reviewable for jurisdictional error and procedural error   + BUT – “…it would take an egregious case to warrant such an action.”     - To quash you need something egregious * General policy decisions involving public convenience won’t be reviewed in court   Takeaway:   * Limit on judicial oversight to only procedural and jurisdictional matters * Court will not look into Cabinet’s motives (legislature)   + Govts do not publish reasons for their decisions; governments may be moved by any number of political economic, social or partisan considerations.”   + Here, also procedurally acceptable b/c the applicant was not denied the opportunity to be heard |

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| **What does strategy #4 look like in practice?**   * Recall, this is controlling the risks of delegation through process requirements     ***Cabinet Directive on Regulatory Management***, Part 6 – sets some guidelines for procedural fairness in the rulemaking process   * Consultation * Identifying issues * Setting objectives, defining outcomes * Selecting “mix” of tools * Legal implications including international obligations * Assessing costs & benefits, recommending an option * Coordination & cooperation * Planning for key aspects of program * Feedback loop: evaluating and reviewing     ***Enbridge Gas Distribution Inc. v. Ontario (Energy Board)***, **(ONCA 2005)**  Facts:   * Context of “notice and comment” model of public participation * Ontario Energy Board made a rule called the Gas Distribution Access Rule (GDAR) permitting gas vendors to determine who will bill consumers for the gas they buy + transportation of gas to consumer   + Allows for vendors and not distributors to bill the consumer * This was implemented following a consultation process * GDAR challenged by gas distributors on two grounds:   + Substance – beyond OEB’s power to enact (outside of jurisdiction)   + Procedure – OEB’s cost/benefit analysis was inadequate (N&C, they weren’t properly consulted)   Analysis:   * First, ONCA held that the standard of review should be correctness – this is pre-*Dunsmuir* so for our purposes it doesn’t matter how the court gets there * Enabling statute gives OEB it’s rulemaking power: ***Ontario Energy Board Act***   + **s.44** – gives OEB the power to govern the conduct of distributors re: selling gas to a consumer + establish the conditions around it     - Court refuses to read this narrowly as not covering relationships with consumers re: text + a contextual analysis * Second, OEB dealt with the procedural argument re: “notice & comment” that the distributors were not properly consulted   + **s.45(1)-(8)** – OEB must send notice of rule to persons containing the stipulated information, same process for changes based on feedback, can only make a rule at the end of the process + after considering all representations     - Court also rejects this b/c there was evidence of considerable participation + Court is not going to impose intellectual discipline   Takeaway:   * Courts will review substance of rules for whether the rule is within the grant of power * The standard is whether the information that was provided give the parties being consulted a reasonable and meaningful opportunity to make written submissions? |

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| **What Remedies are Available in Administrative Law?** |

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| **What are the basic concepts?**   * Problem = sometimes administrative remedies are treated as though they only begin at the point that someone seeks judicial review   + Legislators try to limit judicial review though * Privative clause, avenues of appeal of a decision that are internal to the tribunal itself   + Rule is that JR is only available after these have been exhausted * Advantage → tribunals have the ability to order varied/creative remedies * Two types of remedies:   + Orders made by a tribunal   + Orders that courts make about tribunal orders |

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| **At the Tribunal Level** |

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| **What are the basic concepts?**   * Tribunal = a creature of statute * Cannot make orders that affect an individuals’ rights or obligations without authority from its enabling statute – ***Inuit Tapirisat et al.*** * Some have their remedies enumerated, some have discretionary powers to fashion the remedy it sees fit * Their composition, structure, mandates are different than courts – no **s.96** inherent jurisdiction * Can remain seized of a dispute over a long period of time + less constrained by formal rules when developing remedies – ability to make novel remedial strategies * Can consider polycentric issues (multiple parties) – courts are very focused on the parties before them   **What are some of the novel administrative remedies?**   * Recall, administrative tribunals take into account a broader perspective on a dispute than courts will   + Can try to develop remedies that address underlying structural/systemic problems in a forward looking as opposed to retrospective manner   + Sometimes the structure is an explicit attempt to represent different interest groups, especially in areas where judges may have been traditionally unsympathetic   + Move towards crossing the public-private divide     - **HOW?** – mechanism by which the agencies maintain ultimate accountability for their programs but outsource the implementation of these to private/3rd party actors |

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| ***McKinnon v. Ontario******(Ministry of Correctional Services)*, (OHRC 2002)**  Facts: M was a corrections officer in Toronto, victim of continuous workplace discrimination and harassment based on his Aboriginal heritage, management didn't stop the behaviour   * Complained to management in 1988 about a poisoned work environment – failed * Same year went to the OHRC (now called the HRT) – mediation failed * Board ruled in his favour, made multiple orders – example of a novel and arguably unsuccessful remedy * Order must be publicized among employees, establish a human rights training program, remained seized of the matter etc. * Board hearing re: non-compliance, lost * Minister sought JR re: that the Board was *functus officio* – lost (now it’s 2001) * Number of other appeals that the Ministry continues to lose, Board remains seized, parties final settle   Analysis: Looking at the 2002 decision where the Board crafted new orders that were Ministry-wide and specific   * Attempt to effect wide, systemic change * Orders directed at the Ministry (implement recommendations), the Detention Centre (complaints to be handled externally), publication (read at parade), specific to complainant, professional assistance, final responsibility * Remain seized * Starting point is the ***Ontario Human Rights Code*** – Preamble   + Allowed to make this kind of order   Takeaway: Administrative agencies have the power to make these systemic changes but uncertain if they are effective - gives rises to several Qs w/r/t remedies:   * How can AT effect both compliance and substantive “good faith” compliance in a recalcitrant employer? * Can law simultaneously enforce rights, redress wrongs, and “cure” systemic problems? * Is it appropriate for the Tribunal to craft new orders in order to achieve an optimal outcome? An ideal outcome? * Can external third parties change culture, create meaningful dialogue, avoid adversarialism? |

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| ***Moore v. BC (Education)*, (SCC 2012)**  Facts: JM has severe dyslexia + insufficient support in school for his disability   * School district closes Diagnostic Centre due to severe budgetary shortfall * Parents complain against the School Board on the basis of discrimination   Analysis: Starting point is the BC ***Human Rights Code*, s.8** – it is discriminatory if someone denies accommodation, service etc. customarily available to the public w/out a *bona fide* + reasonable justification   * BC ***School Act*** says something to the same effect – focus on literacy etc.   HRT → yes discrimination, parents reimbursed for private school tuition + $10K for pain + suffering (individual)   * Also, systemic discrimination against children with disabilities across the Province * Ordered systemic remedies   BCSC → quashed this decision on the basis that this was a tainted analysis re: who JM should be compared to (other students with disabilities)   * Policy decision not to fund the Diagnostic Centre   BCCA → majority agrees with the BCSC  SCC → special education is not the service, it is the means by which you access the service of education   * Failure to meet his needs to access this service is discrimination * **Remedies – individual are upheld, Systemic remedies are not b/c too remote from AT’s jurisdiction**   Takeaway: Tribunals should be careful when crafting systemic remedies re: their reach, not Royal Commissions |

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| **What about Charter remedies in admin?**  **s.24(1)** – anyone whose rights or freedoms as guaranteed by this Charter have been infringed or denied can apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances   * Debate = whether a tribunal is a court of competent jurisdiction * As per ***Cooper*** the SCC said that tribunals should be able to examine Charter questions |

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| ***R v. Conway*, (SCC 2010)**  Facts: NCR individual, sought absolute discharge on the basis that he was subject to Charter violations in the institution in which he was held   * Court must decide whether the ORB is a court of competent jurisdiction   Analysis: Yes, the ORB is a court of competent jurisdiction – it is quasi-judicial   * BUT – it does not have the power to grant an absolute discharge – mandate is to balance the public interest in protection + his liberty and other needs = he is a risk to public safety so board can’t give an absolute discharge   Takeaway: When deciding if a court is one of competent jurisdiction first step = *look at the enabling statute*   * Then, ask generally if this tribunal in particular has the jurisdiction to grant Charter remedies general * Can it decide questions of law? If so, has this jurisdiction be removed by the legislature? (this is the ***Martin***test)   + If yes, no then this is a court of competent jurisdiction and can consider the Charter   + Next, on a case-by-case basis ask if this board has the jurisdiction to grant the remedy sought? * Look to the enabling statute – legislative intent as to the body’s mandate * **NOTE:** having the ability to look to Charter questions doesn't allow for a tribunal to go beyond its statute, this is a strange on/off switch as per Ford |

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| **Are damages available? Generally, no.**   * Only if you use private law to attack a tribunal decisions   + For example, ***Odhavji*** re: misfeasance in a public office     - The tort does exist btw * Private law is mutually exclusive to juridical review   + Remedies are not available when an administrative decision is challenge don JR * BUT – tribunal can impose penalties, sanctions etc.   + Enabling statute may allow for damage-like remedies |

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| **Enforcing Tribunal Orders Against Parties** |

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| **Can tribunals enforce their own orders?**   * Very rare but yes – if the remedy is not challenged   + Usually in small quasi-criminal offences re: an enabling provision + a catchall in the *Criminal Code* that is rarely used     - One example is the federal Competition Tribunal * The ***Administrative Tribunals Act*** can help obtain compliance   + HOW? – schedule a hearing, make a decision, dismiss an application etc.     **What is the more common enforcement route? Apply in court.**   * If it is transformed into a court order than it has more power   + When a party has disobeyed a tribunal order then the statute (***Statutory Powers Procedure Act***) allows for the tribunal to apply to court for an order requiring the person to comply * THEN – can enforce in the same way as a court judgment – for example, contempt proceedings     **Can a party seek to enforce a tribunal’s order? Yes.**   * Can bring an action against another party in court to enforce the tribunal’s order * Success will depends on whether the tribunal order is a type the court would enforce + if the court thinks it should do so in the absence of any statutory provision to this effect   + More likely if this is the type of order a court would make |

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| **Challenging Administrative Action** |

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| **How does one challenge an administrative action?**  **Internal Tribunal Mechanisms**   * Look to the tribunal’s capacity and structure as per its enabling statute * Sometimes will have the power to rehear and reconsider decisions * Some are part of multi-tier administrative agencies with internal appeals available * Does not preclude appeals to the court but unless provided for the only avenue is JR   **External Non-Court Mechanisms**   * Go to the ombudsperson, FOI commission, auditor-general, etc.     **How does one use the courts? Statutory appeal + Judicial Review**  Recall, statutory appeal (either internal or to the courts) is the norm, JR is an exceptional remedy  **Does the Tribunal’s Enabling Statute Provide for a Right of Appeal?**   * Courts **do not have inherent jurisdiction** over tribunals so right to appeal **must** be in the enabling statute * If so, will usually stipulate which court this right of appeal is to – BC Securities Commission is straight to the BCCA (sign of respect + deference)   + Statute will tell you what you can appeal and when     **What is the Scope of Available Appeal?**   * This is determined **entirely** by the enabling statute   + Some may permit a *de novo* review, some might be limited to questions of law   + Scope is determined re: how closely the tribunal’s mandate/expertise mirrors that of courts     **Appeal as of Right? Or by Leave? If Leave, Who May Grant It?**   * By right = automatic * By leave = either by the original decision-maker **or** more commonly by the appellate body     **Stay of Proceedings**   * The rules governing stay of proceedings varies between jurisdictions + tribunals * Recall, this is the power to stay enforcement of a tribunal order pending appeal * A legislative decision to make a stay automatic or not speaks to how the legislature views it |

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| **Judicial Review** |

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| **What is Judicial Review?**   * JR is about the inherent jurisdiction of courts to oversee and check administrative action in the interest of the rule of law * JR is **always** discretionary (exception of *habeas corpus* – ***Mission Institution v. Khela***, SCC 2014) as this is a court’s equitable jurisdiction that it is not bound to exercise * WHY? – review of executive action beyond what the legislature provided for     **First consideration: Should the courts grant JR?**   * Court’s decision to grant JR is caught up in tension between ROL + democracy as embodied by Parliament/its decisions to empower them – ***Dunsmuir***   **NOW – shift back to upholding ROL while not interfering with administrative powers**   * Cemented in ***Khosa*** * Look to 6 factors   + Applicant’s delay,   + Failure to exhaust adequate alternative remedies,   + Mootness   + Prematurity**,**   + Bad Faith,   + Balance of convenience to parties (***Mining Watch***) * The threshold question of whether this will be granted is **discretionary** * Moving away from institutional-dialogue view to a more court-centred one * BUT – also appropriate to refuse JR out of deference to tribunals’ unique institutional roles – ***Domtar*** * Principle of the ROL must be qualified (I’d prefer if it wasn’t but whatever Bev) |

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| ***Domtar v. Québec*, (SCC 1993)**  Facts: Different rulings from different administrative tribunals regarding statutory interpretation of the same provision   * CALP and the Labour Court diverged in whether an employer should pay 3 days or 2 wks. of disability following plant’s closure post-injury   Analysis: Standard of review = **patent unreasonableness**   * Neither of the two decisions are patently unreasonable   + WHY? – different bodies with different burdens of proof/mandates * Can the courts “wade-in” with JR on tribunal decisions based on inconsistency?   + No   Takeaway: “Principle of the rule of law must itself be qualified.”   * Must respect the tribunal decision-making autonomy, expertise, effectiveness * Height of “institutional dialogue” outlook * Can only intervene re: inconsistency when the conflict is serious/significant     **NOTE:** in ***Khosa*** resurgence of the 5 reasons not to grant JR + addition of 6th in ***Mining Watch***   * In ***Altus Group*** the ABCA found one panel’s interpretation to be unreasonable re: contradictory decisions |

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| **Second consideration: is the tribunal whose actions are being challenged a public body?**   * WHY? - JR is a tool that is used exclusively to check administrative action * Consider the following factors   + Function and duties, sources of power + funding, presence/extent of governmental control, whether the government would have to ‘occupy the field’ if the body wasn’t performing this function, body’s power over public at large, nature of the body’s members + how appointed, nature of the body’s decisions (impact on individuals), constituting documents, relationship to other parts of the government   ***McDonald v. Anishinabek Police Services*, (ON Div. Ct. 2006)**  Facts: M was a FN Constable with APS, faced complaints of misconduct during training, interviewed by a College officer, contacted Chief re: getting rid of M   * C conferred with union but not M re: next steps * C concluded the complaints were adequately investigated + M had adequate chance to respond * Immediately discharged   Analysis: Issue here is whether the APS’ Chief’s actions are “public enough” to permit JR + quashing remedy   * WHY? - b/c this disciplinary action stems from a Code of Conduct, not a statute * Does the Chief owe a duty of fairness as a decision maker * See criteria above   Takeaway: Prerogative writs have evolved a extend to all bodies established through bodies resulting from the Crown’s prerogative power - statute is not the only source   * Subject matter and **not** source determines the remedy * **Test: if a decision-maker fulfills a public function/if decision making has public law consequences then the duty of fairness applies and the decision is subject to JR** |

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| **Third consideration: Does the party bringing the application for JR have the standing to do so?**   * Actual parties to the action, yes * Parties with a collateral interest in the same matter, maybe – issue of ‘public standing’   + Look to the test in ***Downtown Eastside Sex Workers v. Canada*, (SCC 2012)** * BUT – tribunals cannot defend their own decisions   + Cannot be judge and counsel at the same time * See ***Ontario Energy Board v. Ontario Power Generation*, (SCC 2015)** – if there is no one else to represent the tribunal perspective then maybe – if this body is more adjudicative than policy then this idea should raise alarm bells |

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| **Fourth consideration: to which court should the party seeking JR apply?**   * The provincial superior courts + Federal Courts have JR jurisdiction * Unlike statutory appeals, the answer to this question will not be found in the statute   + WHY? – recall that JR is an extraordinary remedy   + HOW? – typically choice is determined by whether the **source of the of the impugned authority’s power is provincial or federal** * BUT – there are some overarching provincial statutes that stipulate to which provincial court JR applications should be brought – for example, in ON there is the ***Judicial Review Procedure Act*** |

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| **Fifth consideration: has the party seeking JR missed any deadlines?**   * Some statutes impose (usually tight) deadlines to seek JR   + ***Federal Courts Act*** – JR application from a federal tribunal must be made in 60 days from the time the impugned decision is communicated   + ***Administrative Tribunals Act*** – in BC the general time limit is 60 days * **NOTE:** courts can extend the time limit if there is a reasonable explanation for the delay, where no substantial prejudice or hardship would result from such an extension, or where the party can demonstrate *prima facie* grounds for relief |

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| **Sixth consideration: has the party seeking JR exhausted all other adequate means of recourse for challenging the tribunal’s actions?**   * Depends on the tribunal’s enabling statute but sometimes the appeal mechanisms provided for are inaccurate   + When the tribunal doesn't have statutory authority over, or is not willing to address the issues the appellant raises – ***Canadian Pacific Ltd. v. Matsqui Indian Band***   + Appellate tribunal doesn't have the statutory authority to grant the remedy the appellant requests – ***Evershed v. Ontario***   + Appeal must be based on the record before the original tribunal but that record doesn't include evidence relevant to the applicant (***VSR Investments Ltd. v. Laczko***) or includes evidentiary errors that the appellate tribunal doesn't have the authority to correct – ***Cimolai v. Children’s and Women’s Health Centre***   + The alternate procedure is too inefficient or costly – ***Violette v. Dental Society*** * Parliament has also legislated in this area   + ***Federal Courts Act*** – prohibits JR by the FC when an available appeal of a tribunal decision to the FC exists   ***Harelkin v. University of Regina***, **(SCC 1979)**  Facts: Student forced to withdraw from school, reasons were unclear   * Appealed to university committee, dismissed without a hearing * Sought *certiorari* instead of pursuing his right of appeal to a committee of University Senate (internal appeal) * Basically, there were procedural issues here from both ends   Analysis: Starting point is the enabling statute - ***University of Regina Act***   * **s.78** - the university will appoint a committee to hear and decide complaints * **s.33** - student can appeal this decision to the senate   + BUT - was this internal appeal an adequate alternative remedy that should have been pursued before seeking JR?   Majority: Yes, you need to show more than a prior violation of procedural fairness to skip a step   * “The courts should not use their discretion to promote delay and expenditure unless there is no other way to protect a right.”   Takeaway: In determining if that available is an adequate alternative remedy look at:   * Procedure available on appeal * Composition of the appeal body + implications * Efficiency, expediency, costs |

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| **Remedies Available on Judicial Review** |

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| * Remedies are rooted in the old prerogative writs * Application for JR does not automatically stay the enforcement of the underlying tribunal order, can apply to have it stayed – on appeal the order is stayed   ***Certiorari*** – “cause to be certified”   * Most commonly used * Special proceeding by which a superior court requires some inferior tribunal, board, or judicial officer to provide it with the record of its proceedings for review for excess of jurisdiction   ***Ex post facto*** remedy that will result in **quashing**  ***Prohibition*** – similar to a common law injunction   * Special proceedings issued by an appellate court to prevent a lower court from exceeding its jurisdiction, or to prevent a non-judicial officer or entity from exercising a power   + It stop the proceedings of any tribunal, board, or person exercising judicial functions in a manner or by means not within its jurisdiction/discretion   ***Mandamus*** – “we command”   * Issued by a superior court to compel a lower court or government agency to perform a duty it is mandated to perform   + Often combined with *certiorari*   + Variation lets courts send something back to a tribunal for reconsideration with directions     - Directions = must clearly state what the original panel it to do/must refrain from doing   ***Declaration*** – two kinds   * A judgment of a court that determines and states the legal position of the parties, or the law that applies to them   + Public law – used to declare a government action *ultra vires*   + Private law – used to clarify the law or declare a private party’s rights under a statute (main concern of administrative law) |

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| **Statutory Responses**  ***Judicial Review Procedure Act*** → transforms old writs into statutory remedies, remedial powers are not broader than with the old writs, allows for interim orders but no time limits  ***Administrative Tribunals Act*** → no inherent jurisdiction so unlike with **s.96** courts one cannot assume there is jurisdiction, must exhaust all alternative remedies re: ***Harelkin*** or JR is completely ousted  ***Federal Courts Act*** → AG + those directly affected have standing   * Public interest standing that is slightly more relaxed than ***DTES*** = serious issue has been raised, it must have a genuine or direct interest in the outcome of the litigation, there must be no other reasonable and effective way to bring the matter to court * 30 day limitation period * **s.18.1(4)** sets out grounds of review (not the same as standard of review) * In ***Khosa*** the SCC made it clear that this does not set out the standard of review, only grounds   + Acting Without Jurisdiction     - This is evaluated on a correctness standard     - However, jurisdictional issues are almost never an issue in common-law administrative jurisprudence and their invocation to the FC   + Procedural Fairness     - This is evaluated on a correctness standard     - Nothing unique about this in comparison to common law procedural fairness     - Exception is the ***Canadian Bill of Rights*** jurisprudence since this instrument applies exclusively to the federal level     - Generally, these procedural rights are different in source but not kind from those found at common law or **s.7** of the Charter   + Error of Law     - May be reviewable on correctness or reasonableness grounds   + Erroneous Finding of Fact     - Administrative finding of fact is given a high degree of deference due to legislative intent     - Reviewed on the reasonableness standard * Remedies   + Statute basically just encapsulates the meaning of the prerogative writs of *certiorari, mandamus,* prohibition, declaratory inunctions   + Same remedies as the provincial superior courts   + Power to award remedies is purely discretionary – use of the word “may”   + Approach to awarding remedies is therefore largely the same as that taken by the provincial superior courts, with a few differences     - Same process regardless of the administrative remedy being sought     - Statute embellishes on common law remedies in the case of a defect in form or technical irregularity * Basically, these Acts have attempted to clarify the procedure surrounding JR |

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| **Procedural Fairness** |

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| **What are the basic concepts re: procedural fairness?**   1. **Procedure is not the same as substance** 2. **Procedure matters** 3. **Three step analysis** 4. **Standard of review is correctness** 5. **Various sources of procedural rights** 6. ***Baker* roadmap** |

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| **#1 - Procedure is not Substance** |

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| **How are procedure and substance different?**   * Substance deals with the result, procedure is how you get there * Decisions made by Cabinet ministers, bureaucrats, tribunals, agencies, boards, commissions, and other public authorities need to be made pursuant to a fair procedure * A “duty of fairness” promotes a better-informed decision-making process, leading to better public policy outcomes, and helps to ensure that individuals are treated with respect in the administrative process |

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| **#2 - Procedure Matters** |

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| **Why?**   * Good procedure leads to a more reliable outcome * Predictability and stability * Fairness can be ousted by specific legislation, but it is always subject to the ***Charter***   + ***Kane v. Bd. of Governors of UBC*, (SCC 1980)** stated that this must be done expressly or by necessary implication |

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| **#3 - Three Step Analysis** |

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| **- Overview: Three-step PF analysis:**   * Threshold – any fairness? * Content – if you do get fairness, how much do you get? * Application to case at hand   **Threshold Question: Do you get any fairness?**   * This is no longer based on what type of court you’re in front of   **Summary: use *Knight* test, consider following factors.**   * Triggered by effect on individual rights, privileges, or interests * There is no right to PF w/r/t purely legislative decisions * There is no right to PF w/r/t policy decisions * Applies to final or *de facto* final decisions, rarely to preliminary * May apply to subordinate legislation but not if “essentially legislative in nature” * Can be suspended/abridged, but not eliminated, in emergency situations   ***Nicholson*, (SCC 1979)**  Summary:   * Collapses the distinction between duty of fairness and natural justice   Facts:   * N is a police constable, terminated after 15 months of employment   Analysis: Starting point is ***Police Act***   * Probation period of 18 months where a constable can be dismissed without a hearing + final disposition of a charge * Yes, N does not get the same protection as someone not during probationary period but he’s not denied any protection: **should be treated fairly and not arbitrarily**   + Here, that means reasons + opportunity to respond   + BUT - board is matter of its own procedure + good faith decision is not reviewable   Takeaway:   * Legislative decisions are untouchable re: procedural fairness * General duty of “procedural fairness” applies to all administrative justice   + **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***   + Usually involves two things: the right to be heard + right to an independent and impartial hearing   ***Cardinal v. Director of Kent Institution*, (SCC 1985)**  Facts:   * KI segregated two prisoners from the general population, refused to release them despite a recommendation by the Segregation Board, not informed of reasons or given opportunity to be heard + no independent investigation   Analysis:   * Starting point ***Penitentiary Act and Regulations*** * Gives KI the right for the “maintenance of good order and discipline” to make segregations, Segregation Board makes recommendations only   + Can’t deprive of privileges without sentencing   Majority:   * Should have informed them of reasons + given an opportunity to respond * General CL principle of procedural fairness lies as a duty on every public authority making an admin decision not of a legislative nature AND which affects the rights, privileges, or interests of an individual * No duty, however, for an independent investigation   Takeaway:   * General common law principle of procedural fairness lies as a duty on every public authority making an administrative decision that is not of a legislative nature and which affects the **rights, privileges, or interests of an individual** * This means notice of the case against you + opportunity to respond   + Limitations though - this is a sliding scale   + **The right to be heard** * An emergency can postpone or limit procedural fairness but it does not eliminate it   ***Knight v. Indian Head School Division*, (SCC 1990)**  Summary:   * Makes clear that the nature of the decision affects PF - provides 3-part test for PF   Takeaway:   * The 3 part test for procedural fairness stands despite ***Dunsmuir***: * **What is the nature of the decision?**    + Administrative or legislative? Preliminary or final? * **What is the relationship between the administrative body and the individual?**   + Legitimate expectations? * **What is the impact of the decision on the individual?**   + Rights, interests + privileges of individual   **Legitimate Expectations** (relationship/impact factors)  ***Ref Re Canada Assistance Plan* (SCC 1991)**  Summary:   * Introduces doctrine of legitimate expectations & its relationship to “legislative functions”   Facts:   * Under **CAP** Fed government agrees to cost-sharing with provinces around social assistance and welfare – agreement to be in force as long as provinces hold up their end of the deal * **s.8** provides for termination with 1 year’s notice either unilaterally or by consent * New fed government comes in, introduces federal deficit reduction plan which involves walking away from the **CAP** without the mandated 1-year notice   Analysis:   * Does doctrine of legitimate expectations create legally enforceable consultation obligations in this case? * **Sopinka J** for the court acknowledges legitimate expectations, but that it does not create a substantive right in a specific outcome, and can’t constrain essential democratic features * Constitutional or quasi-constitutional statutes may bind future governments, but this is not one   Takeaway:   * If you are someone who has a legitimate expectation of being treated a certain way, you have the right to have demonstrated that this expectation has been considered in the decision being made (but not in result)   + This goes to credibility, predictability, rule of law, fairness, etc * There is no PF regarding “purely legislative functions” or “purely ministerial decisions on broad grounds of public policy”   **Rights, Interests + Privileges** (impact on the individual factor)  ***Re Webb* (Ont CA 1978) - rights, interests, privileges**  Summary:   * Case which deals with PF immediately after ***Nicholson***   Facts:   * Webb and children were tenants in subsidized housing complex, had their lease terminated and were evicted because their children were disruptive * Had been spoken to by social worker, had been warned * Ont Housing Corp argued that conversations with social worker constituted notice of case against her and opportunity to respond, albeit informally   Analysis:   * **Although there is no right to social housing, interests were certainly affected, never had a hearing**    + Once in, then her and her children had a vested interest * Court found that these consultations were sufficient – PF can look very different in different places, affirms contextual nature of fairness   Takeaway:   * Extends the idea of PF at least to the vested interests in public housing * Content of PF is very circumstantial (interview with social worker = hearing)   ***Re Hutfield* (ABQB 1986) - rights, interests, and privileges** (impact on the individual)  Facts:   * Hutfield was a doctor applying for professional license to have hospital privileges * Denied hospital privileges three times without being given a reason for this denial * Argued that the fact that he is a doctor is less valuable to both himself and the public if he is not granted hospital rights   Issue:   * Does the decision in this instance to deny hospital privileges 3x slur his reputation as a doctor? Should he not know why he is being denied these privileges and have an opportunity to defend himself? * In short, are his interests “sufficiently, directly, and substantially affected?”   Analysis”   * Received PF upon judicial review – court did not feel that the test was for “vested interests” (at least where professional licenses are concerned) * This case may be distinguished by its context from ***Re Webb*** as the court grants procedural fairness at the application stage for Hutfield where it might not have for Webb * In ***Re Webb***, complainant had a vested interest in subsidized housing once living there, although she had no right to it, and thus DoF applied   Takeaway:   * In the context of professional licenses, may not require rights or “vested interests” to be at stake in order to be entitled to receive PF * May be entitled to PF if interests “sufficiently, directly, and substantially affected?”   **Preliminary vs. Final Decisions** (nature of the decision)   * General rule is that you can only get PF for final decisions, not interim decisions, and legislative decisions definitely do not attract DoF   -  ***Re Abel* (Ont DC 1979) –** **preliminary vs. final decisions** (nature of the decision)   * Patient at psychiatric facility, declared NCRMD, only hope of release was through annual review by advisory review board * Wanted to see medical records kept by board, argued that he was entitled to access to his files as a matter of PF – board refuses, says they are only an advisory board which does not make a decision affecting Abel’s rights/interests * Gets access to some info b/c advisory board is “practically speaking the patient’s only hope of release”   Takeaway:   * If decision is not technically a “final” decision, but is practically speaking the applicant’s only means of achieving a result, applicant may be entitled to PF w/r/t that decision   ***Dairy Producers’ Co-Op* (SQB 1994)- preliminary vs. final decisions** (nature of the decisions)   * Human rights case regarding sexual harassment in the workplace * HRC appoints investigator where there is a *prima facie* case to determine whether case is serious enough to be heard before board, who will have a full hearing on the matter * Co-op wanted information on particulars of case from the investigator, in order to know case against them * Court held that there was no DoF at preliminary/interim stages of the administrative process; fact that the Board would be conducting a full hearing and making its own decision at a later stage was instrumental   Takeaway:   * Cannot be entitled to PF until there is a final decision   ***Irvine v Canada* (SCC 1987) - preliminary vs. final decisions** (nature of the decision)   * Alleged anti-trust case before Competition Commission * Allegation is followed by an inquiry from hearing officer, who prepares a report for the Commission, who then decides whether to make full inquiry * In this case, hearing officer clearly did not provide PF in the expected way * Court held that DoF should not “unduly burden and complicate” law enforcement investigative process   Takeaway:   * One doesn’t get procedural fairness at the investigatory stage because we do not want to “unduly burden and complicate” the law enforcement investigative process     **Quasi-Legislative Decisions**   * Purely legislative decisions do not attract PF, but what about cabinet/ministerial decisions, subordinate legislation, or policy decisions?   + For example, both ***Wells*** and ***Authorson*** both stand for the idea that purely legislative decisions are not bound by a duty of fairness     - Retroactive amendments, breach of fiduciary duty etc.   + Cabinet and ministerial decisions made without debate/public accountability, etc.     - Should these decisions be afforded same exemption from DoF?   ***Canada (Attorney General) v Inuit Tapirisat of Canada* (SCC 1980)** **- Cabinet/Ministerial decisions - does the exemption for DoF for legislative decisions extend here?**  Facts:   * CRTC determines rates for telephone services by holding hearings w/r/t rates including hearings involving ITC and others * CRTC allows Bell Canada rate increase in NWT, ITC appeals this to LG-in-C as per statute, but is shut out of proceedings and denied appeal * ITC seeks JR of LG-in-C’s decision, arguing that they were entitled to PF at level of appeal to LG-in-C * **s.64 of National Transportation** **Act** provides a free-floating policy power to make changes to LG-in-C regardless of whether that decision arose from an *inter partes* dispute or not → very broad discretion   Analysis:   * This is a sort of trump power w/r/t policy, and is not subject to procedural fairness * **Estey J** holds that LG-in-C is not automatically sheltered from review in exercising a statutory power, is always a question of construing statutory scheme   + Here the cabinet’s decision was very akin to a legislative decision * In this instance, broad discretion granted and polycentric policy decision meant no PF, regardless of administrative structure   + Note → courts are very reluctant to look at such a policy decision   Takeaway:   * No automatic sheltering from PF for ministerial decisions, may be sheltered where decision is very akin to legislative decisions (broad discretion, polycentric policy considerations)   ***Homex Realty & Development Co v Wyoming (Village)* (SCC 1980)** - **Municipal Decisions**  Summary:   * Does the legislative exemption apply to municipal by-laws? * This is a “bill of attainder” style case, in which a bill is aimed at a particular person to make them stop doing something   Facts:   * Homex wants to develop subdivision registered under prior owner on condition they would provide all services – Homex wants to develop without providing utilities * Village passes by-law to allow them to pull registration from subdivisions in particular circumstances, such as the exact circumstances of that owned by Homex * Homex seeks JR to quash by-law, says this is not a legislative decision – traditionally, when a statute authorizes interference with property rights, courts have injected common law procedural fairness   Analysis:   * SCC holds that Homex had a right to be heard in this decision, and were not adequately heard – while by-law had a policy overlay, this did not abrogate right to PF * However, court did not grant remedy – JR is always discretionary (H didn’t come with clean hands)   Takeaway:   * No automatic sheltering from PF for municipal decisions, may be sheltered where decision is very akin to legislative decisions (broad discretion, polycentric policy considerations) * PF may apply to municipal by-laws as quasi-legislative decisions   ***Canadian Society of Immigration Consultants v Canada (CIC)* (FC 2011)** **- issue of subordinate legislation (something pursuant to an Act)**  Facts:   * Immigration consultant helps people through immigration process through advice/representation – not lawyers * Prior to 2003 were completely unregulated, then CSIC was formed as independent self-regulatory body * Rival body CAPIC made allegations of corruption, attempted to undermine CSIC’s status * New statute is created, Minister passes regulation revoking CSIC’s regulatory designation and gives the role to ICCRC, affiliated with CAPIC * CSIC first unsuccessfully challenges statute, then argues the new regulations affected its rights privileges and interest, and wasn’t purely legislative (bad faith) * Argued both for PF and legitimate expectations, as well as the right to be heard   Analysis:   * Regulations or policies not reviewable, no PF attached and CSIC did not have a legitimate expectation to either process or result * Upheld by FCA in 2012   Takeaway:   * Regulations and policies are not subject to JR or PF   + WHY? - because they are essentially legislative actions     - Does not matter whether the action results from an Act of Parliament or of a regulation made by the Executive branch * This is the same result in ***Martineau v. Matsqui***   **Content of the Duty of Fairness**   * How much fairness is a person entitled to does not deal with the ideal level of fairness but the minimum to which an individual is entitled * Second step in the 3-part analysis (once the threshold has been passed that the applicant does get some PF, then the question is what does it entail?) * **May include:** notice, disclosure/discovery, oral hearings, right to counsel, right to cross examine witness, timeliness and delay, reasons     ***Baker v Canada (CIC)* (SCC 1999)**  Summary:   * Leading case on PF   Facts:   * Mavis Baker: entered as visitor in 1981, stayed, had 4 children born in Canada (Cdn citizens) * Mental illness, living on welfare * 1992: children placed temporarily in foster care, MB ordered deported * 1993: applied for exemption on H&C grounds, had a lawyer and supporting documents which said that while she had been psychologically unwell she had improved, would suffer emotional hardship if deported and separated from her children * 1994: gets denied exemption by Officer Caden, who gives no reasons, receives somewhat inflammatory notes from Jr Officer Lorenz, which court says are *de facto* Caden’s reasons   Analysis:   * SCC held that Baker was entitled to fairness, as the decision engaged her rights, privileges, or interests * Deliberates how much fairness, setting out **Baker test** with 5 factors:   1. **Nature of decision** being made and process followed in making it      + How close to a judicial decision is this? How discretionary?      + How much like a court is the body making this decision?   2. **Nature of statutory scheme** and “terms of statute pursuant to which the body operates”      + internal appeal mechanism leads to less PF as they can correct it, unless they are limited to the findings of the first level of inquiry   3. **Importance of decision** **to affected individual(s)**      + Most important factor to consider      + More important, more fairness   4. **Legitimate expectations** – you can never have a legitimate expectation in an outcome, only that particular procedure will be followed      + If led to believe you can expect a particular result = more fairness   5. **Choices of procedure** – choices made by agency must be respected, particularly where statute leaves decision-maker ability to choose its own procedures, or where agency has an expertise in determining what procedures are appropriate * SCC then applies the test to the facts of the case to determine the extent of fairness which is applicable in this instance * Held oral hearing, which Baker claimed to be entitled to, was not a requirement as the participatory requirements were satisfied by the written submissions made   **NOTE:** Court refers to “participatory rights” which is another term for content   * What participatory rights is the applicant entitled to?   ***Canada (AG) v Mavi* (SCC 2011)** - doctrine of legitimate expectations + relationship to legislative functions  Facts:   * Immigration context involving undertakings to support family members being sponsored to enter Canada * These are valid Ks but also “structured, controlled, and supplemented” by Federal Legislation * Sponsors did not support family members, contested obligation on grounds that caveat in undertaking gave them legitimate expectation that minister was not going to enforce against them under certain circumstances * Were not given notice of fact that minister was going to enforce against them nor opportunity to make response to allegations   Analysis:   * PF applied to the situation due to the interests affected (threshold met), but determination of content is contextual * SCC applies ***Baker*** test * This is a debt situation, not benefits or licensing, undertaken in writing, with concerns about taxpayers   + ***Baker*** factors are not exhaustive * SCC decides legitimate expectations existed here, because representation about repayment and caveat had to be “clear, unambiguous and unqualified” but proof of reliance upon them was not required * The content of this DoF include the following:   + “to notify a sponsor at his or her last known address of the claim;   + to afford the sponsor an opportunity within limited time to explain in writing his or her relevant personal and financial circumstances that are said to militate against immediate collection;   + to consider any relevant circumstances … keeping in mind that the undertakings were the essential conditions precedent [to relative immigrating to Canada];   + to notify the sponsor of the government’s decision   + without the need to provide reasons.” |

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| **#4 - Standard of Review** |

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| * The standard of review for procedural fairness is correctness; when a court is looking at the decision of an AT, they have to look at whether this decision is correct, rather than within a range of reasonable possibilities   + Question in the end is whether the person was or was not treated fairly in terms of procedure   + Little to no deference   + If fairness was not met then the decision is quashedBUT don’t substitute their own remedy, send it back to the tribunal with directions * **Binnie J, *Dunsmuir*** – “On such matters…, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have their rights, interests, or privileges adversely dealt with by an unjust process.”   + Were the proceedings conducted fairly? |

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| **#5 - Various Sources of Procedural Rights** |

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| **The *Charter* & Administrative Law**   * What is the proper relationship between CL procedural fairness and **s.7** principles of fundamental justice? * Largely, procedural fairness is the same in **s.7**, admin law, and the Bill of Rights * While legislation trumps common law duty of procedural fairness, the *Charter* trumps the legislature   + How does this trump card interact with administrative principles?   ***Charter***   * Preamble → unwritten principle of the ROL but recall, this is not enough to override legislation based on its content (***Re Secession Reference***) * **ss.1 and 7** are the only sections of the *Charter* which really apply to admin law * **s.32(1)** indicates that the *Charter* applies to parliament/legislature and governments of Canada and each province; as administrative entities derive their authority from the executive (government), the *Charter* applies to them * **s.52(1)** indicates that the Constitution is the supreme law of Canada and any law that is inconsistent with it is of no force/effect * ***R v Conway*** **(SCC 2010)** indicates that the *Charter* will not give a broader remedy in the administrative law context than would be available under administrative law, as an administrative entity, while required to comply with the *Charter*, can only grant remedies within its statutory purview * Threshold question for activation of **s.7** is whether the life, liberty, or security interests are impaired – if not, it is still possible to look to the common law principles of procedural fairness or the ***Bill of Rights***  |  |  |  | | --- | --- | --- | | **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, Harriso****n*)  Hospital boards (***Stoffman***)  Law Society of Nfld. (***Harvey***)  ***CBCA*** and ***BCBCA*** corporations |   ***Bill of Rights***   * Quasi-constitutional instrument which informs legislation unless otherwise specified within legislation, was interpreted rather narrowly by courts * Is rarely used, but may create room to make arguments which are broader than those available under *Charter* * **s.1(a)** guaranteed the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law * **s.2(e)** provides that unless expressly stated, no Federal law will be construed/applied to: deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations   + **NOTE:** limited to federal laws   **Content of Principles of Fundamental Justice**   * Oral hearings * Duty to disclose & right to reply * Reasons – on procedural fairness, reasons are a binary proposition, you either get them or you don’t. * Right to state-funded legal counsel * Timeliness & delay * *ex parte, in camera* hearings   **NOTE:** content of POFJ is very similar to content of PF  ***Singh v Canada (Minister of Employment & Immigration)* (SCC 1985)**  Summary:   * Applies *Charter & Bill of Rights* to admin law context * Challenge to statutory design itself, not its application * Mainly concerned with oral hearings   Facts:   * **ss.41, 45 of Immigration Act** sets out steps for making claim for convention status * 7 people made Convention refugee claim, required examination under oath by senior immigration officer, counsel was present and transcript was made, sent to claimant and Minister * Minister sent claim to Refugee Status Advisory Committee (RSAC) for recommendation based on transcript, RSAC recommends denial and Minister affirms this. * **ss.70, 71** are triggered if Minister refuses claim, allowing claimants to apply for redetermination by IAB, which must consider application and allow it if it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established   + Minister gets notice and opportunity to be heard at this stage, but claimant does not   + Problem is that the person claiming status is not present past the interview stage   Analysis:   * **Wilson J** for 3 justices held that the *ex parte* hearing provided in the **Immigration Act** denied the life, liberty, and security of the person not in accordance with the principles of fundamental justice (this is an adversarial process) and that it was not saved by **s.1** of the *Charter*. * **Beetz J** concurred, felt use of the *Charter* was unnecessary, was possible to achieve same result by invoking PF or *Bill of Rights*   Takeaway:   * Could look to *Bill of Rights*, *Charter*, or CL right to PF to get this result - all provide similar content   ***Suresh v Canada (Minister of Citizenship & Immigration)* (SCC 2002)**  Summary:   * Incorporation of CL procedural fairness framework into **s.7** concepts of fundamental justice   Facts:   * 1991: S gets convention refugee status in Canada, * 1995: CSIS published a report on the Tamil Tigers, of which S was accused of being a part * 1995: goes through deportation process by way of issuance of National Security Certificate whose validity is determined by hearing in Federal Court (per **s.40.1**) * 1997: has an oral deportation hearing, is represented by counsel and fails * 1998: minister issues **s.53(1)(b)** Certificate (danger to Canadian society and deportation regardless of possible persecution) to deport S   + S does not receive memo or reasons and cannot make submissions w/r/t **s.53(1)(b)** decision – issue is whether the structure provided by statute violates **ss.2 and 7** of the *Charter*   + S is complaining that he didn’t see what went up to the Minister + didn’t get a chance to make his own submissions   Analysis:   * SCC held that the same principles underlie **s.7** and the admin law PF, though they are not necessarily always identical * **s.7** principles require, at a minimum, compliance with duty of fairness principles * CL principles are not constitutionalized, but inform content of **s.7** principles through the ***Baker*** test:   + Nature of the decision being made and the process followed in making it – in this case does not tend towards according either more or less PF   + Nature of the statutory scheme and the “terms of the statute pursuant to which the body operates” – court holds more procedural protections should be accorded where decision is final/there is no appeal, tends towards more fairness in this case   + Importance of the decision to the individual(s) affected – importance high in this case, as is effect on the life of the individual, tends towards fairness   + Legitimate expectations (?) – convention against torture gave S legitimate expectations he would not be sent back, which tends towards fairness   + Choices of procedure made by the agency itself – discretionary, tends towards fairness * Principles of fundamental justice require more fairness than S received, require:   + He be informed of case to be met   + Opportunity to respond   + Opportunity to challenge minister’s information   + Written reasons * For the purposes of **s.1**, valid objectives do not alone justify infringements, and the limitations in the *Act* in this case are neither rationally connected to objective nor proportionate to the harm   Summary:   * ***Baker*** test can be used to inform the content of the **s.7** principles of fundamental justice and determine whether they have been violated * If this test not met then obviously the deprivation is not in accordance with POFJ   ***Blencoe v British Columbia (Human Rights Commission)* (SCC 2000)** - undue delay (delay and timeliness are one of the POFJ)  Summary:   * Dealt with undue delay and administrative inconvenience and the issue of using the *Charter* vs. using CL admin law principles   Facts:   * Blencoe was a BC cabinet minister, was accused of sexual harassment and ejected from caucus and his position * HRC received complaints and preliminary inquiries, appointed a tribunal where warranted to investigate and hear complaints * Scheduled a tribunal hearing for these issues, taking place in 1995, for 1998 * B argued that this was an unreasonable delay and complaints should accordingly be stayed altogether   Analysis:   * Does this delay violate PF, principles of fundamental justice, or both? * **Bastarache J** **for majority** first determined *Charter* application, then whether it had been violated, and if not whether admin law principles could be applied, and then whether stay of proceedings was an appropriate remedy * Holds that while *Charter* does apply, **s.7** rights were not violated, state-caused delay did not affect his right to a fair hearing, and there is no **s.7** guarantee for “dignity” injured by media attention   Takeaway:   * Delay in and of itself does not amount to violation of the principles of fundamental justice, nor is a remedy warranted under administrative law principles * Must disrupt right to a fair hearing   ***Charkaoui v Canada* *(C&I)*, (SCC 2007)**  Summary:   * Concerns ex parte, in camera hearings by Federal Court on whether person can receive certificate and be detained based on information presented by CSIS * dismantled the regime of national security certificates which may be issued against permanent residents or convention refugees   Facts:   * 5 detainees suspected of being Canadian Al Qaeda sleeper cell * Minister could issue certificate of inadmissibility under IRPA and detain any foreign national without proof of threat to national security or any permanent resident if you can show that they are a threat * If FC finds certificate reasonable, person is detained; provisions of IRPA say there is no JR and no appeal from this decision, permits deportation based on confidential info   Analysis:   * SCC finds that **s.7** rights are engaged, national security context does not excuse procedures from compliance with principles of fundamental justice * **“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” – *Suresh*** * Even in a national security context, cannot eliminate PF rights in ways which “erode the essence” of **s.7** * Cannot detain someone without fair process - this is a principle of fundamental justice   + right to a hearing   + before independent, impartial tribunal   + based on the facts & the law   + right to know the case to meet and to have opportunity to answer it     - Case failed on the last two indicia * Judicial independence and impartiality:   + No co-option of judiciary by executive   + Judicial, not investigative, role   + Judge not linked with name person * SCC held that these requirements were met in this instance * Based on facts and law:   + Process only allows for the examination of one side’s material   + Adversarial material is compromised   + Not fully inquisitorial either   + Knock-on effects on legal argument * Right to know the case, have opportunity to answer it:   + Incomplete information provided by CSIS   + Seriousness of impact upon individual   + What substitutes for complete disclosure?   + Judge cannot compensate for lack of informed scrutiny     - Due to context this is not a showstopper but you need some   Takeaway:   * Ideas of POFJ are the same as the ideas we recognize as PF in admin law   ***Harkat v Canada (C&I)* (SCC 2014)**  Takeaway:   * Incompressible minimum of information which must be given in order for accused to know case against them in national security context * If you cannot give meaningful instructions to your counsel and to special advocates to challenge information and evidence presented by the other side, this minimum has been violated * This test is applied on a case-by-case basis |

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| **#6 - *Baker* Roadmap** |

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| 1. **The nature of the decision being made and the process followed in making it**  * Classification of decisions as judicial, quasi-judicial, administrative is important because (quasi) judicial decisions will require more extensive procedural protection than administrative ones  1. **The nature of the statutory scheme and the terms of the stature pursuant to which the body operates**  * Requirements of fairness may be minimal in the context of preliminary steps to the formal decision-making process – for example, investigatory procedures  1. **The importance of the decision to the individual(s) affected**  * Content of the duty of fairness increases in proportion to the importance of this particular decision to the person it affects  1. **The legitimate expectations of the person challenging the decision**  * The doctrine of LE may extend to the content based on the conduct of the public authorities   + Conduct can be representations, promises, understandings, past practices, etc.   + Idea of holding the government to its word and proof of reliance is not a requisite  1. **The choices of procedure made by the agency itself**  * Content of the duty of fairness also affects the decision-maker who often has to make tons of these * A workable standard is needed that takes into account the procedural choices made by the decision-maker   + Does the statute leave the decision-maker with the ability to choose its own procedures? Does the agency have particular expertise? |

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| **What is some of the specific content of the duty of fairness?**   * **Notice**   + This is the most basic aspect of the duty of fairness and addresses the who, what, where, when, why, and how of the decision   + Notice requirements are often set down in the tribunal’s rules of procedure or in legislation governing hearing procedures   + When litigation arises the overarching idea is of reasonableness: that the notice was adequate in all circumstances to provide those concerned a reasonable opportunity to present proof, arguments and to respond to those presented in opposition     - It is an ongoing duty to keep the parties appraised of any relevant issues that arise * **Disclosure**   + The rule in criminal law that the Crown must disclose all relevant material to the defence in a criminal prosecution does not extend to administrative proceedings   + Usually requires that the decision-maker disclose the information she relied on because the individual must know the case he or she has to meet   + How much to disclose depends on what is at stake and the particular circumstances of the case     - For example, confidentiality requirements * **Oral Hearings**   + These are not usually necessary to reach an informed administrative decision and are costly in terms of both time and money   + Oral hearings are required when a decision depends on a witness’ credibility – ***Singh*** * **Right to Counsel**   + The Charter right to counsel does not extend to administrative proceedings   + Representation by counsel is usually in the context of oral hearings and the representation can be limited, it’s not all or nothing   + There may be a requirement of provision of counsel in administrative decisions where a deprivation of life, liberty, or security of the person is at stake     - Principles of fundamental justice * **Right to Call Evidence and Cross-Examine Witnesses**   + Usually part of an oral hearing but is not absolute   + Remember, tribunals control their own procedures and may limit the exercise of this right * **Timeliness and Delay**   + Not usually under a specific statutory timeline for holding hearings or making decisions   + In some cases the delay can rise to the level of a deprivation of life, liberty, and security of the person or result in an abuse of process/impair the fairness of a hearing |

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| **Independence, Impartiality, and Bias** |

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| **Independence** |

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| **Overview**   * Impartiality is the ideal   + A pristine state of mind with no improper influences * Independence is the means by which impartiality is achieved   + Look at structural factors and relationships * Bias is the evil to be avoided   + Partiality to a particular outcome   **Basic Concepts**   * Bias can be either perceptions of individual bias + perceptions of institutional bias * If an allegation of perceived bias is successful it will quash any decision made   **Sources**   * ***Nemo judex in sua causa debet esse*** – no one should be a judge in their own cause, where one is a party to the proceedings or has a personal interest at stake   + This has been held to include things such as prior opinion/reputation/indications of a disposition which would lead to a closed mind * ***Audi alteram partem*** * *Charter*, principles of fundamental justice are incorporated into the ***Baker*** test, **s.11(d)** does not apply to administrative tribunals according to the case law despite the fact that meaningful sanctions may be handed out by certain tribunals * Unwritten constitutional principles * Quasi-constitutional statutes, such as the *Bill of Rights*   **Judicial Independence** - the first wave   * Judicial independence is a “high-water mark” for independence which provides the framework for examining the independence afforded to ATs   + **NOTE:** it’s the benchmark, but not what you get in administrative law * Starting in about 1985, various court decisions began talking about the idea of judicial independence and what it actually entails * Independence in the judicial model includes three main requirements:   + Security of tenure – mandatory retirement at 75, overseen by Canadian Judicial Council which is another AT composed of judges   + Security of remuneration   + Administrative control   ***Committee for Justice and Liberty* (SCC 1978)**  Takeaway:   * Indicates that a “reasonable apprehension of bias” is the test for a lack of independence. * Decision-maker must be “sufficiently free” of factors that could interfere with their ability to make impartial decisions – in assessing independence, look to structural factors * Grounds must be substantial, a real likelihood/probability   + Sufficiently free is a question of how much bias is too much bias?   + WHY? - everyone has some bias * RAB must be:   + A reasonable one   + Held by reasonable and right-minded persons   + Applying themselves to the question and obtaining the required information   + Viewing the matter realistically and practically, and   + Come to the conclusion that they are not sufficiently impartial * **NOTE:** this test depends on perception, not whether bias actually exists   + “Would he think that it is more likely than not that ‘x,’ whether consciously or unconsciously, would not decide fairly?’”   + This test comes from the dissent   **Tribunal Independence**  ***CP v Matsqui Indian Band*** **(SCC 1995)**  Facts:   * CP sued band for making a decision in the context of aboriginal self-governance where the Matsqui decided to tax CP for their actions upon band land   Takeaway:   * Requisite independence depends on the nature of the tribunal, interests at stake, and other indicia of independence; must look to way tribunal actually behaves, not how it is structured on paper   + **NOTE:** *prima facie* a problem with bias because everyone on the tax tribunal is a member of the band     - BUT - this is integral to how self-governance works in the Aboriginal context so it is acceptable here   ***2747-3174 Quebec v Regie*** **(SCC 1996)**  Facts:   * Case regarding QC liquor licensing board, which had fixed-term appointments for two-year terms contingent on good behaviour * Were also lots of points of contact between members of the liquor board and the supervising Minister   Analysis:   * SCC held that tribunal independence was far less stringent than judicial independence:   + Guidance provided by minister did not in and of itself constitute RAB,   + Fixed terms of the tribunal members also did not provide a RAB   Takeaway:   * Tribunal Independence not held to same standard as Judicial independence - standard is much lower   + **NOTE:** Norm in tribunals across Canada is to have one full-time chair appointed for a fixed term, with other members appointed part-time on a per diem basis for two-year term renewable once (or twice with discretion)   ***Ocean Port Hotel Ltd v BC*** **(SCC 2001) -** second wave (context of ‘at pleasure’ appointments)  Summary:   * Case deals with “at-pleasure” appointments in the context of ongoing alleged liquor license violations   + What does “sufficiently independent” mean w/r/t an at-pleasure appointment?   Facts:   * Involved investigation, hearing, and a 2-day suspension of the license imposed upon OP * OP appeals to Liquor Appeal Board, *de novo* hearing by board members appointed at pleasure – LAB confirms suspension * OP appeals on the basis of lack of impartiality on the part of LAB to BCCA and then all the way up to SCC   Analysis:   * The Liquor Control and Licensing Act 1996 provided absolute discretion to LG-in-C which made any independence on the part of the LAB an illusion * CL can supply an omission of legislation through reading in and statutory interpretation, but it was clear that no independence was intended in this instance * Legislation can explicitly override CL protection of independence, unless there is a constitutional conflict * Courts will not likely assume that legislation intends to violate procedural fairness and impartiality, but in this case it is clearly the legislature’s intention * SCC holds against OP – **McLachlin J** holds that there is a “fundamental distinction between tribunals and courts”; ATs lack the constitutional distinction from the executive and their primary function is the execution of policy, which the legislature may decide how to build   Takeaway:   * Use RAB when dealing with PF problem of lack of independence * There is no freestanding constitutional guarantee of tribunal independence   + Recall, can’t use ROL to fill gaps   ***McKenzie v Minister of Public Safety & Solicitor General*** **(BCSC 2006)** - 3rd wave??   * M had appointment rescinded 18 months into a 5 year term – had been considered a competent board member * Argued that she should have been accorded adjudicative independence on constitutional basis as her work was on the “high end of the adjudicative spectrum” and not much different from JPs and small claims courts judges * Won at BCSC and lost spectacularly at BCCA – legislature had changed *Act* in meantime, but BCCA gave reams of paper on reasons why she did not deserve independence   Takeaway:   * Regardless of adjudicative nature of role, ATs will not require (constitutionally or otherwise) level of independence provided to judiciary   ***Keen v Canada*****(FC 2009)** - real life concern  Facts:   * Canadian Nuclear Safety Commission (CNSC) is an AT – K had 5-year term appointment as member of CNSC, then appointed as president of CNSC “at-pleasure” * License violation problems occur at Chalk River plant, who failed to meet the requirement for two cooling pumps * K decides reactor must be shut down → result was world-wide shortage of radioactive isotopes produced by plant which had medical applications * Minister issues directive requiring reopening of plant, K refuses * Minister passes Bill C-38 to overrule CNSC decision and notifies her of intention to terminate her as president, citing loss of confidence in leadership/judgment abilities   Analysis:   * **Nuclear Safety and Control Act, s 10** provides that all members have security of tenure “during good behaviour” that prevents them from being fired without cause, but does not indicate whether the presidential term is also protected in this manner, arguably provides unfettered discretion to minister * K argues that president held office “during good behaviour” as president would always necessarily be a member of the committee and subject to same security of tenure * FC holds that presidential appointment is indeed at-pleasure per the *Act* and there is no right to PF in her termination   Takeaway:   * Illustrates problematic nature of at-pleasure appointments, especially where tribunal or member has an influential role/power to make public policy decisions w/r/t real-life concerns |

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| **Bias** |

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| **Overview**   * Bias in the administrative context = improper influence   + Does not require the impartiality that would be required of judiciary * What kind of factors may lead to reasonable apprehension of bias?   + An issue which is raised often (400 cases 2007-2012) * Must be raised at first opportunity and based on an apprehension of bias (RAB), not proof of actual bias   + RAB must be (***Committee for Justice and Liberty***):     - A reasonable one     - Held by reasonable and right-minded persons     - Applying themselves to the question and obtaining the required information     - Viewing the matter realistically and practically, and     - Come to the conclusion that they are not sufficiently impartial * How much bias is acceptable varies with context – important to know the statutory scheme as well as the parties and the relationships between them * There is such thing as statutorily permissible bias   + In ***Brosseau*,** a scheme which allowed one to hold the position of both chief investigative officer and judge was held to be permissible as it was set out clearly in the enabling statute   **Forms of Bias**  **Pecuniary Interest in Matter in Dispute**   * Easier to establish RAB where the interest is a direct one – ***Dimes v. Gran Junction Canal Co.*, (HLC 1952)**   ***Energy Probe v Canada (Atomic Energy Control Board)* (FCA 1985)**  Facts:   * Company supplied cable to Ontario Hydro following one of its SHs’ participation in evaluating a competitive tender process   Analysis:   * If it had simply been the case of membership of a widespread group of beneficiaries (i.e. where an entire industry would stand to benefit from a decision) that would not be enough for a RAB * Interest in his company’s favourable outcome from this process was enough to raise RAB through indirect pecuniary interest in a particular outcome   Takeaway:   * Stands for the proposition that only direct and certain financial interest can constitute pecuniary bias   + Minority = test would be to determine “whether the benefits in question stemmed from the decision to be rendered, and whether the benefits would be so sufficiently likely to occur that they would “colour” the case in the eyes of the decisions-maker.” * RAB may not be found where persona accused of benefiting is a member of a widespread group of beneficiaries * Statute may authorize bias in cases where parties must necessarily have pecuniary interest in matter in dispute * For example, egg marketing   **Non-Pecuniary Material Interest**   * Other forms of material interest can lead to disqualification   + For example, decision of a band council to evict a member to make way for a larger family was set aside because one of the intended residents was on the council – ***Obichon v. Heart Lake First Nation No. 176*, ( FCTD 1988)**   **Prior Relationships** - are the parties’ relationships significant enough to affect the impartiality of the decision-maker, and if enough time has passed?  ***Brar v BC College of Vets*** **(BCSC 2011)**  Facts:   * Dispute between BC College of Vets and some of its members; south Asian vets alleging racial/cultural discrimination against the college * Was a long-standing dispute before BCHRT, tribunal member was not reappointed to her position and stopped the hearing, causing media uproar and BC College of Vets alleged RAB for her replacement   Analysis:   * Court held that the media uproar that resulted from halting the case was not expected nor foreseeable, and that parties cannot use media to create a furor and establish RAB   + Issue was the existence of a prior relationship of the decision maker with those in the dispute   Takeaway:   * RAB depends on factors such as context, whether partiality is expected, and the significance of the relationship * Presumption of impartiality for tribunal members   **Prior Knowledge of Matter in Dispute**  ***Wewaykum*** **(SCC 2002)**   * Prior to appointment to SCC, my boy **Binnie J** was ADM of Justice, had participated in meetings in that capacity on behalf of govt in the case now before the SCC   Takeaway:   * Mediation privilege means that access to information through mediation undergone earlier in the process can give rise to RAB * Binnie J’s involvement was too remote to give rise to RAB – Not enough to give rise to RAB that he had participated in meetings in a supervisory capacity some 15 years earlier   **Prior Involvement**  ***Committee for Justice & Liberty v NEB* (SCC 1978)**   * Chair of NEB was previously involved in a study group that had put an application for a pipeline before the NEB, then was subsequently involved in the approval process for applications as chairperson.   ***Imperial Oil v Quebec (MoE)*** **(SCC 2003)**   * MoE was previously involved in decontaminating site and was sued by site’s new owners because it was still contaminated * When minister ordered Imperial to undertake study and decontamination measures for the site at great costs to Imperial, Imperial sued on basis of RAB   **Attitudinal Predisposition**   * General test is still RAB but is there a spectrum to be considered? (do not use ***Baker*** here)   ***Chrétien v Canada*** **(FC 2008)**   * Commission of inquiry into sponsorship scandal in Quebec where government money seemed to have been inappropriately funnelled into particular interest groups in the province   + Relevance?   ***Great A & P* (1993)**   * Osgoode Hall professor specializing in feminism, sexual equality, and discrimination was a complainant in a sexual discrimination complaint against Osgoode Hall which proceeded through OHRT, was appointed to OHRT and acted as decision maker in claim against A & P * Does fact that she is a party to another matter on similar facts and that she has a prior published record in this area give rise to RAB? * Court held that fact that she was party to ongoing dispute gave rise to RAB and she could not sit on Great A & P – prior publication issue was left unanswered   Takeaway:   * Being party to ongoing dispute presents RAB, but prior scholarship does not (necessarily)   **A “Closed Mind?” (Lower Standard)**  ***Old St Boniface***   * Members of city council had campaigned on a platform re: land use and against development and had been elected on that basis – question was not whether there was any RAB, but whether councillors had come to hearings with completely closed minds * A “closed mind” is what it takes to establish RAB in the case of elected officials who have stated positions/platforms on an issue   ***Nfld. Telephone***   * Before being appointed to Nfld Telephone Authority, Andy Wells was a consumer advocate who spoke out against the costs being levied by telecom companies * Upon appointment gave a statement that he would continue to advocate for consumers in this position   + Question was whether Wells subsequent actions in hearings and w/r/t policy decisions in favour of consumers were the result of a closed mind     - Court held that Wells’ policy decisions were in fact the predetermined result of a “closed mind”   **Institutional Bias**   * ***delegatus non potest delegare*:** if the executive delegates authority to make a decision to the chair of a tribunal, they must make that decision and cannot sub-delegate to others * One who has not heard the evidence cannot make the decision   + Consistency problem in admin law – decision maker must actually make decision, but in cases such as IRB where there are hundreds of decision-makers, overriding policy and direction may be necessary to achieve internal consistency of decisions   + Consistency is in tension with the *delegatus* principle   **NOTE:** tribunals are different than courts because of their need for institutional policy making, collaboration, and consistency   1. **Policy** – generally accepted as central to every tribunal’s existence    1. “…every tribunal no matter how adjudicative it appears, has some role in implementing a government policy.” – ***Ocean Port***    2. Policy making related to the expertise of each tribunal    3. Tension = when the methods used in their policy-making appear to infringe on the adjudicative independence of a decision-making as articular in ***Beauregard***       1. It’s the ability of a decision maker to decide free of inappropriate interference by others 2. **Full-Board Meetings** – methods (like this one) used to promote consistency have given rise to allegations of RAB    1. Has the adjudicative independence of individual member been compromised?    2. ***Consolidated-Bathurst, Tremblay, Ellis-Don*** – trilogy of cases where the SCC set guidelines’ that tribunals should follow so members can collaborate to promote consistency without compromising adjudicateive independence   ***International Woodworkers v Consolidated-Bathurst*** **(SCC 1990)** - one way to ensure consistency  Facts:   * Union/company dispute re: plant shutdown goes before 3-member panel of OLRB, Union lost at first instance and argued that the legal test for good faith negotiations in the context of a plant shutdown should be changed * C-B felt that test was too strict and argued for change in the other direction * OLRB hears arguments and convenes a full-board meeting to resolve this issue and decide appropriate test to be applied * No minutes were kept, attendance taken, or evidence introduced; meeting went on several hours * After meeting, OLRB reconvenes and upholds existing test; C-B argues that the full board meeting gave rise to RAB * OLRB reviews the process, upholds the practice of full board meetings if the meeting is limited to policy implications * **Ontario Labour Relations Act** provides at **s 114** that technical defects in decision-making are not enough to quash a decision, while **ss 106(1) and 108** provide for the finality of OLRB decisions   Analysis:   * **Sopinka J** **in** **dissent** felt that the effect of the full board meeting, principles of natural justice, and the tension between uniformity and natural justice should be considered   + Held that principles of natural justice are about ensuring the integrity of the process, and the question isn’t strictly whether the panel members made the decision, but whether they were unduly influenced by policy considerations   + Felt that achieving uniformity could not come at the expense of the principles of fundamental justice and that full board meeting created institutional bias * **Gonthier J** **for the majority** recognized the institutional constraints of the OLRB, felt that natural justice was context-specific, and drew an analogy to judicial independence   + Decision-makers are entitled to change their minds as the result of conversations of colleagues – test is whether they are still making the decision on their own or under coercion * Held that *audi alteram partem* imposed two conditions upon these full board meetings:   + Can’t discuss facts of the case   + Must disclose any new grounds of argument which arise   Takeaway:   * SCC acknowledges the need for full-board meetings   + WHY? – allows for members with a heavy case-load to benefit from the expertise of the collective, consultation key in achieving mandate, tripartite structure was conducive to exchanges of opinions   + BUT – fostering coherence shouldn't compromise any one panel member’s capacity to decide in accordance with her conscience and opinions   + **Relevant issue is whether there is pressure on the decision-maker to decide contrary to C/O** * Following conditions must be met to ensure natural justice will not be breached   + Decisions be limited to law/policy, not factual issues   + Parties must be given a reasonable opportunity to respond to any new ground arising from the meeting   ***Tremblay v Quebec*** **(SCC 1992)**  Facts:   * T was living on social assistance, applied for and was denied reimbursement for bandages by ministry * Pure question of law – is she entitled to reimbursement for her injury when her social assistance was not based on her injury * Protocol is for commission to make decision and for legal counsel to vet that decision after the fact – counsel was on vacation and so commission president vetted the decision, but disagreed with their conclusion * Comm. president wanted decision to be brought before a “consensus table,” who agreed to overturn the decision, causing panel members to change their minds and resulting in a hung panel, which left the decision to the president per statute * Consensus table was not a statutory instrument, was conducted by internal directives; minutes and attendance were taken, decision was by show of hands, and it was chaired by president   Analysis:   * **Gonthier J** held that the consensus table gave rise to RAB because it was problematic in terms of who could initiate it, that it constituted “compulsory consultation” for the panel, that it employed certain procedures, and the fact that the president’s decision to call for consensus table indicates a prior commitment to a certain decision   Takeaway:   * Decision-makers may make their decisions under permissible pressure as in ***International Woodworkers***, but must be free to make their decisions without mandatory consultation   + This amounts to inappropriate constraint * Fact that president could require consultation, and possible outcome of that procedure was to leave decision in his hands constituted RAB   ***Ellis-Don v. Ontario (Labour Relations Board***, **(SCC 2001)**  Takeaway: At issue was whether facts had been discussed at a full board meeting contrary to the above principles.  **Leading Case**  ***Geza v Canada (Minister of Citizenship & Immigration)*** **(FCA 2006)** - leading case  Facts:   * Large influx of gypsies from Hungary seeking refugee status caused a heavy caseload for the IRB who had insufficient resources * Required “country condition” reports as part of evidence, which demonstrated well-founded fear of persecution by state or that state was unable/unwilling to protect from in each individual case, despite that these reports would have been relatively consistent for all applicants * Wanted to build a lead case which would serve as a guideline for all other cases going forward   + 7 Applicants consented to participate, had an active participant counsel, Minister of Citizenship participated in hearings, Operations Service Manager for Europe team within IRB selected individual cases, and experienced panel members familiar with gypsy issues were selected * despite this, all 7 applicants lose on lead case, with findings of fact established which affect success rate for other gypsies across the country * applicants argue for JR and raise several grounds for RAB in the building of the case and in the subsequent drop in the success rate of gypsy applicants   Analysis:   * FC held minister’s involvement was only at high-level policy discussion, and mere fact of success rate dropping did not demonstrate bias on the part of the lead case; did not amount to bad intent by the ministry to shut down these cases   + ***Lippé*** **(SCC 1991)** provides that the RAB test in institutional cases makes the question whether the institution is “sufficiently free” of factors in a substantial number of cases that could interfere with its ability to make impartial decisions   + **Two-step test** for institutional bias (***Lippé***):     - **Looking at institutional factors, will there be a RAB in the mind of a fully informed person in a substantial number of cases?**     - **If not, can still allege RAB case-by-case** * At FCA, **Evans J** instead uses ***Baker*** test to make an assessment of RAB * Found RAB on basis of relationship between IRB and its bureaucracy, involvement of certain individuals, “entire factual matrix” raising RAB, * Subsequent cases, however, were not vitiated en masse, as there was not a sufficient causal connection to indicate RAB for all of them   Takeaway:   * ***Baker*** should not be used to assess bias; is more geared towards PF in the construction of the statutory scheme as opposed to bias on an individual or institutional level * For institutional bias use two-step test from ***Lippé*** * RAB can arise from a totality of evidence as opposed to a single determinative fact |

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| **Standard of Review for JR of Substance** |

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| **Pre-*Dunsmuir*** |

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| **Overview**   * Unlike an appeal from a trial court, the procedures used by tribunals/administrative agencies are not uniform, with the court deciding procedural matters on a standard of correctness   + When called upon to conduct a review of the interpretation or application of a statutory provision by an administrative decision-maker will first determine that the decision maker will merit deference     - Deference is a respectful attention to the reason offered + could be offered in support of a decision * **Substantive review of content is upon a standard of reasonableness or correctness – but it wasn’t always** * ***Dunsmuir*** reformed first part of SoR test   + Prior to ***Dunsmuir,*** SoR was supposed to be conducted on the basis of patent unreasonableness, reasonableness, or correctness * There was, however, a great deal of overlap and uncertainty between these supposedly discrete standards of review * Two conceptions of JR in Canadian law: the romantic conception and the skeptical:   + Romantic:     - Constitutional pluralism     - Ethos of justification     - Shared commitment to “new” rule of law?     - Democratic constitutionalism   + Skeptical (correct view):     - Tug of war among entities with irreconcilable differences     - Kabuki dance to cover for vast judicial discretion in interpreting statute   **Philosophy**   * Romantic view of substantive review + its implicit model of constitutional ordering is so chic atm * Substantive review is less about judicial patrolling + more an expressing of a shared constitutional project   + **State action must be grounded in and so publicly justified in light of the law**   + Not very Diceyan   **Privative clauses** – provide that jurisdiction of an AT is exclusive and final and conclusive and not open to question or review in any court   * **#1:** Grant of Exclusive Jurisdiction * Pretty fucking self-explanatory – give exclusive jurisdiction to ATs over a certain subject matter * In some instances, entire point of regulatory structure may be to avoid court interference in particular matters * **#2:** Finality provision   + Sets out that decision of AT is final * **#3:** Ouster clause   + Says it is not open to any kind of review by any court   ***CUPE Local 963 v New Brunswick Liquor Corp*****(SCC 1979)**  Summary:   * Pre-1979 the courts had an upper hand in jurisdictional battle with ATs - judicial strategy which justified non-deference was statutory interpretation * Case was the inception of judicial deference to ATs – invented “patently unreasonable” standard of review   Facts:   * Union/mgmt. fight in which a lawful strike was held by liquor employees, employer replaced striking workers with scabs from mgmt. * **s.102(3)(a) of PSLRA** prohibited replacing striking employees with any other employee (a definition which explicitly excluded mgmt.) and **S 102(3)(b) of PSLRA** prohibited picketing places of employment   + PSLRA granted jurisdiction over complaints to PSLRB and protects decisions of the board with **privative clause** including finality/ouster clauses (full privative) – mgmt. won at first instance * Mgmt. argues **S 102(3)(a) of PSLRA** must be read purposively, with the purpose being to ensure that employees would have their jobs back when the strike ends * Union argues that this provision aimed at promoting peaceable labour relations through a quid pro quo agreement that employees will not be replaced and will in turn not picket at their place of employment   Analysis:   * **Dickson J** conducts a three-part analysis:   + Jurisdiction: held that courts need to respect the decisions of boards and should not be quick to brand an issue as jurisdictional in order to wade in and conduct their own review   + Privative Clause: held that interpretation of the provision would seem to lie at the heart of the specialized jurisdiction conferred upon the board, and that even if board is not “correct” in its interpretation, it is entitled to err and have its errors protected from JR by the full privative clause   + Standard of Review: SoR is therefore not of correctness in all instances, but of patent unreasonableness – must be a striking or outrageous failure or breach * Must assess these criteria to determine which will be operative in according or not according deference to the AT   Takeaway:   * Legislature may not, no matter what language it shrouds its AT’s jurisdiction in, absolutely exempt it from JR * For jurisdictional questions, correctness will be the standard of review; once it is determined that the decision is within the AT’s jurisdiction, however, the **standard is patent unreasonableness**   + In line with the pragmatic approach to statutory interpretation 🡪 there is not always only one correct interpretation of a statutory provision * **NOTE** the attitude of curial deference to these specialized bodies that possess a legislative mandate to apply their expertise + experience to matters that they may be better suited to address than courts   **Additional Cases**  ***Crevier*** and ***Pasienchyk*** seem to indicate that constitutionally, courts can invoke the unwritten principle of “rule of law” to give themselves a constitutional right to JR   * Not possible to completely insulate provincial admin bodies from JR * First case in particular constitutionalizes JR for jurisdictional matters even if there is a privative clause   + This is out of the reach of legislative amendment   ***Bibeault*****(SCC 1988)** frames the question as one of legislative intent – what does the legislation say about who the decision-maker is supposed to be?   * Beetz sets out to distinguish between jurisdictional and non-jurisdiction conferring provisions through the above question   + Look to the wording and purpose of statute, reasons for tribunal, expertise, nature of problem, will all be considered in making this determination * This is a commitment to Parliamentary supremacy + rejection of contextual statutory interpretation   ***Pezim* (1994 SCC)** – role of expertise in according deference was assessed   * Close to ***Bibeault*** and question of legislative intent + privative clause + jurisdiction * Even w/no private clause + has a statutory right of appeal the concept of the specialization of duties requires that **deference** be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal’s **expertise**   ***Southam* (1997 OSCB) *–*** dealing with a question of mixed fact/law, referred to standard of **reasonableness *simpliciter***– creating a third standard which existed somewhere between correctness and patent unreasonableness standards   * Continues shift of emphasis to relative expertise b/c this obviously fit in the PU/C dichotomy * This new standard requires an inquiry into the evidentiary foundation/logical process by which conclusions are sought to be drawn from   ***Pushpanathan v Canada (Min. of Citizenship & Immigration)* (SCC 1998)**  Facts:   * P claimed refugee status, then got permanent resident (PR) status through another route * Was charged in the same year with narcotics trafficking, pled guilty, and was sentenced to 8 years * Felony offence is a basis for revoking PR status, and got a deportation order * Could only stay in Canada by reactivating his convention refugee status, question became whether drug trafficking was an action contrary to purposes and principles of UN convention in question   Analysis:   * **Bastarache J** held that the central inquiry was legislative intent of statute in creating the tribunal – did it intend for IRB to have final say and exclusive jurisdiction over this question * Established **four-part test to determine the SoR** – did the legislator intend this question to attract judicial deference?   + Presence of a privative clause   + **Expertise relative to courts**   + Purpose of the act and the specific provision (polycentric decisions = deference)     - Appears to address indicia of expertise   + The “nature of the problem” question of law? One-off, obscure issue?     - Appears to address indicia of expertise * Proper standard was held to be correctness, as the IRB had no expertise in this general question of law and was not acting in a policy capacity   Takeaway:   * ***Pushpanathan*** factors used to determine SoR - even post-***Dunsmuir*** this analysis has not been entirely overruled and may inform decisions * **Arguably there are only two: legislator’s direct/indirect pronouncements about judicial supervisions (privative clause, finality clause, CL JR, statutory JR, appeal etc.) + reviewing court’s assessment of the agency’s expertise**   **Expertise Analysis**   * Three steps in evaluating expertise - ***Pushpanathan***  1. Characterize the expertise of the tribunal in question 2. Consider the court’s own expertise relative to that of the tribunal 3. Identify the nature of the specific issue before the administrative decision-maker relative to this expertise  * As in ***Southam***, the court will show considerable deference when the tribunal possess ‘broad relative expertise’ that it brings to bear to some degree on the interpretations of highly general questions   + Apex = economic, financial, technical matters   + Bottom = human rights tribunals b/c at the heart of judicial function is rights adjudication   **Additional Cases**  ***TWU v BC College of Teachers* (SCC 2001)**   * Court applied ***Pushpanathan*** factors   + Court divides between correctness/PU, no one picks reasonableness *simpliciter* – unanimous outcome   + PU is a problematic standard; based on the immediacy or obviousness of the effect - decisions are allowed to be unreasonable as long as the defect in the reasoning is not too obvious to overlook   ***Toronto v CUPE, Local 79* (SCC 2003)**   * **LeBel J** holds that there is no meaningful distinction between reasonableness and PU, and that PU is a flawed standard in deep tension with the rule of law:   + Would allow unreasonable decisions to stand as long as they did not meet the level of PU * Case gives rise to the idea of the **ethos of justification**: permeates the rule of law throughout admin law   + “The purpose of judicial review is to uphold the normative legal order by ensuring that the decisions of administrative decision-makers are both procedurally sound and substantively defensible” |

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| ***Dunsmuir v New Brunswick* (SCC 2008)** |

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| Facts: - LeBel’s concurring judgment final comes out on top as per ***Toronto v CUPE***   * D was a court clerk in Fredericton, non unionized, held statutory office at pleasure * Faced reprimands and had a spotty work history, had probation period extended twice, wrote an “intemperate” letter to CJNB * Asked for permission to be a lecturer at UNB and was denied permission, proceeded to do so anyways while representing that he had received permission * Had an upcoming performance review, court decided that he wasn’t a good fit, cancelled the review and fired him, though not for cause * D argues he *was* terminated for cause and was therefore entitled to PF * **PSLRA** has full privity clause, also indicates that law of K applies wherever there are statutory gaps * **PSLRA** adjudicator addresses two issues:   + Question of whether he had jurisdiction to decide whether the dismissal was actually for cause, as he only had jurisdiction in that instance – read enabling statute as entitling him to inquire into the reason for dismissal   + On merits of the case, was D entitled to PF?     - Found D entitled to PF as statutory office holder, and held termination process was unfair and void *ab initio*, reinstates D   Result:   * SCC splits on the matter with 3 concurring reasons:   + Bastarache & LeBel JJ (with McLachlin, Fish, Abella JJ)   + Binnie J   + Deschamps J (with Charron, Rothstein JJ)   Primary analysis:   * In addition to the role JR plays in upholding the rule of law, it performs an important constitutional function in ensuring legislative supremacy   + Must adopt narrow interpretation of what a jurisdictional question is * **Bastarache & LeBel JJ** abandon the standard of patent unreasonableness, feeling that current approach is non-workable, and move to dual standards of reasonableness and correctness   + **The new standards of review: a “principled framework that is more coherent and workable”** * Not adopting a less deferential approach, but attempting to simplify the process and eliminate a problematic standard which forces parties to accept unreasonable distinctions – abandon immediacy of defect as an important consideration   **Reasonableness**:   * Reasonableness as a test looks to whether or not the underlying admin decision had a reasonable process and outcome:   + The existence of justification, transparency, and intelligibility within the decision-making process   + Whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law * This is a deferential standard which pays “respectful attention to the reasons offered or which could be offered in support of a decision, with a margin of appreciation for the decisions made by the AT * Reasonablenessapplies:   + To questions of fact, mixed fact/law, policy, some questions of law; privative clause provides “strong indication” that reasonableness is SoR   + Where AT is interpreting its own statute or a statute closely connected to its function, or in an area of particular expertise/regulatory function     - Privative clause, discrete and special admin regime in which AT has special expertise, and the nature of the question of law are all factors to be considered in application of reasonableness standard   **Correctness**:   * Is more of a *de novo* approach, which does not involve deference – look at the problem to determine the correct decision in the assumption that there is one   + Promotes consistency, uniformity, predictability, stability   + Relies on judicial expertise   + No deference to other reasoning   + Recognizes rule of law and the unique role of the courts in upholding it * Correctnessapplies to:   + Questions of law that are of central importance to the legal system, and those which are outside the expertise of AT     - Constitutional questions, including those regarding division of powers     - Jurisdictional questions or “true questions of *vires*” including jurisdiction as between different ATs   ***Dunsmuir* Test**  **Two-step process**:   * + First ascertain whether jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded w/r/t a particular category of question - is there a precedent?   + If first step proves fruitless, assess/apply above factors to determine which SoR applies   Further Analysis:   * **Bastarache & LeBel JJ** then proceed to cite ***Pushpanathan***, despite the apparent abandonment of those factors – ***Pushpanathan*** has not been entirely overruled * **Binnie J** concurs on the two standards to be applied, on the application of the reasonableness standard, and on the result, but says that the test does not fully recognize the diversity of decision-makers available in ATs, nor the differing levels of deference which will be applied on a more individual basis   + Feels that the change to two standards creates a spectrum in the SoR of reasonableness of which aforementioned factors will be determinative   + Must also consider the kinds of questions being asked   + Should presume there shouldn’t be deference if there’s a statutory right of appeal, or it’s a constitutional question, and presume deference where there’s a privative clause – why not build these assumptions into the analysis?   + Also feels that ***Dunsmuir***test does not give enough weight to the presence of a privative clause in making the SoR assessment * **Binnie J** felt that the presence of a privative clause should be conclusive * **Deschamps J** felt that the nature of the question should trump all in the SoR analysis, treat JR w/r/t ATs the same way as a court of first instance - radical simplification.   Conclusion:   * In applying the test for SoR to the facts at hand, court finds there is a full privative clause, in the specialized admin regime of labour law, but that the jurisdictional question is a question of law * Determines that a reasonableness standard must be applied, and that this standard has not been met by the decision of the adjudicator * Felt that the interpretation of the statute was deeply flawed and fell way outside the range of reasonable interpretations   Takeaway:   * Two SoRs: reasonableness and correctness (PU = dead)   + Provides a bright line test between correctness and reasonableness, with definitions for each * Apply two-part test to determine SoR based on either precedent or determinative factors which may include factors from ***Pushpanathan*** * **Subsequent jurisprudence indicates that the default position is deference unless one of the exceptions obtains – this is a defeasible position**    + **BUT – balancing of factors methodology appears to be alive as a supplement** |

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| **Standard of Review: Correctness** |

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| **Overview**   * Post­-***Dunsmuir***, SoR is almost always reasonableness; correctness standard very rarely used * Recognition that deference should be paid to decisions of ATs * Courts have a habit, however, of stating that the SoR is reasonableness but applying a test that looks more like correctness * ***Dunsmuir*** indicated that where there is a reasonable precedent, one need not conduct the entire SoR analysis from the top – what needs to be determined is what is a reasonable precedent * Where there is a decision by the same AT, or where the AT has decided on a similar question of law, this may be a reasonable precedent   **When do you get Correctness?**– ***Dunsmuir***   1. Where the question of law is “of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise, 2. Constitutional questions, 3. In “true” questions of jurisdiction “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter,” 4. In “questions regarding the jurisdictional lines between two or more competing specialized tribunals.”   **Correctness**   * The goal of the correctness SoR is to reach the one right answer * In applying this standard, courts treat ATs like inferior bodies who’ve erred in interpretation, with no deference or benefit of a doubt   + Underpinned by the skeptic approach * Courts will impose and substitute their own answer, rendering the AT’s decision a nullity   + Courts may, however, be in the best position to make decisions about an AT’s jurisdiction or the constitutionality of its decisions   + Judges get the last word - expertise * It also may not be desirable to allow ATs their own novel interpretations of legal questions for the sake of predictability and certainty * There is the question of whether an AT’s contextual understanding is ever not helpful, and whether the correctness SoR is truly necessary to achieve predictability/certainty * **Correctness is used where there is only one answer, the topic is in Court territory, or the court is safeguarding the ROL** * Correctness is the proper SoR regarding:   + Questions of “general law” of “central importance to the legal system and outside the adjudicator’s specialized area of expertise”   + Constitutional questions, esp. w/r/t division of powers   + Jurisdictional questions or “true questions of *vires*”   ***Canada (AG) v Mossop*****(SCC 1993)**  Facts:   * M was civil servant, applied for bereavement leave to attend funeral of same-sex spouse’s father * Denied because leave applied to immediate family, and spouse was defined as someone of the opposite-sex * M complained to CHRC on basis of CL, not *Charter* * **s.3 of CHRA** defines “prohibited grounds of discrimination” to be “race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted” * M’s only opportunity was “family status” problematic because Hansard showed that legislature had considered including sexual orientation and decided not to include it   Analysis:   * Several sets of written reasons:   + **Lamer CJ w/ Sopinka, Iacobucci JJ:** pure question of law, SoR is correctness, looks to legislative intent to find that sexual orientation was not included   + **LaForest J:** pure question of law, SoR is correctness, looks to plain text meaning to interpret family = traditional family   + **Cory, McLachlin JJ:** SoR is correctness, decision was incorrect   + **L’Heureux-Dubé J (dissent):** SoR is patent unreasonableness, as HRTs are experts in this area of law, and it is important to look at family status in a social context   Result:   * M loses 4:3 – majority judges use different principles from Driedger’s modern rule of statutory interpretation to arrive at the same conclusion * Question of law of significant importance = majority applies correctness standard   + Statutory interpretation   ***Canada (AG) v Northrop Grumman* (SCC 2009)**  Summary:   * One of few cases post-***Dunsmuir*** in which correctness SoR was applied * Case emphasizes importance of precedent in the face of complicated set of nested agreements, regulations, and statutes   Facts:   * NG participated in a bid for a major ($150MM) military procurement K – NG’s Canadian subsidiary did not bid, but its Overseas branch did (for tax reasons) * Did not win bid, complained to Canadian International Trade Tribunal (CITT) about process * CITT agrees to hear complaint, but Canada seeks JR, saying CITT does not have jurisdiction to hear this complaint – is CITT process only available to Canadian suppliers?   Analysis:   * **s.30.11 of CITTA** provides that a potential supplier can complain to tribunal concerning any aspect of the procurement process that relates to a designated K and request CITT conduct an inquiry * **s.30.1 of CITTA** defines potential supplier as a bidder or prospective bidder on a designated K   + Inquiry involved analysis of several policies/*Acts* which interacted with one another * First step of SoR analysis is whether there is a satisfactory precedent: in prior cases w/r/t CITT and similar questions, SoR was held to be correctness * This is, in all likelihood, a true question of *vires* or jurisdiction   Takeaway:   * Correctness standard is rarely used → unlikely to be employed as SoR without satisfactory precedent * Courts are averse to addressing “true questions of *vires*” and will do so obliquely rather than openly if they must * For precedent you can probably use pre-***Dunsmuir*** cases |

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| **Standard of Review: Reasonableness** |

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| * “In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” – ***Dunsmuir*** * “Where, as here, the reasonableness standard applies, it requires deference. Reviewing courts ought not to reweigh the evidence or substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls - 6 - within a range of reasonable outcomes.” ***– Khosa***   **Overview**   * The breadth of the reasonableness standard may result in a lack of transparency because there are no clear criteria for what is and is not reasonable * Privative clauses cannot keep courts out conclusively, but provides a “strong indication” that deference should be accorded to the AT   + Strong indication of reasonableness     - Deference is “respectful attention to the reasons offered or which could be offered in support of a decision” – validates and respects AT as a decision-maker. * Must afford a margin of appreciation to both the expertise of the AT members and the legislative choice to put the decision-making power in their hands * ***Dunsmuir***indicated (at **para 40**) that reasonableness was both:   + “The existence of justification, transparency, and intelligibility within the decision-making process” AND   + “Whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” * It is very hard to do justification while suspending judgment as to what the right answer should be * What counts as justifiability is whether the tribunal considered all relevant factors and did not consider any irrelevant factors – leads to questions about how relevance is determined   **When do you get Reasonableness?**   1. Question of fact, discretion or policy, questions of fact + law cannot be separated = almost automatic discretion – ***Dunsmuir*** 2. When the tribunal is interpreting its own statute + statutes closely connected to its function 3. Discrete and special administrative regime in which the decision maker has expertise 4. Privative clauses  * “In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.”   + The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.   **Conducting Reasonableness Analysis**   * Court should stay close to the reasons offered by the AT and maintain some connection to the analytical path used by the AT instead of forging their own   + Did AT demonstrate the “ethos of justification?”   + “The purpose of judicial review is to uphold the normative legal order by ensuring that the decisions of administrative decision-makers are both procedurally sound and substantively defensible” -  ***Toronto v CUPE*** * Do not conduct a *de novo* review or reweigh the factors the tribunal considered   **Reasonableness → Discretion**   * Discretionary decisions have caused some trouble over time – ***Baker*** was useful in clarifying the issues surrounding such decisions:   + The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries   + Usually seen in decisions by Ministers, Governors-in-Council etc. * Discretion is visible within statutory language in the presence of “may” v “shall”   + Broad delegated powers, often through vague language; and authorizing administrative action and/or decision aimed at individuals or small groups * Discretionary decisions were long considered not to be a part of the law – the traditional “abuse of discretion” doctrine (1959-1969) looked at:   + Improper purpose and/or consideration   + Bad faith   + Dictation/influence   + Wrongful delegation of powers   + Fettering * *Discretionary Justice* → “A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.”   ***Baker v Canada (Minister of Citizenship and Immigration)*** **(SCC 1999)**  Summary:   * SCC held that discretionary decisions could be considered and reviewed as a part of the law, and rolled into the SoR analysis   Analysis:   * **L’Heureux-Dubé J** killed the idea that discretionary decisions are not law   + Decision maker must be given the leeway to exercise the conferred discretionary power, but   + Must act within certain limits * **L’Heureux-Dubé J** then proceeded to re-weigh the factors considered in making the discretionary decision – not in line with a true reasonableness analysis * Decision was unreasonable because the manner in which it was reached was inconsistent with the values underlying the grant of discretion – i.e. the humanitarian and compassionate aims of the statute   Takeaway:   * There is no strict dichotomy between discretionary and non-discretionary decisions: Discretionary decisions are part of the legal regime and can be reviewed by courts in the same way as other decisions may be   ***Suresh v Canada (Minister of Citizenship and Immigration)* (SCC 2002)**   * Modifies the SoR w/r/t discretion * Reviewing court must limit itself to ensuring that only relevant considerations have been taken into account – **cannot re-weigh factors as part of reasonableness review of discretionary decisions**   ***Celgene Corp v Canada (AG)*****(SCC 2011)**  Facts:   * US pharmaceutical company selling drug (thalidomide) out of the US to doctors in Canada for under special administrative regime for clinical trials * Alternative approval route allows drugs to be fast-tracked for use in clinical trials and avoiding Health Canada approval process * C went out of its way to keep its sales in the US, did not keep any stores of the drug in Canada, in order to keep point of sale in US for conflict of law reasons * Did not want to be subject to Patented Medicines Prices Review Board, because they were selling thalidomide at a crazy mark-up * PMPRB wanted to go after C – under its **Patent Act**statutory mandate, could oversee patented medicines “sold in any market in Canada” – claimed jurisdiction over C’s sales * PMPRB decision goes to JR – no suitable precedent is found and so SoR must be determined   Analysis:   * SoR was likely reasonableness, but parties had agreed at FC that the SoR to be used was correctness * SCC considers whether the decision was reasonable, reviews reasoning process & outcome:   + AT’s reasoning was based on its consumer protection mandate   + Would be incongruous to find they did not have jurisdiction based on that mandate * Court conducts its own statutory interpretation, drawing on “overriding purpose” from Driedger’s modern principle where words of statute can support more than one meaning   ***Nor-Man Regional Health Authority* (SCC 2011)**  Facts:   * Plaisier started work at N in 1988, became permanent employee in 1999, worked for N for 20 years; under collective agreement this entitled her to a bonus week of vacation * N argued that time counted from when she became a permanent employee – went to labour arbitrator * Experienced labour arbitrator invokes CL idea of “estoppel,” decides for P – gets it wrong * Relevant term in collective agreement: “an additional week of paid vacation shall be granted to an employee in the year of her 20th anniversary of employment”   Analysis:   * Reasonableness SoR applies, due to privative clause and labour tribunal’s specialized jurisdiction   + The decision was found to be reasonable – SCC considered the arbitrator’s reasoning process and use of precedent on the merits of the grievance and on estoppel * Labour arbitrators have a broader mandate and a distinctive role in fostering peace in labour relations – the invocation of “estoppel” is not a strict application of law but an arbitral remedy in the context of this collective bargaining agreement.   + Decision was found to be transparent, intelligible, justified, and coherent in accordance with the ***Dunsmuir*** factors within the context of a labour arbitration   Takeaway:   * Courts are willing to give incredible leeway to the decisions of ATs where there is “transparent, intelligible, justified, and coherent” justification * Apparent errors in law may be found to be reasonable within an AT context - wild west   **Reasons Requirement**   * First implemented in ***Baker***:   + **¶43:** “it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. … in cases such as this where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.” * In ***Dunsmuir,*** however, the court indicated that deference at the SoR stage involved:   + **¶¶41-42**: “respectful attention to the reasons offered or *which could be offered* in support of a decision”   + **ALSO –** The purpose of reasons, when they are required, is to demonstrate “justification, transparency and intelligibility.” * Is analysis of reasons conducted at both the SoR and the PF stages? Should these analyses be collapsed?   + ***NFLD***: no reasons is an issue under procedural fairness + if they are good or not is an issue under substantive review   ***Catalyst Paper v North Cowichan* (SCC 2012)**  Facts:   * Development of municipality lead to residential tax burden being widely distributed while industrial tax base was primarily paid by C – was paying 20% more tax than a residential user on a use-of-service basis * C provided its own services and utilities * Municipality agreed to step down the taxation of C but wanted to reduce slowly over time – C did not find this acceptable   + Can a municipal taxation by-law be subject to JR at all? And if so, what is the SoR?   Analysis:   * ***Thorne’s Hardware*** stands for the proposition that tax legislation is purely legislative, but is distinguished here on the principle that municipality must exercise its delegated authority within the scope assigned to it   + **SoR = reasonableness** * Is there any useful pre-***Dunsmuir*** precedent?   + Case is a bit of an outlier because this case is dealing with a municipality, with elected representatives – Court was not going to go to jurisdiction questions or correctness SoR * **Reasonableness is not a spectrum – it is a single but flexible and deferential standard that takes its colour from the context (it’s a spectrum)** - **“Is there anything more spectral than colour?” (DALLAN POULIN!)** * What does reasonableness look like in the context of municipal bylaws?:   + **¶24:** “only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside.”   + **¶25:** “the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature”   + **¶28:** “muni councils must adhere to appropriate processes and cannot act for improper purposes” * Looks a lot like PU – really showing a lot of deference to municipality * How can the process be assessed – there are no obligations to justify tax by-law with written reasons – reasons are self-evident and clearly related to the municipality’s powers and ambit * Outcome for C is harsh but countervailing considerations exist   + **NOTE:** this is a quasi-judicial adjudication process and not the same as a democratic process giving rise to bylaw   Takeaway:   * Accepted reasons as self-evident, in lieu of written reasoning, based on ambit of municipal power   + Self-evident reasons include socio-economic factors such as the needs of the residential population and objective service consumption factors * Reasons requirement has been eroded throughout the jurisprudence almost to nothing – “ethos of justification” is diminishing as the case law has read down the reasoning requirements   + “The purpose of judicial review is to uphold the normative legal order by ensuring that the decisions of administrative decision-makers are both procedurally sound and substantively defensible”   ***NFLD & Labrador Nurses’ Union v NFLD & Labrador (Treasury Board)* (SCC 2011)**  Facts:   * Labour arbitration decision re: vacation pay * Adjudicator’s decision was 12 pages, included relevant facts, parties’ arguments, collective agreement provisions, interpretive principles, but not the analytical process by which he arrived at his conclusion * TJ held that this decision was “completely unsupported by any chain of reasoning that could be considered reasonable”   Analysis:   * **SoR = reasonableness** * **Abella J** held that a decision should be presumed to be correct even if its reasons are deficient in some respects, and that the default position should be to supplement rather than subvert the reasons offered by the AT * If reasons provided are enough to understand why tribunal made its decision or whether outcome is within range of reasonable outcomes, they will suffice   + **There is a different standard for reasons in PF and SoR – deficient reasons will often suffice on the reasonableness SoR**   Takeaway:   * In reasonableness review, default position should be to supplement rather than subvert the reasons offered by the AT * Deficient reasons will often suffice on the reasonableness SoR if reasons provided are enough to understand why tribunal made its decision or whether outcome is within range of reasonable outcomes * Further erosion of reasons requirements - how far will the SCC go? Stay tuned to find out!   + **NOTE:** no reasons is an issue under procedural fairness + if they are good or not is an issue under substantive review   + ***Baker*** stands for the proposition that “in certain circumstances”, the duty of procedural fairness will require “some form of reasons” for a decision (para. 43).  It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness.  In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfill the duty of fairness   ***Alberta (I&P) v Alberta Teachers’ Association* (SCC 2011)**  Summary:   * Illustrative of what happens if there are no reasons at all – issue is not raised before AT but only arises upon JR   Facts:   * Complaint against Alberta teachers brought, long investigation, statutory 90-day deadline for providing date of conclusion of investigation or to provide reasons for investigation’s extension per **s.50(5) of** **Alberta Privacy & Information Protection Act** * No factual basis for undue delay – was conducting investigation, not wasting time, but did not provide any reasons for the requirement of the extension * Issue of whether non-compliance with this provision takes the investigation out of the jurisdiction of the investigators – adjudicator did not give date of conclusion of investigation until 22 months later   + This issue was never raised at adjudication, but came up at JR stage   Analysis:   * **ABQB** held that **SoR = correctness**, and decision was incorrect. Quashed decision   + Held this was a jurisdictional issue * **ABCA majority** conducted no SoR analysis but instead provided their own *de novo* review and upheld ABQB’s decision * **ABCA dissent** felt that JR was impossible on this issue as it had not been raised @ AT hearing and the adjudicator’s order should be restored * **SCC** had to determine whether there should have been any JR at all of an issue not raised @ AT * Held that there was no prejudice to either party caused by addressing this issue, and that the court could imply reasons on the part of the investigator * **Cromwell J in dissent** provided very strongly-worded reasons about how the SCC could conduct an analysis of *implied* reasons on an issue that was *never raised* at AT * Wanted to remit to AT so that they could provide reasons   + Though obviously they would just prepare the reasons they thought a court would want to hear * **Rothstein J for the majority** implied reasons from other tribunal decisions considering similar language w/r/t an analogous provision of the *Act*   + **SoR = reasonableness** * Although they took their reasons from a decision rendered 6 months after the decision in the case at bar, they were not using it as precedent, but to infer;   + Even this sort of looked like correctness analysis as they were analyzing AT’s statutory interpretation * **Rothstein J** holds that category of true questions of *vires* is very narrow, particularly where AT is interpreting its own statute – practically eliminates it as a possibility * Nevertheless, “reasons which could be offered” isn’t a carte blanche for courts to reformulate the reasons of the AT upon JR   Takeaway:   * Courts can find implied reasons where a reasonable basis for the decision is apparent, but should show restraint before “finding an **implied decision** on an issue not raised before the tribunal was unreasonable” * Courts are going to have to be wary about ATs attempting to manipulate this bullshit precedent * Nonetheless, this is subject to a duty to provide reasons in the first place.  When there is no duty to give reasons (***Mavi***) or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review   ***Agraira v Canada (Public Safety & Emergency Preparedness)* (SCC 2013)**  Facts:   * A was a Libyan national, member of a group that had been classified as a terrorist organization (but which went on to overthrow Moammar Gaddafi) * Minister denied ministerial relief to alleged terrorist on the grounds that said relief was not “in Canada’s national interest” * **s.34 of IRPA** provides relief for deportation where a member of a terrorist organization’s being in Canada would not be detrimental to Canada’s national interest * **IRPA** also provides a set of explicit guidelines to be used in making this determination * A is denied, Minister provides only cursory reasons without defining national interest or explicitly analyzing **IRPA** guidelines (or the FC’s previous interpretations of those guidelines) whatsoever   Analysis:   * **SoR = reasonableness** on the basis of the extant suitable precedents * SCC infers reasonable reasons on the part of the Minister, apply Driedger’s modern principle and conduct statutory analysis to hold that the IRPA guidelines are not “a fixed and rigid code” * Hold that:   + “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”   Takeaway:   * What is the limit of inferred reasons? There does not seem to be one, does there? IS THIS NOT AN INCENTIVE TO JUST NOT GIVE REASONS??   ***McLean v BC (Securities Commission)*** **(SCC 2013)**   * Case about statute of limitations – no adequate reasons provided for why BCSCB interpreted statute of limitations as it did * Had no other cases of BCSCB to look to w/r/t this issue, but held that the basis for their decision was apparent in the arguments raised by counsel – inferred reasons from the advocacy which occurred at the JR stage. * Held that “though reasons would have been preferable, there is nothing to be gained here from requiring the Commission to explain on remand what is readily apparent now.”   Takeaway:   * What is the limit of inferred reasons? There does not seem to be one, does there? – use counsel’s reasons |

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| **Standard of Review & the *Charter*** |

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| **Two Main Issues:**   * Should administrative tribunals and agencies have general jurisdiction to apply the *Charter*? * How is *Charter* review of decisions conducted, and how does it differ from “normal” JR in administrative law?   **1) General Jurisdiction Question**   * **s.24(1)** of the*Charter:* 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. * **s.52(1)** of the *Charter:* The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. * Can an AT conduct a constitutional review of its own enabling statute?   ***R v Conway* (SCC 2010)**  Facts:   * C wanted absolute discharge from Ontario Review Board based on alleged *Charter* rights violations   Issues:   * C’s claim raised two issues:   + Is ORB a “court of competent jurisdiction” for purposes of **s 24(1)**?   + If so, does it have jurisdiction to grant remedy sought?   Jurisprudential Background:   * Relationship between administrative tribunals and the Charter was first developed in ***Mills v The Queen*****(SCC 1986)** where it was held that a court of competent jurisdiction for *Charter* purposes was a ‘court’ with jurisdiction over the person, subject matter, and remedy sought. * In ***Slaight Communications Inc v Davidson*****(SCC 1989)** it was held that any exercise of statutory discretion is subject to the ***Charter*** and its values. * In the ***“Cuddy Chicks” Trilogy*** it was held that specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates * if (and only if) AT has the power to interpret law, then it has the obligation to apply the *Charter* to its enabling statute   + ATs cannot declare statutory provisions invalid, but can refuse to give effect   Analysis:   * **Abella J** states that it is unhelpful to determine whether a tribunal has jurisdiction w/r/t a specific *Charter* remedy:   + must determine whether it has the jurisdiction to grant *Charter* remedies generally: if it does and the *Charter* jurisdiction has not been excluded by statute, the tribunal is a court of competent jurisdiction and may grant *Charter* remedies in accordance with its statutory mandate. * Holds that decision of ***“Cuddy Chicks” Trilogy*** w/r/t **s 52(1)** should also be true of **s 24(1)**unless otherwise specified in the enabling statute. * Thus, proper inquiry is whether:   + Tribunal can grant *Charter* remedies generally, on the basis of its jurisdiction to decide questions of law, and   + Whether it can grant the particular remedy sought, given the relevant statutory scheme, determined by discerning legislative intent.   Decision:   * SCC holds that ORB is a quasi-judicial body with significant authority over a vulnerable population and unquestionably authorized to decide questions of law, thus passes first stage of the test * Fails second stage because it cannot grant absolute discharges to NCR patients who are clearly not intended to have such a remedy, thus such remedy cannot be sought from ORB – C’s appeal is dismissed.   Takeaway:   * If AT has competence to decide questions of law it has competence to answer constitutional questions, as all law is sourced from constitution, provided that jurisdiction has not been removed through legislation * proper inquiry is whether:   + Tribunal can grant *Charter* remedies generally, on the basis of its jurisdiction to decide questions of law, and   + Whether it can grant the particular remedy sought, given the relevant statutory scheme, determined by discerning legislative intent.   ***Suresh v Canada (Minister of Citizenship and Immigration)* (SCC 2002)**   * Same principles underlie **s.7** of the*Charter* and admin law duty of procedural fairness, though they are not necessarily always identical * **s.7** principles require, at minimum, compliance with duty of fairness principles * CL principles are not constitutionalized, but “inform” content of **s.7** principles * If there is a limit on a principle of fundamental justice in the admin law context, this can be justified through an ***Oakes*** test analysis; in ***Suresh*** it was not justified because:   + Valid objectives do not alone justify infringements   + The limitations in the Act are not connected to the objective   + The limitations are not proportional to the harm   **2) How is a *Charter* review of a tribunal decision conducted?**   * Certain cases employ use of *Charter,* with no employment of admin law, others do vice versa, and some employ both      |  |  |  | | --- | --- | --- | | ***Charter*-based Approach** | **Mixed Approach** | **Admin Law Approach** | | ***Slaight***  Dickson J (majority) | ***Slaight***  Lamer J (partial dissent) |  | | ***Multani***  Charron J (majority) |  | ***Multani***  Deschamps & Abella JJ (dissent) | |  | ***Baker*** | ***TWU***  (Chamberlain) |  * **Dickson J for the majority** in ***Slaight*** provides a two step test:   + Use two step *Charter* analysis     - Is the *Charter* right infringed?     - Is this infringement saved under **s.1**?   + Where *Charter* and admin law apply, analyze using **s.1**     - Admin law should not impose a more onerous test than **s.1**, and thus **s.1** should apply   ***Multani v Commission Scolaire Marguerite-Bourgeoys* (SCC 2006)**  Facts:   * Orthodox Sikh boy attending public school, was wore a kirpan as per his religion, but under his clothes – dropped it in class one day. * School bans his wearing kirpan, but school board reaches an agreement for reasonable accommodation * School board reached an agreement with the boy’s parents that he could continue to wear it to school, but must sew it under his clothes, where it could not be seen or pulled out in a way that might frighten other children or used as a weapon. * governing board refuses to ratify this arrangement, says wearing a kirpan violates rule 5 of the board code of conduct and kirpan is prohibited as a weapon. * Father seeks declaration that this ban on wearing kirpans is a violation of **s.2(a)** and an injunction against it.   Analysis:   * Rule in the code of conduct is not invalid, what is in question is the school board’s decision as to how to enforce it – nothing “prescribed by law” is being questioned. * SCC is unanimous in deciding that this is a non-trivial breach of **s.2(a)**, and ultimately in the result, but splits on how to approach next stage of the analysis. * **Charron J for the majority** approaches justification stage via ***Oakes*** test analysis:   + Where *Charter* rights are at stake, it should be applied, and constitutional law standards should not be dissolved into admin law standards   + *Charter*applies to both statute and delegated decisions thereof   + ***Oakes*** test provides a more structured approach * **Concurring decision of Deschamps and Abella JJ** held that while the *Charter* should be used for statutory challenges, admin law should be used to challenge administrative acts   + Where there is a decision/exercise of discretion inconsistent with the *Charter* it should be resolved on administrative law grounds, and that *Charter* approach is not suitable for administrative decisions. * **Deschamps and Abella JJ** take the position that the administrative law concept of reasonable accommodation is the standard to be used rather than minimal impairment   Takeaway:   * In certain cases where there is a decision and not a law impugned, and right and infringement have been established, administrative law analysis may be an option for assessing justification of infringement instead of **s.1** analysis.   ***Doré v Barreau du Québec* (SCC 2012)**  Facts:   * Lawyer disciplined for writing an intemperate letter to a judge (who was also reprimanded) * Issue is whether to use the admin law SoR or ***Oakes*** test to review an admin law/*Charter* rights question   Analysis:   * Constitutionality of the statute is not being challenged, neither is the length of the suspension * What is being challenged is the constitutionality of the Barreau’s decision itself – a discretionary administrative act * Court holds that an adjudicative admin decision ≠ statute that could be justified under the ***Oakes*** test – requires a “richer conception of administrative law”   + ¶4: “while a formulaic application of the ***Oakes*** test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality”   + ¶43: “There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness. It is not at all clear to me, however … that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.” * Constitutionality of statute not at issue   + Code of Ethics: “conduct of an advocate must bear the stamp of objectivity, moderation and dignity” * **SoR = reasonableness** due to precedents, interpretation of own statute, etc. * Court distills ***Oakes*** analysis down to relevant aspects of “balance” & “proportionality”   + - Consider & define statutory objectives     - Ask how *Charter* value at issue is best protected in view of statutory objectives   + **RESULT = an administrative act that disproportionately impairs *Charter* values is an unreasonable decision** * In application: “Disciplinary bodies must demonstrate that they have given due regard to the importance of the expressive rights at issue [both individual and public]”   + Fact dependent & discretionary exercise   + Reviewed Disciplinary Council’s reasons   + Here, balance of expressive rights & statutory objectives = reasonable   Takeaway:   * Where constitutionality of statute is at issue, **SoR = correctness**   + BUT when it’s the constitutionality of an administrative act/decision then the SoR is likely reasonableness (like here) * Adjudicative admin decisions ≠ statute that could be justified under the ***Oakes*** test – requires a “richer conception of administrative law”   + Accomplished through a distillation of ***Oakes*** analysis down to relevant aspects of balance and proportionality in which the court     - Considers and defines statutory objectives     - Asks how *Charter* value at issue is best protected in view of statutory objectives   ***Loyola High School v Québec (AG)* (SCC 2015)**  Summary:   * Latest case on interaction between SoR & *Charter*   Facts:   * Quebec legislation mandated a prescribed course be taught in all schools on ethics and religion – had a provision allowing for an equivalent course to be taught. * Loyola was a catholic boys school, applied to teach an equivalent course, was rejected by Minister who felt catholic teachings were not equivalent to ethical values; school appealed the decision on the basis of **s.2(a)**.   Analysis:   * SCC held in favour of the high school, but split 4-3 on remedy. * **Majority** decision follows ***Doré*** * One issue is whether the school could claim freedom of religion as an organization * **Abella J for the majority** says that school can, also seems to assume that administrative law approach is correct approach to justification in this case. * Holds that minister’s decision requiring that *all* aspects of teaching be taught neutrally limited freedom of religion more than necessary given statutory objectives and was not proportionate * peaks about *Charter* values & rights without distinguishing between the two * **McLachlin CJC for dissent** ignores ***Doré***almost entirely, says expressly that all religious institutions can claim the benefit of **s.2(a)**. |

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| **Charter + Admin Bodies**   * Challenging statute before Court? Normal *Charter* analysis * Challenging statute before tribunal? *Charter* applies to admin body, body must apply *Charter* * Admin bodies may be Courts of Competent Jurisdiction for Charter remedies, per ***Conway***   **Procedural Fairness**   * *Charter* **s.7** POFJ uses Baker procedural fairness to assess * If POFJ infringed, follow with ***Oakes*** test (*Charter* **s.1**)   **Substantive Review**   * Use enriched admin law (incl. proportionality & balance) not ***Oakes*** test: ***Doré*** * SoR = correctness re *Charter* interpretation or application to statute, per ***Dunsmuir, Doré*** * SoR = reasonableness for discretionary decisions, Charter application to specific facts (***Doré*)** |

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| **Relevant Statutes** |

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| * Ongoing battle between legislature and judicial branches as to who gets to make decisions about what judicial review will look like * ***Judicial Review Procedures Act*** replaces old prerogative writs with statutory judicial review remedies   ***Federal Courts Act***   * Judicial review from federally-created AT goes to FC * **s.18.1** gives FC power to create remedies in line with former prerogative writs * **s.18.1(2)** allows court to conduct JR on applications which have not been made within the 30-day deadline * **s.18.1(4)** provides the following grounds of review:   + Acted contrary to law   + Made decision on an error of fact   + Acted in a perverse or capricious manner   + Failed to observe PF   ***Administrative Tribunals Act***   * Successive string of BC provincial govt’s started to reform administrative law in the province beginning about 15 years ago * Starting with *Administrative Justice Project*, reviewed functioning of all BC ATs – core services review and delivery review (upon those services) * came into effect June 30, 2004, made more uniform and enhanced powers of AT to determine own practices/procedures * ***ATA*** focuses on:   + Independence, accountability, appointments – decision-makers at ATs should be as independent as possible, should be accountable, and appointed on a merit-based process (within the bounds of ***Ocean Port***)   + Institutional design & statutory powers for tribunals – systematic streamlining   + Dispute Resolution – resolving disputes finally earlier, resolving disputes more quickly   + *Charter* & Human Rights Jurisdiction   + Standard of Review * **Does not create anything new, but lies atop the existing enabling statutes for ATs in BC, applies to different ATs differently [see chart]**   + Since provincial legislation does not affect federal tribunals   + A provision only applies if tribunal’s enabling legislation adopts it * This was followed by further sweeping reviews of dispute resolution generally within BC, including abolition of BCHRT and revamping of rules of Civil Procedure * **Civil Resolution Tribunal** was also created – AT which deals with resolution of civil disputes that arise frequently, such as strata disputes, small claims, etc.   + **CRT** is going to be completely online, lawyers are not welcome * In April 2015 the govt made the decision to cluster certain tribunals to streamline the system and make it more efficient   **Key ATA Provisions**   * **s.1** provides definitions:   + “**facilitated settlement process**" means a process established under section 28 [facilitated settlement];   + "**privative clause**" means provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;   + "**tribunal**" means a tribunal to which some or all of the provisions of this Act are made applicable; * **ss.2-10** **deal with appointments and AT composition**   + **s.2(1)**: Chair of AT appointed by appointing authority after merit-based process for initial term of 3-5 years   + **s.2(2)**: additional term may be up to 5 years, also merit based   + **s.3(1)**: member may be appointed after merit-based process and consultation with chair for initial term of 2-4 years   + **s.3(2)**: additional term may be up to 5 years, also merit based   + **s.5(1)**: possible to replace absent/incapacitated member so as to continue the hearings and resolutions that member is involved in   + **s.7(1)**: if member resigns or appointment expires, chair may authorize them to continue to preside over matters they were involved in   + **s.8**: appointing authority may terminate appointment of chair, vice-chair, or member for cause   + **s.9**: chair is responsible for effective mgmt./operation of AT and organization/allocation of work among members * **ss.10.1-10.6** **provides for the clustering of certain alike ATs** – raises certain issues of independence where executive chair may reduce independence of individual ATs:   + **s.10.1(1)**: LG-in-C may designate 2 or more ATs as a cluster if they would operate more efficiently and effectively together   + **s.10.2(1)**: LG-in-C may appoint executive chair to manage all ATs in a cluster, merit-based process   + **s.10.2(4)**: executive chair holds office for initial term of 3-5 years   + **s.10.2(5)**: additional term may be up to 5 years, also merit based * **Part 4 of the Act (ss.11-42)** **gives ATs more power over their own practices and procedures**   + **ss.11-13** provide for the ability to make procedural rules,   + **s.11(4)**:must make any procedural rules made available to public   + **ss.12-13**: must issue certain practice directives, may issue others   + **ss. 19-21, 30, 32, 34**: provide for parties’ rights * **s.26-27** **provides for organization of ATs**:   + **s.26(1)**: chair may organize tribunal into panels comprised of one or more members   + **s.27(1)**: ATs can hire necessary employees under Public Service Act * **s.28** **provides for facilitated settlements**:   + **s.28(1)**: chair may appoint member/staff of AT or another person to conduct facilitated settlement   + **s.28(2)**: AT may require 2 or more parties to participate in this process in accordance with its rules   + **s.28(3)**: AT may make consent of one, all, or none of the parties to the application a condition of this process * **s.43 provides certain ATs discretion to refer questions of law to court** (applies to only Labour Relations Board and BCSCB)   + **s.43(1)**: provides jurisdiction to determine all questions of fact, law, or discretion in any matter including constitutional questions   + **s.43(2)**: provides discretion to refer questions of law in court * **s.44** provides that certain (i.e. most) ATs do not have jurisdiction over constitutional questions – trumps what is said w/r/t constitutional questions in jurisprudence * **s.45** provides that certain ATs, while they may have jurisdiction over constitutional questions, do not have jurisdiction over *Charter* questions * **s.46.1** provides that certain ATs may exercise discretion to decline jurisdiction to apply HRC   + **s.46.1(1)**: AT may decline jurisdiction to apply HRC in any matter before it   + **s.46.1(2)**: AT may consider whether there is a more appropriate forum in which HRT may be applied   + **s.46.1(3)**: if issue of a conflict between HRT and other enactment is raised, party or intervener raising it must serve notice on AG   + **s.46.1(6)**: AT may not hear question of conflict until AG has been served with notice * **s.46.2** provides that certain ATs have limited jurisdiction and discretion to decline jurisdiction to apply HRC   + **s.46.2(2)**: AT does not have jurisdiction over questions of conflict between HRC and other enactments   + **s.46.2(3)**: AT may consider whether there is a more appropriate forum in which HRT may be applied * **s.46.3** provides that certain ATs have no jurisdiction to apply HRT   **Standard of Review**   * **s.57** provides a 60 day period from the final decision made by an AT to bring an application for JR, with discretion built in for the court to extend this period in extenuating circumstances * **ss.58-59** apply to judicial review w/r/t ATs on the pre-***Dunsmuir***standard of review – therefore, patent unreasonableness lives on in BC   + “A patently unreasonable decision is one that can be described as “clearly irrational”, “evidently not in accordance with reason” or “so flawed that no amount of curial deference can justify letting it stand” - ***Pacifica Newspaper Group Inc.*, (BCCA 2014)** * **s.58** refers to “exclusive jurisdiction” within which AT is considered expert – does not have jurisdiction generally protected by privative clause but only within that area which is its expertise   + **s.58(2)(a)**: If there is a privative clause, for findings of fact or law or exercise of discretion within discretion, SoR is patent unreasonableness   + **s.58(2)(b)**: questions about CL natural justice and PF must be decided w/r/t whether AT acted fairly   + **s.58(2)(c)**: SoR for all other matters is correctness   + **s.58(3)**: provides where a discretionary decision will be found patently unreasonable   + **s.59(1)**: SoR where there is no privative clause is correctness for all questions except those regarding discretion, findings of fact, application of CL rules of PF   + **s.59(2)**: court must not set aside finding of fact unless unreasonable   + **s.59(3)**: court must not set aside discretionary decision unless patently unreasonable * **s.59.2** requires ATs to be accountable to their responsible minister for reports on their operations, performance indicators, workload, trends/special problems, plans, and other info – bureaucratization of ATs * If there is no privative clause = **s.59** applies:   + Default SoR = correctness   + Unless:     - Discretion (as defined) = patent unreasonableness     - Findings of fact with no evidence = reasonableness     - Procedural fairness = fairness * If there is a privative clause = **s.58** applies:   + Discretion (as defined), questions of fact, or fact/law = patent unreasonableness   + Procedural fairness = fairness   + Anything else = correctness * Post-***Dunsmuir***, there was much conversation about amending the ***ATA***, but it has not been done |

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| ***Khosa v Canada (C&I)*, (SCC 2009)**  Facts:   * Khosa is a permanent resident. Convicted of criminal negligence while driving 120 km/h in a 50 km/h zone during some sort of spontaneous street race * Charged with criminal negligence causing death and sentenced with two years less a day of house arrest   + Criminal offence of this nature makes one potentially subject to a removal order per ***IRPA* s.36** * IAD denies special relief on H&C grounds because K refused to admit that he was street racing * Seeks JR per **s.18.1 FCA** - FC applies patent unreasonableness standard, upholds IAD   Analysis:   * Is **s.18.4 of the FCA** analogous to the **ATA** – does it provide a standard of review which obviates the need for ***Dunsmuir*** analysis w/r/t federal ATs?   + No, this is not enough to oust the common law * FCA applies reasonableness *simpliciter*, allows appeal * SCC unanimously applies reasonableness standard, 7:1 upholds IAD * Question is really about how legislation and CL (***Dunsmuir***) interact * **Binnie J for majority** holds that legislation does not displace SoR   + **¶18**: where legislature has enacted JR legislation, an analysis of that legislation is the first order of business, though scope of legislation can still be interpreted   + Does not think that **s.18.1 of FCA** sets out SoR for every tribunal – mere fact that it provides standards does not eliminate requirement for SoR analysis * **¶41-51**: goes through each subsection of **s.18.1 of FCA** and says that they do not set out standards of review, only grounds of review, and that SoR must be “filled in” by CL * **s.18.1(d) of FCA** is most controversial in terms of whether it provides SoR, in language such as “perverse, capricious, without regard” which appears qualitative * **¶36**: content of **s.18.1 of FCA** is not sufficient to provide a SoR – only sets out threshold grounds which permit but do not require the court to grant relief – whether or not relief is granted must be dealt with in accordance with the analysis set out in ***Dunsmuir***   + Differentiates role of statute from CL so that **FCA** does not override CL analysis * **¶51**: says that legislature can expressly oust CL SoR analysis but courts will not interpret grounds of review as SoR   + Will assume they have discretion to make determinations about SoR unless such discretion is expressly removed * **¶59**: reasonableness is a single standard which takes its colour from its context, looking at justification, transparency, and intelligibility * **Rothstein J concurring in the result** held that **s.18.1 of FCA** fully ousts the CL SoR analysis   + Should only use ***Dunsmuir*** in cases where there is a strong privative clause, and expertise should not be a free-standing basis for deference * **¶ 70**: rejects differentiation between **s.18.1 of FCA** and SoR analysis: “In my view, courts must give effect to the legislature’s words and cannot superimpose on them a duplicative common law analysis.” * **¶ 72**: Where Parliament wanted a deferential standard, it used clear & unambiguous language. Where it didn’t want deference, it didn’t use that language.   + **¶ 79**: it is only with the enactment of privative clauses … that the legislature evinced an intent to oust, or at the very least restrict, the court’s review role.   + The necessary implication is that where Parliament did not provide for deferential review, it intended the reviewing court to apply a correctness standard as it does in the regular appellate context. * Expertise is reason behind privative clause, not a freestanding basis for deference – to accord deference on that basis is to overstep the role of the courts – correctness should be standard unless there is indication that legislature intended deference be accorded and ATs should be treated like lower courts * **Binnie ¶¶21-26**: With or without privative clause, tribunals entitled to some deference if legislature intended to allocate question to tribunal * Might be more than one right answer, even on legal questions * **Rothstein ¶¶ 76-98**: Without privative clause, SoR on questions of law is correctness. Court’s view of “expertise” irrelevant * Rejects ***Pezim, Pushpanathan, Dunsmuir*** for not taking legislative intent seriously enough   Takeaway: A legislature has the power to specify a standard of review if it manifests a clear intention to do so. However, where the legislative language permits, the court  (a) will not interpret grounds of review as standards of review,  (b) will apply  ***Dunsmuir*** principles to determine the appropriate approach to judicial review in a  particular situation, and  (c) will presume the existence of a discretion to grant or  withhold relief based in part on ***Dunsmuir*** including a restrained approach to judicial  intervention in administrative matters. |

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| **Aboriginal Law**   * Admin law governs those who exercise public power in   + Rule-making   + Adjudication   + Enforcement of specific regulations * First nations governed under the ***Indian Act***, which sets out different jurisdictions and ways first nations can govern themselves, including delegating the authority to create bylaws * Custom election codes have also been the source of important issues within admin law   ***Tait v Johnson*** **(FCA 2015)**   * Petition against chief counsellor, was supposed to go to appeal board which had fallen into non-practice * Board was meant to have five members, one was resigned, one dead, one had a conflict of interest, and two could not be contacted * No process in custom election code for what to do to replace board, but board was replaced and then relieved chief counsellor of his position * Court held that procedure for electing new appeal board was not procedurally fair   ***Lewis v Gitxaala Nation* (2015 FC 2014)**   * G has custom election code, with a provision for a clan-based elected body with representation for each of the four constituent clans * Also provided for a justice tribunal, didn’t provide any qualifications apart from being employed by the band – tribunal was populated entirely by elders * Election was appealed due to issues with mail-in ballots, justice tribunal declared election invalid, and electee appealed decision to FC * Hearing was procedurally fair – both nation and appellant thought that justice tribunal should be held to a standard of correctness, but FC upheld its decision * Shortly thereafter, petition came to amend custom election code to remove clan system and justice tribunal in favour of an arbitration system   ***Thompson v Leq’a;met First Nation*** **[2008] 2 CNLR 368**   * Code said that Leq’a;met members living outside of Stó:lō territory were ineligible to vote – this was found to be a violation of the *Charter* * Code had an amendment provision which required 50% + 1, tried several times but failed   ***Matsqui***   * Has a land code under first nation land management act * Granted environmental assessment certificate to Kinder Morgan Pipeline, whose route travels through reserve - cannot build on reserve without consent of First Nation   ***Nisga’a***   * Nisga’a negotiated jurisdiction through modern treaty process * All decision making can be appealed Nisga’a Administrative Review Act * Proceeds through Nisga’a Administrative Review Officer, who makes preliminary assessment of whether complaint is frivolous, without merit, or based on a technical irregularity * Also have Nisga’a Administrative Decision Review Board   + 3-6 members not part of Nisga’a Government or Public Institutions * Can conduct full hearing * BCHRT denied an appeal from the review board, said that they did not have jurisdiction to review that decision   **Deference to Aboriginal Administrative Boards**   * We see a variety of reactions to Aboriginal authorities   + Courts consider legislation, privative clause etc.   + Correctness in interpreting law   + Reasonableness for mixed fact and law * Often FC substitute their decision making for appeal boards or band council   + FC seems to struggle with actual drafting of laws – legislative provisions are often not clear and it is difficult to draft provisions with both courts/communities in mind   + Not consistent with other Administrative Law principles of independent and procedural fairness   + Respect for indigenous legal traditions?     **Intersection of Abo & Admin Law**    **Law of Consultation**   * Although duty to consult is a constitutional duty, it is informed by administrative law * PF and natural justice help determine the procedural safeguards to apply – more often a procedural right than a substantial right * There is no need for a separate constitutional remedy: admin law is flexible enough to give full weight to the interests of the First Nation   **Standard of Review**  ***Haida Nation v BC (Minister of Forests)* (SCC 2004)**   * SCC held that should the govt misconceive the seriousness of the claim or the impact of the infringement, question of level of consultation required would likely be reviewed on correctness standard * Where govt is correct on these matters and acts on the appropriate standard, decision will be set aside only if govt’s process is unreasonable   **Executive Prerogative**   * Is the Crown prerogative reviewable in the context of the duty to consult?   ***Cook v Minister of Aboriginal Relations and Reconciliation*** **(BCSC 2007)**   * Nation brought JR application to prevent minister from signing Tsawwassen Final Agreement * Crown agued that treaty-making was an exercise of prerogative, not statutory power, so JR was not the proper forum for interfering with that decision * BCSC agreed   **Fettering Discretion/Honour of the Crown**   * Crown is reluctant to commit to consultation or accommodation that could interfere with discretionary decision under statutory powers * Raised in consultation processes, in negotiation of consultation agreements, and in defense to litigation * Honour of the Crown is “upstream” of statutes, need creative solutions to find ways to meet obligation despite statutory limitations – sits before statutory obligations/limitations * On the other hand, Crown must not fetter its own discretion so that it is prevented from discharging the duty to consult   ***-***  ***Coastal First Nations v BC (Environment)* (BCSC 2016)**   * BC and Canada signed an agreement that stated that a federal environmental assessment would take the place of BC’s EA process on certain major projects, and BC would follow Canada’s decision   + BC EA Act required BC to make a decision on each project   + BC abdicated its decision-making responsibility and breached its duty to consult FNs about that decision * Lofty” principle SCC uses from time to time to create new bodies of law when they cannot justify a decision otherwise * Pre-proof obligation to consult with aboriginal communities which is triggered by Crown actions w/r/t their land * Courts do not like to quash crown decisions, have instead created the remedy of suspending decisions which pertain to the duty of the Crown pending further consultation * Courts are trying to balance asserted rights against statutory rights   **Limitations of Admin Law**   * Admin law works well for process-based issues like consultation, but less for substantive issues |