# Checklist

* Remedies:
  + A ministry doesn’t have an enabling statute, so look @ the Preamble.
  + Read the enabling statute carefully!!!
* Procedural Fairness: whether the procedure followed respected the duty of PF?
  + Being able to bring in evidence, if no reasons given for the decision, being present, getting a chance to make your case, right to know the case against you
* Independence, impartiality & bias:
  + Independence: how is the tribunal set up? What outside influences are there? Does the decision maker have a monetary stake in the outcome? Media pressure? Bribery?
  + Is there individual bias?
  + Is there institutional bias? Full board meeting? lead case?
* SoR

# Remedies

**@ Tribunal: What Remedies Are Available at the Tribunal?**

**Statutory authority?**

* No tribunal has general/inherent jurisdiction to impose any remedy. The power MUST be in the enabling statute.
  + Could include an express list of remedies or broad power (ex.“any remedy necessary”); explicit or implicit (which is rare; ex. if have the power to review documents, then must have the power to compel documents to review)

**Novel administrative remedies: when can tribunals create new remedies?**

* A combination of the following **factors** has led some tribunals to create novel remedies:
  + **1) Ongoing seisin:** If the remedies ordered are carried out in good faith with a view to make them effective, then [Board] has no jurisdiction to impose some other set of orders simply b/c hindsight makes it appear that the remedy sought and ordered was inherently ineffective. BUT if [Ministry] fails to comply with the orders, then [Board] is entitled to produce more specific set of orders to further support fulfilment of remedies already in place (**McKinnon**).

**McKinnon:** corrections officer faced regular workplace discrimination & harassment based on aboriginal heritage. Eventually, the matter was heard by the Board of Inquiry, which ruled in favor of M and made multiple orders, but Ministry didn’t comply. So, there was a second Board decision, which crafted new orders. **Held:** tribunal remains “seized” until entire series of orders implements and complainant’s remedial right met w/ full compliance and substantial conformity.

* + **2) Broad mandate:** if there is an express list in the statute, this argument will likely fail
  + **3) Different expertise:** admin tribunal members are a more diverse group than judges are, especially in terms of their training and expertise (ex. a combination of judges and laypersons). Also, the tribunal’s expertise makes it more likely that its members will devise remedies that reflect their training and perspective and that may be more economic than legal (p.91 text).
  + **4) Crossing of public/private divide:** tribunal’s outsourcing implementation of programs to private or 3rd party actors.
* **Awarding systematic remedies: McKinnon** (about administration of corrections system) illustrates that tribunals can make a systematic change (unlike courts, which are limited to solving the problem before them). BUT as illustrated in **Moore** (about $ and public spending priorities – fundamental political stuff), a systematic remedy will be quashed if it is held to be too remote.
  + Factors in favor: **McKinnon**: about administration of corrections system; there is evidence of repeated non compliance by the [Ministry]
  + Similar to Moore there is no lack of cooperation or intransigence on the part of [BC Education]

**Moore:** child w/ dyslexia; admin tribunal ordering both individual and systematic remedy based on an individual complaint. Individual remedy upheld, but systematic remedies were held to be too remote!

**Charter remedies? Can the tribunal order charter remedies?**

Per **Conway**: when charter remedy is seeked:

* First, determine whether the board is a court of competent jurisdiction.
  + Does it have jurisdiction to decided questions of law, and if so, whether that jurisdiction has been removed by the legislature – look at enabling statute; consider things like: can it hear appeals, etc.
* If so, does the board have jurisdiction to grant the remedy sought.
  + This issue is to be determined by legislative intent, as discerned from the board’s statutory mandate, structure, and function.

**Conway:** wanted an absolute discharge from mental health institution based on alleged Charter rights violations. ORB was held to be a court of competent jurisdiction, but did not have jurisdiction to grant the remedy sought b/c Conway continued to pose a risk to public safety.

**Enforcing Tribunal Orders Against Parties**

* **(1) Tribunals seeks to enforce own order** 
  + By itself (enforcement power must be granted by its enabling statute; rare)
  + By transforming it into a court order
* **(2) Party seeks to enforce tribunal’s order** 
  + Court’s don’t like this and prefer tribunal to enforce
* **(3) Criminal prosecution** 
  + Statutory provisions: quasi-criminal (Securities Act)
  + CCC provisions: indictable offence to disobey order from tribunal. Use CCC only if no other punishment expressly provided by law.

**Challenging Administrative Action** (i.e. challenging the tribunals order)

**A. Internal Tribunal Mechanisms**

* **Slip rule:** for clerical errors
* **Reconsideration & rehearsing:** look @ the enabling statute to determine whether they have this power. Statute can give power to re-hear based on misanalysis or new evidence. If not in the statute, tribunal is *functus officio* and have to go to internal appeal or JR
* **Internal appeals/reviews:** if the tribunal is part of a multi-tiered admin agency, the tribunal’s enabling statute may provide for appeals internal to the admin agency.
  + Tribunal Administratif du Quebec

**B. External Non-Court Mechanisms (e.g. Ombudsperson)**

**C. Using the Courts**

* **(1) Statutory Appeals** 
  + **Does the enabling statute provide for a right of appeal?** Courts have no inherent appellate jurisdiction over admin tribunals, so a right to appeal must be in the tribunal’s enabling statute. Otherwise, have to access the courts by way of JR.
  + **What is the scope of the appeal?** Determined entirely by the enabling statute. Can vary from *de novo* review to being limited to issues of law based on original record
  + **Is an appeal available as of right or is leave required? If leave is required, who may grant it?**
  + **Is a stay of proceedings automatic, or must one apply?**
* **(2) Judicial Review:**

1. **Discretionary basis for refusing a remedy**
   * JR is a discretionary remedy(i.e. discretion not to grant JR even if you have a good claim). Per **Domtar**, for the purposes of JR, the principle of the rule of must be qualified. But it should be noted that subsequent cases raise some question as to whether Domtar has eroded or not. It seems that post Domtar, JR is becoming less discretionary overall. For instance, the result of **Khosa** has been a resurgence of list of principled reasons for not granting JR: 1) delay, 2) failure to exhaust adequate alternative remedies, 3) bad faith, 4) mootness, 5) prematurity and so forth (refer to p.108-109 for details) (i.e. can’t just refuse JR by saying there are times that we have to qualify rule of law. Need to have a reason for not exercising discretion to grant JR). In **Mining Watch**, the Court added another consideration: the balance of convenience to the various parties. Such considerations will include any disproportionate impact on the parties or the interests of third parties.
   * **Khela:** application for **habeas corpus** (for reporting unlawful detention or imprisonment before a court) is not discretionary though JR still is.
   * **Altus Group:** directly **contrary decisions w/in the same tribunal** not reasonable even though decisions are not precedential.

**Dunsmuir:** 2 panels reaching inconsistent decisions w/ respect to construing the same statutory language. **Held:** inconsistency on its own not enough to trigger JR. Refer to the SCC headnote for more info on why the principle of rule law must be qualified.

**Mining Watch:** held: when all the relevant considerations are taken into account, the appropriate relief is to allow the application for JR. The balance of convenience justified reducing the impact of the remedy granted, from relief in the order of certiorari and mandamus to a declaration.

1. **Threshold Qs to determine if JR is available:**
   * **1) Is the tribunal whose actions are being challenged a public or private body?**
     + Only public bodies can be subject to JR. Per **McDonald v Anishinabek**, JR is available to supervise the general machinery of government, even if not constituted by prerogative powers. So if decision-maker fulfills a public function or if decision-making has public law consequences, then duty of fairness applies and decision is subject to JR. The court in **McDonald v Anishinabek** **set out the criteria for determining whether a tribunal is a sufficiently “public” body:** 
       - Source of the body’s powers: just b/c source is not from statute, doesn’t mean can’t get JR. Look at subject matter.
       - Functions and duties of body
       - Whether gov action has created the body, or whether, but for the body, the gov would directly occupy the area, such that there is an implied devolution of power
       - Extent of government’s direct OR indirect control over the body
       - Body’s power over public at large
       - Nature of the body’s members and how appointed
       - How the board is funded?
       - Nature of body’s decisions: does it seriously affect individual rights and interests?
       - Whether board’s constituting documents or procedures indicate duty of fairness owed
       - Relationship to other schemes/parts of government, such that the body is “woven into the network of government”
       - Applying these criteria to [X], it is difficult to imagine a function that is more public in nature than the …
   * **2) Does the person seeking to challenge admin action have standing?**
     + Either: 1) individual standing (note: actual parties are GTG) or 2) public interest standing
       - **Public interest standing** recognized when the following **3-part test** is met (**Canadian Council of Churches**):
         * **(1)** the applicant must show that a serious issue has been raised
         * **(2)** it must have a genuine or direct interest in the outcome of the litigation
         * **(3)** there must be no other reasonable and effective way to bring the matter to court
         * this test is slightly relaxed by the **Downtown Eastside Sex Workers** case, which outlined that need to look at whether the proposed suit is a reasonable & effective means of brining the matter before the court.
   * **3) To which court should the party apply to for JR?**
     + As a general rule, if the admin body is Federal, then apply to Federal Court; and if, admin body is provincial, then apply to provincial superior court (BCSC)
   * **4) Deadlines?** 
     + Fed: per FCA JR application from a fed tribunal to the fed court must be made w/in 30 days
     + Prov: JRPA s.11, no time limit; ATA s. 57(1), the general time limit is 60 days
     + However, Courts are often statutorily empowered to extend the deadline for making a JR with good reasons
   * **5) Has the applicant exhausted all other means of redress?**
     + Before gaining access to JR, applicant must establish that he has exhausted all other adequate means of recourse for challenging the tribunal’s actions. To evaluate whether right of appeal constituted an alternative remedy consider: procedure on appeal; composition of Senate and implications; efficiency, expediency and costs (**Harelkin**).
     + FCA s.18.5: completely ousts JR if it applies, no need for analysis of what’s an adequate remedy. Look at the enabling statute!

**Harelkin:** student forced to withdraw; reasons unclear; appeal to uni committee was dismissed w/out a hearing. Student sought certiorari rather than pursuing right of appeal to a committee of Uni Senate. **Majority held:** must show more than just a prior violation of PF; can’t assume Senate will act the same as earlier committee.

1. **What remedies can you get on JR?**
   * **Prerogative writes:**
     + **Certiorari:** power of court to quash admin decision (ex post = based on actual results), but can’t substitute its own decision
     + **Mandamus:** mandating something to be done; power to compel the lower court or agency to perform a duty it is mandated to perform
       - **Would sending the matter be inadequate? Insite**:SCC held that the minister of health had not exercised his discretion consistent w/ the Charter when he refused to exempt Insite from certain criminal law provisions. The court found that sending the matter back to the minister for reconsideration would be **inadequate** in view of the attendant risks and delays. It therefore, took the rare step of issuing an order in the nature of mandamus, compelling the minister to exercise his discretion so as to issue an exemption on Insite.
       - where the court used writ of mandamus to mandate that Minister exercise his discretion in a particular way to allow In-site exemption to keep operation (note Charter context).
     + **Prohibition:** tribunal prevented from hearing a matter, usually based on jurisdiction (preemptive)
     + **Declaration:** declaration of what people’s legal rights are
       - Ex. **Khadr:** SCC declared that Canadian government violated Khadr’s charter rights
     + **Habeas corpus:** right not to be detained arbitrarily; produce the body and explain why detention warranted
     + **Quo warranto:** inquire into the authority that justified action; abolished in most provinces
   * **Statutory Reform**
     + **JRPA (BC)** – refer to appendix
       - Old writs transformed to statutory remedies: **petition for relief “in the nature of”** [insert the appropriate old writ]
     + **ATA (BC)**
     + **FCA (Federal)** –refer to appendix

**Private Law Remedies**

Private law remedies are outside the scope of admin action and JR. Gov agencies can be sued for breach of K, tort of negligence, or tort of misfeasance in (or abuse of) public office.

If your claim is fundamentally private, then you can proceed without JR. But have to pick your remedy: damages or JR (**Telezone**).

* **Tort of Misfeasance in Public Office:** the court in **Odhavji** held that there was such a thing as the tort of misfeasance in public office. The underlying purpose of the tort is to protect each citizen’s reasonable expectation that public officials will not intentionally injure members of the public through deliberate and unlawful conduct in the exercise of public functions. Prof: high bar to succeed! Cannot be negligence or wilful blindness, there MUST be intention.

**Odhavji:** An action for damages against police officers & the chief of the Metropolitan Toronto Police by the estate of an individual shot by the police.

**McMaster:** A prisoner w/ large feet requested a new pair of properly fitting shoes when his old shoes became worn out. A long and potentially intentional delay followed in getting him new shoes and, while waiting, he injured his knee exercising in his old shoes. Liable for tort of misfeasance in public office.

# Procedural Fairness

**Charter & Bill of Rights**

**First, determine if they apply …**

|  |  |
| --- | --- |
| **Bill of Rights – vs. – Charter** | |
| * Federal only * Applies to “persons”, “indivs” * Property rights * PoFJ generally * Overrides legislation *absent express intention* | * Fed/prov/territories * Applies to “everyone” * No property rights * PoFJ only if “life, liberty & security of person” engaged * Overrides legislation *always* |

**Charter**

When to use Charter argument instead of CL:

* CL PF only fills in blanks where legislation isn’t explicit
* But if legislation explicitly and intentionally allows/doesn’t allow certain procedures, might need constitutional argument to overcome, whereas CL PF doesn’t overcome statute.

**Singh** established that principles of fundamental justice include PF.

**STEP 1: Does the Charter Apply?**

* Must be government. Prob will not be an issue w/ most admin tribunals
* Charter applies to any body exercising statutory authority (**Blencoe**)

**STEP 2: Is the party “everyone”?**

* Includes “every human being physically present in Canada” (**Singh**)
* Ex. refugee claimants are entitled to PF (**Singh**)

**STEP 3: Is the Party’s “Life, Liberty, or Security” Interest Deprived?**

* Section 7: Everyone has the right tolife, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
  + **Liberty:** freedom from physical restraint; engaged where statute compulsions or prohibitions affect important and fundamental life choices; protects an individual’s personal autonomy; not synonymous w/ unconstrained freedom
  + **Security:** serious psychological harm from the actions of the state
* The threshold Q to activate s.7 of the Charter: Are [X’s] “life, liberty or security” interests impaired? Examples:
  + Risk of return to dangerous country engages security of the person (**Singh**, **Charkaoui**)
  + Forced separation of mother and children would have serious effect on parent’s psychological integrity and stigmatize her. This engages security of the person (**N.B. vG(J)**)
  + Undue delay in resolution of HR complaint resulting in stigmatization and impairment of psych integrity NOT an infringement of security interest; no right to dignity under s.7 (**Blencoe**)
  + Imprisonment/detention pending deportation engages liberty interest (**Charkaoui**)

**STEP 4: Once Charter is Engaged, CL Defines the Content of PF:**

Per **Suresh,** s.7 POFJ require, at a minimum, compliance w/ duty of fairness principles. Common law principles are not constitutionalized, but “inform” content of s.7 principles. Following the courts approach in **Suresh**, I will apply Baker in the s.7 context to determine the level of PF:

Baker 5-part test:

* 1) nature of decision being made & process followed in making it
* 2) nature of statutory scheme & “terms of the statute pursuant to which the body operates”
* 3) importance of decision to individual(s) affected
* 4) legitimate expectations
* 5) choices of procedure made by agency itself

**STEP 5: Content of PoFJ**

* **1) Notice**
* **2) \*Duty to Disclose & Right to Reply**
  + Ex: **Suresh** should have been informed of the case against him with an opportunity to respond.
* **3) \*Oral Hearings**
  + Ex: where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing (**Singh**).
  + Counter Ex:in arguably, this case is similar to **Suresh** and the procedural protections required by s.7 in this case do not extent to the level of requiring the Minister to conduct a full oral hearing.
* **4) \*Right to State-Funded Legal Counsel:** seriousness of interest (separation from family) + complexity of proceedings (custody hearing) + limited capacity of individual (poor): **N.B. v G(J)**
* **5) Right to Cross-X, Call Witnesses**
* **6) \*Timeliness & Delay**
  + **Blanco:** s.7 rights do not cover emotional distress.
* **7) \*Reasons** 
  + Ex: **Suresh**
* ***\*Ex Parte*, *in Camera* Hearings**
  + Ex parte: having the hearing w/out the subject of the hearing present
    - Reasons: sensitive info, national security
  + In Camera means public is excluded
    - Reasons: safety of person involved

|  |  |
| --- | --- |
| **Singh** (refugee context) | Credibility @ issue 🡪 oral hearing should have been granted |
| **Suresh** (deportation order; torture) | No right to an oral hearing  Informed of case against him  Opportunity to respond  Opportunity to challenge Minister’s information  Written reasons |
| **Charkaoui** (detained to be deported; national security concerns) | Can’t detain someone w/out fair process:   * Right to a hearing (got it) * Before independent, impartial individual (got it) * Based on facts & the law (nope – Fed Court only had access to one side (Minister’s version), the adversarial system was compromised) * Right to know the case to meet and to have opportunity to answer it (nope – incomplete info (not show-stopper on its own), seriousness of impact on individual), judge can’t compensate for lack of informed scrutiny |
| **Harkat** | “incomprehensible minimum” of info needed to know the case against you in national security context   * Can you give meaningful instruction to your counsel? * Can you give meaningful guidance & info to special advocates so they can challenge info and evidence presented? * Case by case analysis |

**STEP 6: Saved by Charter s.1? Is limit on PoFJ demonstrably justified in a free & democratic society?**

Section 1: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Per **Charkaoui**, apply the Oakes test to determine whether a violation ca be justified under s.1:

* Pressing and substantial objectives AND
* Proportional means, which requires
  + a) means (i.e. limitations in the Act) rationally connected to the objective
  + b) minimal impairment of rights
  + c) proportionality between the effects of the infringement and the importance of the objective
* **Charkaoui:** pressing and substantial objective but means not proportional

**The “*Suresh* exception”:** extraordinary circumstances will justify deportation to torture

**Bill of Rights**

* Can use Bill of Rights: **Singh**
* Doesn’t apply if there is a provision in the statute that says: “… it shall apply notwithstanding the Bill of Rights.”
* Includes some parts Charter doesn’t
  + s. 1(a) right of individual to … and enjoyment of property
    - NOTE: individual doesn’t include non-natural persons
  + s.2 every law of Canada will not abrogate – (e) deprive person of right to fair hearing in accordance to POFJ

**In the alternative, I think principles of PF from admin law apply.**

**Procedural Fairness**

The standard of review is correctness. 3 STEP ANALYSIS for when **JR proceedings** are brought alleging a breach of the duty of fairness:

**STEP 1: Threshold: is [X] entitled to any fairness?**

Formerly, proceedings had to be judicial or quasi-judicial to pass the threshold test. The SCC in **Nicholson** changed this and held that there is a general common law duty of fairness on a sliding scale (meaning it will look different in different situations). The Nicholson principle was affirmed in **Cardinal**, where the SCC held that there is as a general common law principle, a duty of procedural fairness lying on every pubic authority making an admin decision which is NOT of a legislative nature AND which affects the rights, privileges or interests of an individual. In **Knight**, the SCC emphasized that it is important to consider whether a decision is preliminary or final.

Taken together, duty of fairness only applies to:

**“Decisions”**

Preliminary or final?

If a decision is not final (i.e. interlocutory or preliminary), then no PF.

* **Re Abel**: Abel got access to records relied on by an advisory board making recommendations to LG (who was the ultimate decision maker), b/c practically speaking, a positive review by the advisory board was his only hope of release.

Multi Step Investigatory Processes

* **Dairy Producers**: the court held that there was no duty of fairness at the investigative stage b/c the decision was too remote (i.e. there were too many interim steps).
* **Irvine**: report of the hearing officer was too remote from the final decision. Also, in a law enforcement context, you want to be careful not to jeopardize the law enforcement process.

**… that affect the “rights, privileges or interests” of an individual**

Vested Interest

* **Re Webb**: there is no right to public housing, but once in public housing, individual has a vested interest and nature of that interest means that he is entitled to some PF.
  + *Court held Webb received enough PF since she had already talked to the social worker.*

No Vested Interest (application stage)

* **Re Hutfield**: however, vested interest doesn’t seem to matter so much in professional licensing situations, but this might depend on the context of a specific case. In Hutfield, a doctor who was denied hospital privileges was entitled to PF. However, in this case, [X] is applying for … Hence, the outcome depends on how far the Hutfield case extends.
  + *Reasons: rejection by the hospital casts a slur on doc’s reputation as a doc; general public’s interest @ stake: going to a doc that can’t operate not in the public’s best interest.*

**… but not “legislative decisions” …**

Rules governing PF do not apply to a body exercising purely legislative functions (**Wells, Authorson, Ref Re Canada Assistance Plan**) b/c any meaningful conception of a separation of powers between the legislatures and courts demands it (p.156 text).

* **Wells**: Newfoundland government passed new legislation, which abolished Wells position on the Public Utilities Board. The court held that this was a purely legislative decision and that Wells was not entitled to any PF.
* **Authorson**: court held that it was w/in legislatures powers to limit interest entitlement of veterans and that they were not entitled to PF.
* **Ref Re Canada Assistance Plan**: formulation and introduction of a bill is purely legislative.

**Legitimate Expectations:** [X] might argue that based on [the conduct of the public official: discuss particular conduct based on facts of Q], he was led to believe that his rights should not be affected w/out consultation. If the doctrine of legitimate expectations is found to be applicable, then it can create a right to make representations or to be consulted. BUT, the doctrine of legitimate expectations does not create substantive rights and can’t constrain essential democratic features, like parliament supremacy (legislative process) and that a gov is not bound by undertakings of its predecessor (**Ref Re Canada Assistance Plan**).

* *Agreements may be amended or terminated by mutual consent, or terminated w/ one year’s notice from either party. Despite this provision, the court held that doctrine of legitimate expectations didn’t apply.*

**Cabinet/ministerial decisions?**

G-in-Council = Cabinet

**\*Look at the language of the statute\*** ASK: is it a decision that was previously carried out by the legislature? Is there anything in the statute that qualifies the cabinet’s discretion? Is there anything in the statute about procedure?

In exercising statutory power, G-in-C is not automatically sheltered from review. Look to the provision and the scheme as a whole to discern the degree to which the legislature intended PF principles to apply. “Procedural trappings not appropriate” if: broad discretion granted to G-in-C, “polycentric” decision, consider where this kind of decision was historically located: w/ legislature, admin structure irrelevant (**Inuit Tapirisat**).

* *Justice Estey considered the Cabinet’s (G-in-Council) power to be legislative in nature, in part b/c the legislation authorized Cabinet to overturn a decision of the CRTC on its own motion.*

**Subordinate legislation?** Rules, regulations, orders, by-laws

Municipal By-laws

Bill of Attainder 🡪 using legislation to resolve interparty dispute

* **Homex**: Traditionally, when statute authorizes interference with property rights, courts have injected common law procedural fairness (i.e., notice), but it is no longer automatic and depends on context: statutory framework (does it specifically eliminate PF? Would giving PF defeat purpose of statute?), nature of action taken by municipality, general circumstances at the time. Municipalities can pass bylaws that impact interests, but have to give notice and an opportunity to be heard.
  + *SCC held that passage of the municipal bylaw was subject to the duty of fairness b/c it was clear that that the village’s motivation for passing the bylaw was an ongoing dispute it had w/ Homex.*

Regulations

* **Immigration Consultants**: regulations or policies of G-in-C or Minister aren’t reviewable, except in cases of excess jurisdiction (bad faith or illicit purpose), or failure to comply w/ legislative or regulatory requirements (ex. publishing in Gazette).

**Policy decisions?**

* Per **Inuit Tapirisat** and **Immigration Consultants**, decisions that are purely policy are not entitled to procedural fairness.

**Emergencies**

* Emergency can pause right to procedural fairness, but can’t eliminate them. For example, in **Cardinal**, they had to lock down the prisoners immediate as a result of an emergency.

**STEP 2: Content: how much PF is [X] entitled to?**

ALWAYS check the enabling statute first.

**Baker non-exhaustive five-part TEST:**

1. **Nature of decision being made & process followed in making it**

* More judicial looking = more PF
* Discretionary decision = less PF (saw in **Baker**)
* Is it legislative or political = less PF or no PF
* Polycentric (managing competing interests/broad policy) = less PF

1. **Nature of statutory scheme & “terms of the statute pursuant to which the body operates”**

* Greater procedural protection will be required when no appeal procedure is provided w/in the statute, or when the decision is determinative of the issue and further requests cannot be submitted

1. **Importance of decision to individual(s) affected 🡪 MOST IMPORTANT FACTOR**

* The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.
* profession, employment, family, citizenship

1. **Legitimate expectations of the person challenging the decision**

* May arise out of conduct such as representations, promises, or undertakings or past practice or current policy of a decision-maker.
* Find it in pamphlets, websites, comments by staff

1. **Choices of procedure made by agency itself**

* Have to consider and respect choice of procedure made by agency itself especially where statute leaves the decision-maker the ability to choose its own procedures or when the agency has an expertise in a particular procedure (ex. tenancy branch has done lots of telephone hearings)

1. Other? Is there anything specific in the fact pattern?

**IF half private law K and half statutory scheme**

* In **Mavi**, the court found that despite K based nature of dispute, sponsors were still entitled to some PF before government enforced debt.

**Legitimate expectations** 🡪 representations must be “clear, unambiguous and unqualified” and proof of reliance is not required (**Mavi**).

**Conclude by comparing your case to other cases:** esp. Nicholson, Cardinal, Homex, Baker, Mavi

[X] is entitled to more procedural fairness than … and less than …

* Prof: if comparing Mavi to Baker, Baker is entitled to more fairness b/c deportation is more serious.
* Homex (passing leg) < Mavi (economic pressure); Nicholson (officer fired) <Baker (deportation); Cardinal (solitary confinement)

**STEP 3: Application: what does PF look like in this specific context?**

What is *minimum* procedure required to ensure party knows the case against him/her & has opportunity to respond?

FIRST, see if any of the following is required by the statute.

* **Notice:** did the person get enough notice? 🡪 **Mavi**
* **Disclosure/Discovery**
  + Type of info: your own info (like Abel) or an informant
* **Oral Hearings**
  + When determination of credibility is essential
  + In **Baker**, looking @ her would not add anything to the situation that sending her back would make her worse
* **Right to Counsel**
  + Definitely need in child custody cases
* **Right to Cross-X, Call Witnesses**
  + Are there other means of getting the answer?
* **Timeliness & Delay**
  + **Blencoe**:delay will violate PF if there is prejudice to the fairness of the hearing (ex. someone dies).
* **Reasons** 🡪 **Nicholson**; **Cardinal**; **Mavi**

Understand what it was found to entail in the following cases:

* **Nicholson**: officer should have been given reasons for why he was discharged and an opportunity to respond
* **Cardinal**: director should have informed prisoners of reasons of his decision and provided them w/ an opportunity to make representations, challenge decisions and information
* **Webb**: OK that she didn’t have a hearing, received enough PF since she talked to social worker
* **Hutfield**: right to be heard
* **Homex**: had a right to be heard
* **Baker**: The opportunity for appellant/her children to make written submissions and receive reasons. But, not an oral hearing.
* **Mavi**: notify sponsors, give an opportunity to explain in writing personal/financial circumstances, relevant circumstances, notify sponsor of gov decision, no need to give reasons

# Independence, impartiality & bias

**Terminology**

* **Independence:** the means of achieving impartiality. Look at structural factors & relationships.
* **Impartiality:** the ideal state. Truly open mind, no improper influences.
* **Bias:** the evil that we are trying to avoid. Partiality toward a particular outcome.

**STEP 1: Independence**

Note: lack of independence is one of the things that can lead to RAB

**(a) Independence Test:** “a reasonable apprehension of non-independence must be

* a reasonable one,
* held by reasonable and right-minded persons,
* applying themselves to the Q & obtaining thereon the required info, the test of “what would an informed person, viewing the matter realistically and practically, and having thought the matter through conclude”?

is [the DM] **“sufficiently free”** of **structural factors** that could interfere with her/his ability to make impartial decisions (**Committee for Justice and Liberty**)?

**(b) As a starting point, it is helpful to look at judicial independence as a framework:**

* **Security of tenure:** can only be kicked out for cause not b/c someone doesn’t like your decision
* **Financial security/remuneration:** guaranteed salary and benefits. If not paid enough, then more vulnerable to corruption
* **Administrative control:** day to day operation of the courts: who gets the high profile case or the new computers?
* **(adjudicative independence – relationship factor):** ability of DM to decide free of inappropriate interference/pressure/social cues by other DMs

**(b) As applied to administrative tribunals:**

* **Requisite independence level** (i.e. security of tenure, financial security and admin control) depends on nature of tribunal, interests at stake, other indica of independence (ex. oaths of office) (**CP v Matsqui**)
  + **If a self-government context (i.e. first nation band) where a clear government task (taxation) is at issue:** in determining whether RAB exists, look at how the body operates in practice. i.e. it’s not enough to see RAB on paper.

**Mastqui:** Band’s taxation council imposed tax on CP. CP not happy an alleged RAB on the part of the council. **Held:** have to wait and see how the tribunal acted and then decide.

* **Serving at pleasure? Board functioning through part-time, fixed-term appointments?**
  + In **Régie**, the SCC held that the requirements of tribunal independence do not necessitate that administrative actors, like judges, hold office for life. What must be avoided, however, is that adjudicators face the possibility of being simply dismissed at the pleasure of the executive branch of government.
  + If serving at pleasure, arguably Minister has complete discretion to fire, unless DM gets some level of constitutional independence. [*name*]’s concerns relating to the independence of the Board are similar to those of Ocean Port’s. In **Ocean Port**, the SCC explained that absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its **enabling statute**. And that there is no freestanding constitutional guarantee of tribunal independence. In the present case, the legislature spoke directly to the nature of appointment to the [*board name*] Board. Pursuant to [s.#] of the Act, the chair and members are appointed for a [#] term, and serve on a part-time basis. Arguably, the legislator’s intention that Board members should serve at pleasure, as expressed through [s.#] of the Act, is unequivocal. So, the argument that a higher degree of independence is required is not strong.

**Ocean Port:** RCMP reported that OP not in compliance w/ *Liquor Control and Licensing Act* 🡪 there is an investigation, which results in a 2-day suspension 🡪 OP appealed to Liquor Appeal Board; **PT fixed-term appointments** (confirmed the 2-day suspension) 🡪 @ the BCCA, OP argued that LAB lacked sufficient independence and their decision should be set aside 🡪 SCC affirmed independence of LAB

* **“high end of adjudicative spectrum? (arguable)” Does DM get some constitutional independence?**
  + **McKenzie (BCSC):** unwritten constitutional guarantees of independence should be expanded to apply to administrative decision makers at the “high end of the adjudicative spectrum”. The BCSC, held that judicial independence should apply to residential tenancy arbitrators. [It can be argued that [name]’s role is “on the high end of the adjudicative spectrum” since it is similar to courts OR the matter used to be in the court’s jurisdiction]. However, it is arguable whether this is a strong argument or not since the BCCA found that the issue is now moot (statute amended to give arbitrators more independence).

**McKenzie:** M was a residential tenancy arbitrator **appointed on a fixed term, but served @ pleasure**. Terminated w/out cause under the *Public Sector Employee’s Act*, which allowed RTA arbitrators to be terminated. BCSC: M entitled to the remainder of her term.

* **One example of real life independence concern (there are others)** 
  + As illustrated in the **Keen** case, the main underlying fundamental problem w/ “at pleasure” appointments is that the government is not legally prevented from removing appointees for the decisions they make. Similar to Keen, the case at hand illustrates the barrier to the independence of SDMs.

**Keen:** member/president of commission. Orders reactor shutdown b/c of license violation, which leads to a worldwide shortage of isotope. Minister issues a directive and Parliament passes a bill to overrule he decision and Minister fires Keen as president. Court finds office held at pleasure.

She had no power to ignore the license requirement, but on the other hand, shortage of isotopes was a serious issue. Essentially, she got fired b/c of a difference in judgment.

**STEP 2: is there Reasonable Apprehension of Bias?**

**Look at statutory scheme, parties & relationships**

* E.g., policy or adjudicative function? Stage of hearing? Need for expertise / familiarity with industry? Significance of relationship?

**How much bias is allowed under the statute?**

* In some instances, an overlap in functions (which is generally not permitted on account of bias) is a necessary element to fulfilling a decisions maker’s mandate. Provided that the particular decision-maker is not acting outside its statutory authority (and the governing statute is constitutional), an overlap in functions may not give rise to a RAB: **Brosseau**

**Brosseau:** chair of security commission was the chief of enforcement and sat on the panel. Held: no RAB b/c statutorily authorized.

Allegations of RAB exist in two major forms in admin law: individual bias and institutional bias. Below, I will examine each of these forms of bias and explore the variations in the standard used to determine the existence of a RAB in different contexts.

**PART A: is there Individual Bias?**

Look at the **statute** to see how much bias is allowed. Then, look at the **relationship** and see if it is strong enough to support bias allegations.

**TEST:** “a reasonable apprehension of bias must be

* a reasonable one,
* held by reasonable and right-minded persons,
* applying themselves to the Q & obtaining thereon the required info, the test of “what would an informed person, viewing the matter realistically and practically, and having thought the matter through conclude”?

is [the DM] **“sufficiently free”** of factors that could interfere with her/his ability to make impartial decisions (**Committee for Justice and Liberty**)?

RAB may arise vis-à-vis an individual decision maker in various situations:

* **(1) Pecuniary ($$) interest in a particular outcome:** the nemo judex maxim is designed to prohibit an administrative actor from making decisions that advance his own cause. Standing to receive a monetary gain fits the notion of advancing one’s cause in an archetypical way.
  + **Direct:** having a direct pecuniary interest in a particular outcome gives rise to a RAB. This was illustrated in **Dimes**, a decision of the Lord Chancellor of England was set aside b/c of his SH interest in a company that was a party to the proceedings. In this case, if [X] succeeds it would benefit DM.
  + **Indirect:** decision of the court in **Energy Probe**,demonstrates that courts are willing to be more flexible when the pecuniary interest is indirect.
    - **ASK:** is there a guaranteed financial benefit?

**Energy Probe:** Board renewed operating license of Ontario Hydro. A PT panel member was also president of a company that supplied cables to power plants through competitive tender process, and had supplied to Ontario Hydro in the past. He was a past director and SH of the company. **Held:** the fact that company got Ks in the past did not mean that they will get Ks in the future, so panel member had an indirect interest and did not lead to RAB.

* + **Interest held by a large group:** when there is a widespread group of beneficiaries (ex. whole industry benefits from the decision), pecuniary interest is not enough to raise a RAB b/c everyone would be equally biased.
  + **Legislation that allows pecuniary interests will trump CL!**
* **(2) Prior relationships w/ those in dispute**
  + **Look at significance/currency of relationship** w/ the parties and others, such as witnesses, counsel(how close is DM’s relationship to the parties that are before him?) **and statutory context** (is partiality expected? Ex. tripartite labor tribunals) **of the fact pattern** 
    - In the context of a tripartite labor tribunal, connections between practicing lawyers in the field and members from labor or management are almost inevitable.
  + As illustrated in the **Brar** case, there is a **presumption of impartiality** for tribunal members.
    - Can’t create a controversy and capitalize on it. In **Brar**, it was fine for the DM to stop the hearing b/c there was still lots of time left for the hearing and the media uproar was unexpected. So, the court held that the politically motivated speculation in the newspaper did not displace the presumption of impartiality.
  + There must be a reasonable RAB in context (**Brar**).
    - Sometimes, depending on context, a decision that looks like it could raise RAB actually doesn’t (ex. when the decision maker doesn’t have a lot of choice)

**Brar:** while in the middle of a hearing, tribunal member P not re-appointed, so she adjourned the proceedings. B complained and went to the media. P was re-appointed for enough days to finish the hearing. College argued RAB since Brar supported her. **Held:** No RAB

* **(3) Prior knowledge or info about matter in dispute:** 
  + **Wewaykum**: consider degree of past familiarity

**Wewaykum:** in his previous position as the deputy minister of justice, Binnie J participated in a meeting at which the current case was discussed. Band argued RAB b/c of his prior involvement/ knowledge. **Held:** no RAB b/c he was never counsel of record and played no active role in the dispute after the claim was filed. Also, the file was transferred to another office.

* + **Mediation privilege:** precluded from adjudicating a case that DM mediated to avoid RAB that may come w/ prior knowledge.
* **(4) Prior involvement in matter/context in dispute** 
  + **Who is the DM?** Chair of a board or a minister? And, **look at the nature of the decision**
  + In this case, the DM is making licensing decisions similar to Mr. Crowe in Committee for Justice and Liberty **OR** it seems that the DM is in a policy role and is worrying about public interest, similar to the Quebec Minister of Environment in Imperial Oil.
    - **Adjudicative:** if role is adjudicative, past involvement will be taken seriously – high potential for bias: **Committee for Justice and Liberty** (Chair of the board)
    - **Policy:** if DM is in a policy role, not an adjudicative one, and is worrying about public interest and is worrying about public interest, there will be no RAB: **Imperial Oil** (Minister)

**Committee for Justice & Liberty v National Energy Board:** Board in charge of reviewing pipeline applications. Chair of the Board was previously involved in a study group that had put an application into the Board. **Held:** prior involvement w/ the study group raise RAB. Worry was that he had written extensively on the issue already. **Imperial Oil v Quebec Minister of Environment:** Minister ordered Imperial Oil to remedy a contaminated site. Imperial Oil alleged RAB on the part of the minister b/c Minister was being sued by the current owner of site due to his prior involvement in decontamination of the site. **Held:** no RAB

* **(5) Attitudinal predisposition toward a particular outcome** 
  + **look to the DM’s comments and attitudes in the course of the hearing and outside of the proceedings**
  + **involvement w/ media:** In **Chretein v Canada**, commissioner spoke to the media in colorful words, said: work was juicy, etc. Held: RAB since comments showed prejudgment of the matter.
  + **Prior scholarship:** prior scholarship doesn’t present RAB (**Great A&P**)

**Great A&P**: Since Connie Backhouse had been involved effectively as a party in an ongoing action, they didn’t have to make a decision based on her prior scholarship. This is a useful case for bringing up the question, and the fact that the court didn’t find her academic work disqualified her suggests at least that that was a harder question than the one they decided on. In **Committee for Justice & Liberty,** Mr. Crowe wrote on the matter as a consultant for a party (a hired expert). That’s different from a situation where someone is an academic and therefore free to speak her mind and protected by the doctrine of academic freedom.

* + **Closed Mind TEST:** 
    - **Democratically elected on a certain platform:** in **Old St. Boniface,** SCC held that b/c of the nature of municipal governance, it is to be expected that municipal councillors would have advocated a position during election time or before different committees prior to sitting on municipal council in the final decision of the same issue. The court held that the appropriate test is that a councillor be disqualified for bias only if it can be established in fact that a councillor has such a closed mind on a matter that any representation made would be futile.
    - **Multifunctional admin body** (i.e. perform investigations, policy making, adjudication): whereas the RAB test has been held to apply to individual bias cases, the closed-mind test, which supports a different evidentiary burden, is generally used in conjunction w/ policy-making and investigatory functions: **Newfoundland Telephone** (Andy Wells/ Consumer advocate; held that his mind was utterly closed)

**PART B: is there Institutional Bias?**

The institutional aspect of bias was first recognized in **Lippe**:

**TEST** (**Committee for Justice and Liberty** + **Lippe**)**:** “a reasonable apprehension of bias must be

* a reasonable one,
* held by reasonable and right-minded persons,
* applying themselves to the Q & obtaining thereon the required info, the test of “what would an informed person, viewing the matter realistically and practically, and having thought the matter through conclude”?

Are you “sufficiently free” of factors in **a substantial number of cases** that could interfere with your ability to make impartial decisions?

* If not, can still allege RAB on case-by-case basis

Arguably this situation gives rise to such an apprehension. A judge is expected to remain somewhat detached and objectively adjudicate each case on its merits. But, in this case…, which appear incompatible w/ the impartial state of mind required of a judge. To illustrate this general incompatibility, below are a number of examples of conflicts of interest which could arise: …

**Lippe:** whether the fact that a PT judge is permitted to continue to practice law gives rise to a RAB in the mind of a fully informed person in a substantial # of cases?

Delegatus non potest delegare (= he who is delegated cannot delegate) & administrative independence

Methods used to promote consistency have given rise to allegations of bias: full board meetings and development of lead cases.

**(i) Full Board Meetings: does the meeting give rise to RAB?**

Natural justice is context-specific and must take into account institutional constraints faced by an admin tribunal, such as the desire to achieve efficiency while balancing a heavy caseload (**Consolidated Bathurst**).

In **Consolidated Bathurst**, the SCC acknowledged that it is alright to have a full board meeting. And, the court outlined that Audi alteram partem (= let the other side be heard as well) imposes 2 conditions on full board meetings:

* **(1)** can’t discuss facts of specific case at meeting (can discuss only policy & law)
* **(2)** must disclose any new grounds if they come up at the meeting. And, the parties should get a right to respond.

Because full board meetings are internal directives, they can be scrutinized more than a statutory structure: **Tremblay:** internal consultation procedure used by the Commission was not created by the legislature (i.e. NOT in the statute)

The meeting can be problematic in terms of:

* **Who can initiate the meeting?**
  + **Consolidated Bathurst:** meeting initiated by the DM
  + **Tremblay:** meeting initiated by president of commission; it was problematic that the panel members couldn’t even ask for a consensus table
* **“Compulsory consultation” for panel**
  + **Tremblay:** panel members had to consult even if clear; it creates an appearance of a lack of independence, if not actual constraint
    - In this case, it can be argued that is not simply an internal consultation process: it is a compulsory consultation.
* **Procedure employed (i.e. nature of the meeting):**
  + **Consolidated Bathurst:** no minutes; this worked in favor of the board (there is no pressure on the DM to be consistent w/ their boss)
  + **Tremblay:** minutes, attendance taken, voting by show of hands
* **“Prior Commitment” situation for president**
  + **Tremblay:** the fact that the president was already on record as not agreeing with the draft decision of the commissioners.

There is a difference between “permissible pressure” and “unacceptable compulsory consultation” (**Tremblay**). The relevant issue is whether there is pressure on the decision maker to decide against he conscious (**Consolidated Bathurst**).

**Consolidated Bathurst (policy Q):** the court examined the consultation process established by the Ontario Labour Relations Board to promote consistency and quality in its decisions. In response to the immense task it faced (3,189 decisions in 1982-83), the OLRB adopted a practice consisting of holding plenary meetings on important questions of policy. **Held:** NO institutional bias

**Tremblay (pure of Q of law):** applies for reimbursement of dressing & bandages, but Minister says NO. So, appeals to commission (2-person panel) and they decide in favor of T. Then, a draft sent to legal counsel for verification and consultation. LC on vacation, so president of commission reviews and sends a memo explaining his contrary positon. Issue submitted to the “consensus table”, where the majority of members present agreed w/ the president. After, one of the commissioners changes her mind. Since the commissioners were divided, the matter was sent to the president pursuant to the Act. President denied reimbursement. **Held:** institutional bias

**Lead Case: does the use of the lead case lead to a RAB?**

* There must be a balance between tribunal efficiency/consistency and bias – consistency important, but don’t sacrifice impartiality/independence (**Geza**).
* RAB can arise from a totality of “factual matrix” of evidence, as opposed to a single determinative fact (**Geza**).

**Geza:** Large influx of Roma seeking refugee status. As a result of the heavy caseload and insufficient resources at the Immigration and Refugee Board (the IRB), they decided to generate “non-binding” lead case w/ all the info as basis for hearing panels going forward. Applicants in the lead case lose. They argue RAB in how the case was built, said: build the case to reduce successful # of Roma applicants. FCA found RAB based on the relationship between IRB and its bureaucracy, Citizenship and Immigration Canada (who had concerns about high # of positive decisions), involvement of Burbin

# Standard of Review

**STEP 1: Threshold: Can we JR this?**

* Constitutionally entrenched power of JR no matter how strong the privative clause: **Crevier, Pasienchyk**
* **Re reviewability of a municipal bylaw: Catalyst Paper**
  + Courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councilors may legitimately consider in enacting bylaws. Only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside.
    - Substance of the bylaw must conform to the rationale of the statutory regime.
    - Municipal councils must adhere to appropriate processes and cannot act for improper purposes.
    - Conclude by assessing process (OK if there are no reasons) and outcome.

**STEP 2: What Standard of Review Applies?**

Per **Dunsmuir**, the first step in conducting a SoR analysis is to “**ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded w/ regard to a particular category of Q.** If the inquiry proves unfruitful, courts must analyze the factors making it possible to identify the proper SoR.”

[X] might be a precedent. But, in case I’m wrong, below is a standard of review analysis:

* **NOTE: if there is one, you’d probably see it in the fact pattern!!!**

**Dunsmuir:** he was a court clerk in Fredericton. Non-unionized, statutory office holder serving at pleasure (appointed by LG-in-C). He was dismissed and given 4 ½ months salary in lieu of notice. The government relied on section 20 of the *Civil Service Act*: “subject to the provisions of this Act and any other Act” termination of any EE “shall be governed by the ordinary rules of K”. But, Dunsmuir argues that he was terminated for cause. If so, then he has alternative grieving under the *Public Service Relations Act*: “where an adjudicator determines that an EE has been discharged or otherwise disqualified for cause […], the adjudicator may substitute such other penalty for the discharge or the discipline as to the adjudicator seems just and reasonable in all circumstances.” **Issue:** does the adjudicator have jurisdiction to inquire into ER’s reason for dismissal with notice? **SoR = reasonableness; not met; went from 3 SoR to 2**

**Correctness**

Correctness review applies to:

* Questions of “general law” of “central importance to the legal system **AND** outside the adjudicator’s specialized area of expertise” (**Dunsmuir**).
* Constitutional questions regarding division of powers between Parliament and the provinces **AND** “other constitutional questions” (**Dunsmuir**).
* Jurisdictional Qs **OR** “true questions of vires” including jurisdiction as between tribunals
  + True jurisdiction Qs arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter(**Dunsmuir**). Per **CUPE**, courts “should not be alert to brand as jurisdictional, and therefore subject to broader [judicial] review, that which may be doubtfully so”
    - Ex. whether City is authorized under the relevant municipal acts to enact bylaws limiting the # of taxi plate licenses
  + Recognize what a jurisdiction-conferring clause looks like (examples on p.45 of CAN). At common law, simple jurisdiction requires jurisdiction over the (1) subject matter, (2) parties & (3) remedies.
  + **If a tribunal is interpreting its home statute,** then the courts probably won’t look at jurisdiction after the **Alberta Teachers** case.
    - **Is jurisdiction dead?** Per majority in **Alberta Teachers**, “experience has shown that the category of true questions of jurisdiction is narrow indeed. Since Dunsmuir, this court has not identified a single true question of jurisdiction…The discretion that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. Indeed, in view of recent jurisprudence, it may be that the time has come to consider whether, for purposes of JR, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate SoR”. On the other hand, **Justice Cromwell** takes issue with this and says that this proposition “undermine[s] the foundation of JR of administrative action”.

**Reasonableness**

The analysis must be contextual and is dependent on the application of a number of relevant factors.

* **(1) Privative clause:** Presence of a privative clause is a strong indication of reasonableness review, since it is evidence of Parliament or a legislature’s intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. It is not, however, determinative (**Dunsmuir**).
  + **A full privative clause:** **finality clause** (typically states that the decision of an agency is final and binding on the parties, but says nothing about JR) + **ouster clause**(prohibition on any court proceedings to set the outcome aside) (examples on p.46 of CAN)
  + Recognize whether a strong or a weak privative clause
* **(2)** A **distinct and special administrative regime** in which the decision maker has special expertise (labour relations for instance)
* **(3) Nature of Q:** where the Q is one of fact, \*discretion\* or policy, or where the legal issue is intertwined w/ and cannot be readily separated from the factual issue, deference will usually apply automatically (**Dunsmuir**).
  + **Deference will usually result** where a decision maker is interpreting its own statute **OR** statutes closely connected to its function, with which it will have particular familiarity **OR** where an administrative decision maker has developed particular expertise/regulatory function in the application of a general common law or civil law rule in relation to a specific statutory context (**Dunsmuir**).
    - Per **Pushpanathan**,making an evaluation of **relative expertise** has three dimensions: the court must characterize the expertise of the tribunal in Q; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the admin decision-maker relative to this expertise.

**Pushpanathan:** P claimed refugee status under the UN *Convention Relating to the Status of Refugees,* but this claim was never adjudicated as he was granted permanent residence status in Canada. Later, he was charged w/ conspiracy to traffic in a narcotic. Pleaded guilty and was sentenced to 8-yrs of prison. Lost PR and renewed his claim for Convention refugee status. Deportation order, unless found to be a convention refugee. Matter goes to IRB and the Board decided that he was not a refugee by virtue of the exclusion clause, which provides that the provisions of the Convention do not apply to a person who “has been guilty of acts contrary to the purposes and principles of UN”. **Held: correctness standard should be applied to the Board’s decision.**

**\*Reviewing Discretionary Decisions\***

Recognize statutory language conferring discretion on DM:

* “believes is required”, “deems reasonable”, “his or her discretion”, “deems necessary”
* authorizes administrative action and/or decision aimed at individual or small group
* language of “may” vs “shall”
* delegate broad powers, often through vague language (ex. council may make provisions for “good government” or “good rule”)

Discretionary decisions are rolled into SoR, no longer a separate “beyond law” category – courts can review a discretionary decision like any other decisions that decision makers make (**Baker**). And the SoR is reasonableness. Per **Suresh** (overruling **Baker** on this), as part of the reasonableness review of discretionary decisions, reviewing court must limit itself to ensure that only relevant considerations were taken into account and is **NOT supposed to reweigh** **factors** the admin actor/tribunal considered.

Traditional abuse of discretion categories still inform thinking about what is “reasonable” exercise of discretion:

* improper purpose and/or considerations
* bad faith
* dictation/influence (***Roncarelli***)
* wrongful delegation of powers
* fettering

**STEP 3: Applying the SoR: was SoR met?**

**Correctness:** when applying the correctness standard, a reviewing court **will not show deference** to the decisions maker’s reasoning process; it will rather undertake its own analysis of the question (***de novo* review**). There is one right answer and the judges decide what it is (**Dunsmuir**).

* “correct” interpretation based on what? E.g. statutory interpretation principles or public priorities? **Mossop**
* statutory interpretation under correctness review: **Northrop Grumman**

**Reasonableness:** it is **an organic analysis** – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls w/in a range of possible outcomes (**Newfoundland Nurses**). Reasonableness is found if:

* **(1)** **Reasonableness is concerned mostly w/ the existence of justification, transparency and intelligibility within the decision-making process** (**Dunsmuir**).
  + Per David Dyzenhaus the concept of “deference as respect” requires of the courts “not submission but a **respectful attention to the reasons offered or which could be offered in support to of a decision**”
  + **If there are no reasons at all,** then it is a PF problem, not SoR (**Baker**, **Newfoundland Nurses**)
  + **If municipal bylaw or other democratic component to DM, refer below**
  + **Deficient reasons:** Even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. There is a presumption of reasonableness (**Newfoundland Nurses**).

**Newfoundland Nurses:** arbitrator decides that time as a casual EE could not be credited towards annual leave entitlement if that EE became permanent. His decision is 12 pages long and includes sets of relevant facts, parties’ arguments, collective argument provisions, interpretive principles, then his decision. But does not explain why she reached the decision. **Held:** the reasons showed that the arbitrator was alive to the question at issue and came to a result well w/in the range of reasonable outcomes.

\*\*\* the court held that a decision-maker’s reasons do not need to include all arguments or explicit findings on each element leading to its final conclusion. Indeed, the court emphasized that such a requirement would paralyze the purposes of speed economy and informality underlying the grievance arbitration process. And, rejected the argument that deficient quality of reasons given could in effect amount to no reasons, thereby triggering a correctness standard under *Baker*.

* + **Implied/inferred reasons:** 
    - **“Implied reasons”:** what are “reasons which could be offered” when issue was never raised before tribunal?
      * **Can look at other tribunal decisions (including subsequent ones) construing similar language.** Reasons which could be offered in support of a decision is not a carte blanche to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favor of the court’s own rationale for the result. But a reviewing court should show restraint before finding that an implied decision on an issue not raised before the tribunal was unreasonable. If it is found that there is no reasonable basis for the tribunal’s decision, then remit to tribunal, so tribunal has a chance to provide a reasonable basis (**Alberta Teachers**).

**Alberta Teachers:** The Information and Privacy Commissioner received complaints that the Alberta Teachers’ Association disclosed private info in contravention of the Alberta *Personal Information Protection Act.* Section 50(5) of *PIPA* provided that an inquiry must be completed w/in 90 days of the complaint being received unless the Commissioner notified the parties that he was extending the time period and he provided an anticipated date for completing the inquiry. The Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded. 7 months later, an adjudicator delegated by the commissioner issued an order, finding that the ATA had contravened the Act. The ATA applied for JR of the adjudicator’s order. In argument, it claimed for the first time that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry w/in 90 days of the complained being received. **Held:** although the timelines issue was not raised before the Commissioner or the adjudicator, **the adjudicator implicitly decided that provided an extension after 90 days did not automatically terminate the inquiry. SoR = Reasonableness; found to be reasonable**

* + - Can you **infer reasons**?
      * If the Minister says that it’s reviewed all material submitted, look at what’s submitted, infer reasons (**Agraira**)

**Agraira:** denied refugee status. Applied to for PR, but IRPA denies PR if ties to a terrorist organization, unless “satisfy Minister that presence in Canada not detrimental to the national interest”. Minister didn’t explicitly analyze IRPA guidelines (5 factors) for ministerial relief and didn’t define “national interest” in reasons and did not grant status even though officer produced notes saying that Minister should grant discretionary relief. **Held: SoR = reasonableness:** a host of cases indicate that reasonableness is the standard of reviewing decisions on applications for ministerial relief under s. 34(2). Also, confirmed by following the approach discussed in Dunsmuir, where the court noted: “where the question is one of fact, discretion or policy, deference will usually apply automatically”. Since a decision by the Minister under s. 34(2) is discretionary, the differential standard of reasonableness applies. Also, b/c such a decision involves the interpretation of the term “national interest” in s. 34(2), it may be said that it involves a DM “interpreting its own statute or statutes closely connected to its function, with which hit will have particular familiarity”. This factor, too confirms, that the applicable standard is reasonableness. **Reasons met the standard:** court inferred reasons and then said they were reasonable – she said she “considered material and evidence submitted in its entirely”, so she considered briefing notes, guidelines, etc.; it is a discretionary decision, so she can interpret national interest how she wants; SCC supported definition of national interest by statutory interpretation

* + - Does **lack of reasons** equal unreasonableness?
      * Don’t remit for reasons if “nothing to be gained” from explaining what’s “readily apparent” (**McLean**)

**McLean:** Ontario Securities Commission issued an order against M. Later, M is notified that the Executive Director of BC Securities Commission was applying for an order against her. M made a written submission arguing that the 6-yr limitation period had expired. The Commission issued an order essentially identical to that made by Ontario Commission and implicitly rejected her limitation period assertion. **Held:** Commission’s interpretation of the limitation period was reasonable. Although it would have been preferable had the Commission provided reasons for its decision, there was nothing to be gained from requiring the Commission to explain on remand what was readily apparent.

* **(2) “whether the decision falls within a reasonable range of possible, acceptable outcomes which are defensible in respect of the facts and the law”** (**Dunsmuir**).

**Celgene:** what is reasonable depends on Board’s mandate/purpose

**Celgene:** Celgne argued that the drug had been sold in New Jersey and so fell outside the Board’s jurisdiction. The Board was justified in concluding that to comply w/ its mandate, sales “in any market in Canada” for the purposes of the relevant provisions, should be interpreted to include sales of medicines that are regulated by the public laws of Canada, will be delivered and dispensed in Canada, and where, in particular, the cost of the medicine will be borne by Canadians. The Board’s interpretation of its **mandate** under the relevant provisions was consistent w/ its consumer protection **purpose** and should not be disturbed.

**Nor-Man** (labour arbitrator creatively applied estoppel): an “arbitral remedy” can be reasonable even if legally incorrect. Fish J. sets out four considerations:

* objectives & purpose of the statutory scheme
* principles of labour relations
* nature of the collective bargaining process
* factual matrix of the grievance

In this case, the arbitrator adopted and applied the [x] doctrine in a reasonable manner consistent w/ the four considerations set out by Fish J.

**What is reasonable in the particular context of bylaws passed by democratically elected municipal councils? Municipalities** don’t have to give reasons for **bylaws** (**Catalyst Paper;** disproportionate tax paid by CP to the municipality)

* Courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councilors may legitimately consider in enacting bylaws. The applicable test is this: **only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside.**
* Reasonableness limits municipal councils in the sense that the substance of their bylaws **must conform to the rationale of the statutory regime set up by the legislature.**
* Municipal councils **must adhere to appropriate processes and cannot act for improper purposes.** 
  + Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality, but does not apply to the process of passing municipal bylaws.

**Charter (first determine if it applies)**

**@ Tribunal:**

* **The Charter applies to admin tribunal’s actions** – admin agencies must act consistent w/ the Charter “and its values” when exercising statutory functions AND
* Admin tribunals can apply the Charter (including to their own enabling statute) **if they can consider questions of law and legislation hasn’t expressly taken Charter-interpretation power away:** (**Conway**)

**On JR:**

* Substantive review of tribunal’s **constitutional analysis of a statute** (including home statute): SoR = correctness (**Dunsmuir**) [determining constitutionality of a law]
* Substantive review of tribunal’s **decisions/ interpretations/ actions** w/in jurisdiction, where “Charter values” are at stake: [Charter application to specific facts]
  + To determine whether administrative decision-makers have exercised their statutory discretion in accordance w/ Charter protections, use “a richer conception of administrative law” (including balance & proportionality analysis), not Charter-based s.1 analysis. the **review should be in accordance w/ an admin law approach, not a s.1 Oakes analysis. And, the standard of review is reasonableness.** On JR, the question becomes whether, in assessing the impact of the contexts, the decision reflects a **proportionate balancing** of the Charter rights and values at play (i.e. statutory mandate) (**Dore**, overruled **Multani** on which approach to use). In **Loyola**, for a majority of four judges, Abella J. applied the **Dore** framework to the minister’s decision. But, it should be noted that the three person concurring judgment in **Loyola** applied a proportionality test without mentioning **Dore** altogether.
    - In the Charter context, the reasonableness analysis is one that centers on **proportionality,** that is, on ensuring that the decision interferes w/ the relevant Charter guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a **proper balance** of the mandate w/ Charter protection, it is a reasonable one (**Dore**).

**Dore:** lawyer had an ongoing dispute with a judge who was ultimately disciplined by the judicial committee. The Bar suspended Dore for 21 days and issued a formal reprimand. Dore agreed that the reprimand generally fell within the Bar’s disciplinary discretion, but argued that the reprimand offended the Charter value of his right to freedom of expression and therefore, shouldn’t stand. **Held:** the reprimand was upheld b/c the infringement was mild and reflected an effort to balance the value with the valid statutory public interest objective of ensuring moderation and civility in a profession that demands it even in the face of difficult circumstances.

**Loyola:** Quebec has a secular religious education course that is mandatory across the province, in public and private schools alike. An exemption is available “provided the institution dispenses programs of studies which the Minister…judges equivalent”. Loyola, a Jesuit high school in Montreal, applied for an exemption. It wishes to teach a religious education from (primarily) a Catholic perspective. The Minister refused the application, essentially because Loyola wants to teach comparative religion and ethics from a Catholic point of view. He wrote, for example: “According to the summary of the program proposed by Loyola High School and transmitted to the department for evaluation, the program does not meet the requirements for the Ethics and Religious Culture program in terms of religious culture, as religions are studied in connection with the Catholic religion”. **Held:** for both majority and minority, the Minister’s inflexible position that religion had to be taught from a neutral perspective violated religious freedom and ran counter to the purpose of the exemption provision. Loyola won!

# Administrative Tribunals Act (ATA)

**For JR from fed tribunal:**

* Go to Federal Courts Act
* Remedies in s.18.1 still based on prerogative writs
* s.18.1(4): grounds of review (NOTE: this is not same as SoR)

**For JR from provincial tribunal:**

* JRPA in BC replaces old prerogative writs w/ statutory “judicial review” - JR by way of a petition
* ATA

**ATA: Provisions apply only if tribunal’s enabling legislation adopts!**

**privative clause:** finality + ouster + jurisdiction (note: a half privative clause doesn’t count under the ATA)

**s.57** sets a 60-day time limit and court has discretion to extend (no time limit in JRPA).

**If there is a privative clause, use s.58:**

* (a) if discretion/fact/law = PU (defined in s.58(3))
  + PU if discretion (a) is exercised arbitrarily or in bad faith, (b) is exercised for an improper purpose, (c) is based entirely or predominantly on irrelevant factors, or (d) fails to take statutory requirements into account.
* (b) if procedural fairness = CL
* (c) for anything else, SoR = correctness (Qs of law in respect of which tribunal doesn’t have jurisdiction)

**If there is NO privative clause, use s.59:**

* Default SoR = correctness
* Findings of fact = reasonableness or if no evidence
* (3) set aside a discretionary decision if PU (def same as s.58)
* PF standard is fairness

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Privative Clause?** | **Question of Fact** | **Question of Law** | **Discretionary Decision** | **Procedural Fairness** |
| **YES:** Go to **58** 🡪 | **PU** [58 (2)(a)] | **PU** [58(2)(c)] | **PU** [58(2)(a)] | **“fairly”** [58(2)(b)] |
| **NO:** Go to **59** 🡪 | **R** [59(2)] | **C** [59(1)] | **PU** [59(3)] | **“fairly”** [59(5)] |

**PU**

Despite *Dunsmuir*, patent unreasonableness will live on in BC, but the content and the precise degree of deference will necessarily continue to be calibrated according to general principles of administrative law – s.58 *ATA* is clear legislative direction to give SDMs a high degree of deference on issues of fact and effect must be given to this clear intention: **Khosa**

Per **Pacific Newspaper Group (BCCA 2014)**, the SoR of PU under the ATA has the same meaning that PU had at common law before *Dunsmuir*. The BCCA adopts this definition of it, originally from the *Law Society of New Brunswick v Ryan (SCC 2003)*:

A patently unreasonable decision is one that can be described as “clearly irrational”, “evidently not in accordance w/ reason” or “so flawed that no amount of curial deference can justify letting it stand”.

# Appendix

**FCA (Federal)** – s.101 court, no inherent jurisdiction

* JR as of right except IRPA (for which need to seek leave)
* **Standing to seek JR**
  + **18.1(1)** application made by AG of Canada or anyone directly affected
  + public interest standing
* **s. 18:** gives the federal court the ability to hear JR applications from fed Ts
* **s. 18.1(2):** time limit for making app: 30 days from time decision made
* **Ground of review, s. 18.1(4):** need to show acted in one of these 6 options if seeking JR in Fed Court
  + acted w/out jurisdiction
  + failed to observe procedural fairness
  + erred in law
  + based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner
  + fraud or perjured evidence
  + acted in any other way that was contrary to law
* **SOR**
  + Once in JR, court will decide which SoR to apply: correctness or reasonableness
  + Grounds of review get you in the door, they don’t address SoR (**Khosa**)
* **s. 18.5:** if statutory right of appeal, then NOT subject to review except in accordance w/ that Act
  + completely ousts JR if it applies, no need for analysis of what’s an adequate remedy – BUT be sure to read the enabling statute
* **s. 28:** list of certain tribunals that directly go to Fed Court of Appeal

**JRPA (BC)** – s. 96 court

* **s. 2(1)**An application for JR must be brought by way of a petition proceeding.
* **s. 2(2)(a)** relief in the nature of mandamus, prohibition or certiorari;(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.
* **s. 1:** definition of statutory power vs. statutory power of decision – SP broader, on top of adjudicative role, there is an investigative and policy role. BUT SPD is adjudicative.
* **s. 12:** eliminates old prerogative writes for this new application procedure
* **ss. 3+4:** can’t get anything more than the old prerogative writs
* **s. 5: (1)** court has power to direct tribunal to reconsider; (2) to do so, MUST (a) give reasons & (b) any directors it thinks appropriate
* **s. 7:** court has the power to set aside an unauthorized statutory power of decision instead of making a declaration.
* **s.14:** sufficiency of application – as long as set out grounds for relief, don’t need to specify which writ using
* **s. 18:** quo warranto abolished
* **s. 10:** on an application for JR, court may make an interim order
* **s. 11:** no time limit for bringing a JR application UNLESS (a) enactment says others wise, and (b) court considers delay will result in hardship.

**ATA**

* **s.1: def section**
  + facilitated settlement process: process established under s.28
  + privative clause: finality + ouster + jurisdiction (note: a half privative clause doesn’t count under the ATA)
  + tribunal: a tribunal to which provisions of this Act apply
* **Appointments & composition** (to institutionalize a certain degree of independence)
  + s.2: chair of tribunal appointed on a merit-based process
* **Part 3: clustering** 
  + s.10.1: LG may cluster tribunals if thinks more effective and efficient together than alone
* **Part 4: practice & procedure** 
  + s.11: tribunal has power to control its own process and make rules respecting practice & procedure