Table of Contents

[1. what is administrative law 3](#_Toc479070513)

[A. theory of administrative law 4](#_Toc479070514)

[B. elements of judicial review 4](#_Toc479070515)

[I. source of power for judicial review 4](#_Toc479070516)

[II. why and how do the courts intervene 4](#_Toc479070517)

[2. the rule of law 5](#_Toc479070518)

[A. Theory/concept 6](#_Toc479070519)

[B. Purpose → non-arbitrary rule 6](#_Toc479070520)

[C. Theorists 6](#_Toc479070521)

[I. Dicey: judicial oversight = proper control on exec discretion 6](#_Toc479070522)

[II. Fuller: Procedure should = successful social relations 6](#_Toc479070523)

[III. Raz: legality = practical guide for making effective law 7](#_Toc479070524)

[IV. Dworkin: individual rights focus: 7](#_Toc479070525)

[D. Case Law 8](#_Toc479070526)

[Roncarelli – Reading in ROFL requirements 8](#_Toc479070527)

[E. ROFL in the constitution (written and unwritten) 8](#_Toc479070528)

[Manitoba language rights – substantive rofl obligations 8](#_Toc479070529)

[Secession reference – binding unwritten principles 9](#_Toc479070530)

[F. ROFL redux: the new minimalism 9](#_Toc479070531)

[Imperial tobacco – constraining the expansive rofl principles 9](#_Toc479070532)

[3. Regulations and rule-making 10](#_Toc479070533)

[A. Distinguishing concepts 10](#_Toc479070534)

[B. Theoretical perspectives on rule-making and delegation 10](#_Toc479070535)

[C. Benefits and risks of delegation 10](#_Toc479070536)

[D. Controlling the risks of delegation 11](#_Toc479070537)

[I. Structural Approaches: 11](#_Toc479070538)

[II. Legislative Review: 11](#_Toc479070539)

[III. Judicial review of substance 12](#_Toc479070540)

[IV. Process Requirements 12](#_Toc479070541)

[4. Remedies 14](#_Toc479070542)

[Remedial options at the tribunal stage 14](#_Toc479070543)

[I. Statutory Authority 14](#_Toc479070544)

[II. Novel administrative remedies 14](#_Toc479070545)

[III. Charter remedies under s. 24(1) 16](#_Toc479070546)

[IV. Enforcing Tribunal Orders 16](#_Toc479070547)

[5. Challenging Administrative Actions 17](#_Toc479070548)

[A. Internal tribunal mechanisms: 17](#_Toc479070549)

[B. External (non-Court) Mechanisms: 17](#_Toc479070550)

[C. Using the courts – Statutory Appeals 17](#_Toc479070551)

[D. Using the courts – Judicial Review 18](#_Toc479070552)

[6. getting to JUDICIAL REVIEW 18](#_Toc479070553)

[A. Discretionary Bases for Refusing Relief: 18](#_Toc479070554)

[Domtar v Quebec (scc 1993) What counts as unreasonable? 18](#_Toc479070555)

[B. Is Judicial Review Available? 19](#_Toc479070556)

[C. Does the individual have standing? 20](#_Toc479070557)

[D. To which court must the party apply? 20](#_Toc479070558)

[E. Has the Party met the deadline? 20](#_Toc479070559)

[F. Has the Party Exhausted All other adequate means of recourse? 20](#_Toc479070560)

[G. What remedies Are available? 21](#_Toc479070561)

[Judicial Review Procedure Act, BC: 21](#_Toc479070562)

[H. Judicial Review at Federal Court 22](#_Toc479070563)

[The Federal Courts Act 22](#_Toc479070564)

[REDUX 24](#_Toc479070565)

[7. Procedural Fairness 24](#_Toc479070566)

[Nicholson v Haldimand Norfolk Regional Police [1979] SCC 25](#_Toc479070567)

[A. Threshold: when is fairness required? 25](#_Toc479070568)

[Cardinal v Kent Institution [1985] SCC 25](#_Toc479070569)

[A. Applies to decisions 25](#_Toc479070570)

[B. That affect the rights, interests, and privileges of an individual 26](#_Toc479070571)

[C. That is not legislative in nature 26](#_Toc479070572)

[Miscellaneous 28](#_Toc479070573)

[B. Content of Procedural Fairness 29](#_Toc479070574)

[Baker v Canada (Minister of Citizenship and Immigration) 29](#_Toc479070575)

[Canada (AG) v Mavi (2011) SCC 30](#_Toc479070576)

[C. Specific Components of the duty 31](#_Toc479070577)

[8. Constitutional Protection of Procedural Fairness RIghts 32](#_Toc479070578)

[A. Threshold 32](#_Toc479070579)

[Charter 32](#_Toc479070580)

[Bill of Rights 32](#_Toc479070581)

[B. Content 33](#_Toc479070582)

[I. Oral Hearings: Singh v Minister of E&I (1985) SCC 33](#_Toc479070583)

[II. Disclosure + Right to Reply: Suresh v Canada (minister C&I) 2002 SCC: 33](#_Toc479070584)

[III. Duty to Give Reasons 35](#_Toc479070585)

[IV. Right to State-Funded Legal Counsel 35](#_Toc479070586)

[V. Undue Delay 35](#_Toc479070587)

[VI. Ex Parte (W/o Party), IN Camera (Closed) Proceedings 35](#_Toc479070588)

[9. impartiality, independence, and bias 36](#_Toc479070589)

[A. Sources of the guarantee of an independent Tribunal? 36](#_Toc479070590)

[B. The Law of Tribunal Independence 36](#_Toc479070591)

[Wave 1: Judicial Independence to tribunal independence 36](#_Toc479070592)

[Wave 2: Parliamentary Supremacy vs Interference 37](#_Toc479070593)

[Wave 3: Reasserting the push for administrative independence? 38](#_Toc479070594)

[C. Bias 38](#_Toc479070595)

[I. Individual Bias 39](#_Toc479070596)

[II. Institutional Bias 40](#_Toc479070597)

[10. Standard of Review 42](#_Toc479070598)

[A. Pre-1979 Judicial Strategy 43](#_Toc479070599)

[CUPE local 963 v New Brunswick Liquor Corp (1979) SCC 43](#_Toc479070600)

[B. Development of Standard of Review Post-Cupe 43](#_Toc479070601)

[Pushpanathan (1998) SCC 44](#_Toc479070602)

[C. Dunsmuir and Beyond 44](#_Toc479070603)

[Dunsmuir v New Brunswick (2008) SCC 45](#_Toc479070604)

[Edmonton (city) v Edmonton East (2016) 47](#_Toc479070605)

[D. Correctness Review 49](#_Toc479070606)

[Northrup Grumman (2009) SCC 49](#_Toc479070607)

[E. Reasonableness Review 50](#_Toc479070608)

[Reviewing Discretionary Decisions 50](#_Toc479070609)

[How to do a reasonable analysis 51](#_Toc479070610)

[F. Reasonable Reasons 52](#_Toc479070611)

[Newfoundland Nurses (2011) SCC 52](#_Toc479070612)

[Alberta (INformation and Privacy Commissioner) v Alberta Teachers’ Association (2011) SCC 53](#_Toc479070613)

[Agraira v Canada (Public Safety + Emergency Preparedness) (2013) SCC 54](#_Toc479070614)

[McLean v BC (Securities Commission) (2013) SCC 54](#_Toc479070615)

[G. Charter Implications 55](#_Toc479070616)

[I. Administrative Jurisdiction to Apply the Charter 55](#_Toc479070617)

[II. How to judicially review a Tribunal’s Charter-implicated decision 55](#_Toc479070618)

[Dore v Barreau du Quebec 2012 SCC 57](#_Toc479070619)

[Loyola High School v Quebec (AG) (2015) SCC 58](#_Toc479070620)

[TWU v LSBC (2016) BCCA 58](#_Toc479070621)

[H. Reflecting on Standard of Review 60](#_Toc479070622)

[11. Statutory Reform: Administrative Tribunals Act 61](#_Toc479070623)

[Key ATA Provisions 61](#_Toc479070624)

[Khosa v Canada (C&i) [2009] SCC 63](#_Toc479070625)

# what is administrative law

The judicial development of legal principles that govern governmental conduct (through judicial review) and delegated executive power.

**Who is the administration?** Executive branch of gov’t and those to whom the executive delegates power

|  |  |
| --- | --- |
| CHARACTERISTICS OF ADMINISTRATIVE BODIES | |
| **Similarities** | **Differences** |
| * Degree of independence * Specialized knowledge/function * Power to determine real world relationships | * Structure and orientation * Caseload * Role in larger system * Impact on individuals * Composition of membership |

|  |  |
| --- | --- |
| WHY CHOOSE AN AGENCY? | |
| **Vs. a government department** | **Vs. a court** |
| * Agency can be insulated from politics * Greater expertise * Efficiency | * Ability to enact proactive solutions * Conserving judicial resources * Cts not always best venue for DM |

|  |  |
| --- | --- |
| EVALUATING THE ADMINISTRATIVE STATE | |
| **With Bureaucratic Criteria** | **With Legal/Judicial Criteria** |
| 1. Effectiveness at reaching objectives 2. Efficiency (via C:BA) 3. Manageability (i.e. appropriateness of structure) 4. Legitimacy/political feasibility | 1. ROFL 2. Procedure 3. Precedent    1. Following it    2. Making it |

## theory of administrative law

**Legal Formalism (Dicey, Positivism, Negative Rights)**

Characterised by adherence to 4 principles:

1. Law = scientific legal rules that could be discovered via careful study and application of legal principles
2. Such rules best discovered through careful study of previous cases
3. Legal docs speak for themselves ∴ judges just need to read the words and apply
4. Judges should ignore the policy implications of their decisions

Perspective on the administrative state:

* Tribunals usurping the role of the cts
* Tribunals worse @ DM b/c they’re using different methods from the cts and are not bound by precedent
  + ∴ less likely to uphold individual rights

→ how CDN cts behaved towards admin bodies until recently

## elements of judicial review

### source of power for judicial review

|  |  |
| --- | --- |
| 1. ORIGINAL JURISDICTION: | Individual suing gov’t through ordinary civil law OR  References re: constitutional questions |
| 1. APPELLATE JURISDICTION: | Enabling statute creates a right to appeal a decision to the cts (rare) |
| 1. INHERENT (SUPERVISORY) JURISDICTION: | JR involving ROFL concerns (most often RE: individual adjudications) – const’lly guaranteed through s. 96 (CA, 1867)   * 2 principles:   + Procedural fairness   + Substantive review |

### why and how do the courts intervene

1. PROCEDURAL FAIRNESS:
2. *Is this an issue that the ct should review? (****threshold question****)*
   * + Usually if the decision affects individual rights or interests, then there is some entitlement to PF

→ If yes, then:

1. *What is the general level of PF req’d? (****general considerations****)*
   * + the nature of the decision and the process followed in making it
     + nature of the statutory scheme
     + importance of the decision to the individual affected
     + legitimate expectations of the parties
     + procedures chosen by the tribunal

→ if yes, then:

1. *Did the administrative DM use the proper procedures in making their decision? (****specific procedures****)*
   * + Look at the enabling statute!!!
     + Then look at general leg’n, like the *BC Administrative Tribunal Act*
2. SUBSTANTIVE REVIEW:
3. *Did the DM make an error of the kind/magnitude that the ct is willing to get involved?*
4. *If so, what is the standard of review applicable to the decision?*

***Dunsmuir***

* + - Correctness (was it the same decision that the ct would have reached?)
    - Reasonableness (was it w/in the range of reasonable options?)
    - Determining the standard to be used:
      * Is there precedent?
      * If not, consider the following (non-exhaustive) list of factors:
        + Pres/absence of privative clause
        + Purpose of the tribunal as determined by the enabling statute
        + Nature of the question at issue
        + Expertise of the tribunal
    - NB: default position is reasonableness UNLESS:
      * Q of central importance to the legal system as a whole *and* o/s the adjudicator’s specialised area of expertise
      * A const’l Q
      * “true” Qs of jurisdiction
      * Qs of competing jurisdiction, as between 2+ admin agencies

1. REMEDIES AND LEGITIMACY OF JUDICIAL REVIEW:
2. *If there are procedural/substantial defects in the decision, should the court intervene?*
3. *If so, how?*

# the rule of law

**2 Different Components:**

1. Relationship between state + citizens
2. Relationship between gov’t sectors
   1. Separation of powers
   2. Authority derivative of different sources ∴ something important about maintaining distinctions

**Principle of legality:** there is a set of underlying principles, some normative content, to the law which informs case law and legislation. Law must always authorise the use and constrain the risk of arbitrary use of public power.

→ HOW? (1) Constrain actions of public officials (2) regulate law-making activity (3) seek to minimise harms created by the law itself

**Rule of Reason:** Prior to deciding the legitimacy of any given rule, we must decide what makes a rule legitimate (e.g. it’s legit b/c it’s the product of the democratic process)

**Arbitrariness:**

1. Substantive: Decision was irrational, unprincipled, morally offensive
2. Procedural: Process of DM was not connected to the reasons the DM power was given

## Theory/concept

Essentially contested concept *but* characterised by 3 interrelated features:

1. Jurisprudential principle of legality
2. Institutional practices of imposing effective legal constraints on the political exercise of power w/in the three branches of gov’t
3. A distinctive political morality shared by all in the CDN political community (i.e. principles of justice that are publicly endorsed and which justify the use of coercive state power)

## Purpose → non-arbitrary rule

**ROFL:** the normative standard against which the use of public power can be evaluated and challenged; public officials must be bound and auth’d by law when exercising power

**Preventing Arbitrariness:**

1. In process: ensuring appropriate procedures will increase probability of just result
2. Jurisdiction: maintaining separation of powers
3. Substance: ensuring moral, reasonable, rational Ds

e.g. ***Insite*** case: decision of Minister to not renew exemption = arbitrary b/c it did not connect to the statutory objectives

## Theorists

### Dicey: judicial oversight = proper control on exec discretion

**ROFL:**

1. Absence of procedural arbitrariness in gov’t authority (esp. executive power and the admin state)
2. Formal legal equality
3. Constitutional law that forms a binding part of the ordinary law of the land

**Mechanism of ROFL:** Common law + parliament (source of all normal law and the source of all executive power) + (unwritten) constitution = institutional control

**Justification for Judicial Intervention:**

1. Institutional role of cts as principal check on arbitrary power
2. Specific monitoring job given by statute
3. Judicial self-perception as vindicators of individual rights

**Role of the Judiciary:** institutional connection between rights and remedies; less vulnerable to power-grabbing by the executive ∴ best protectors of individual rights. This means, in turn, inherent distrust of administrative state.

### Fuller: Procedure should = successful social relations

**ROFL:** Enterprise of subjecting human conduct to the governance of rules in order to create and sustain a network of successful social interaction

**Mechanism of ROFL:** Abide by the following 8 principles of law:

|  |  |
| --- | --- |
| 1. General 2. Public 3. Clear 4. Constant through time | 1. Non-contradictory 2. Congruent as applied (laws as written = law as applied) 3. Prospective 4. Capable of being performed |

* Law should maintain this stable structure which allows individuals to predict legal responses to their behaviour
* Positive feedback loop: Voluntary compliance with law → benefits compliant people → incentive for law-makers to make laws that are easy to comply w/

**Role of the Judiciary:** common set of principles should also constrain the judiciary; courts can’t be the only safeguards b/c:

* Inability/unwillingness of parties to pursue litigation (A2J concerns)
* Inability of cts to properly constrain police lawlessness
* Cts departing from principles
* Not articulating reasonably clear, general rules
* Issuing contradictory rulings
* Aggravating problem of interpretation
* Changing direction frequently/suddenly

### Raz: legality = practical guide for making effective law

Similar to Dicey in terms of belief in core principles but focuses more on institutions and judicial independence

**ROFL:** 3 basic principles:

1. Certainty (people must be able to be guided by the system)
2. Generality
3. Equality (no one is above the law)

* ROFL is not an ideal to be pursued for its own sake but rather b/c it helps realise other values – like democracy

**Mechanism of ROFL:** The system of law must follow certain patterns:

1. Prospective and open with stable and clear rules
2. Underpinned by open/clear principles
3. Existence of jud’l independence, A2J, and meaningful remedies
4. Limitation on jud’l and police power

In sum: implementation of a ROFL system is through competent and relatively impartial officials who use predictable and fair procedures in order to make public and reasoned decisions that if an individual wanted to dispute, could potentially be argued by specially trained legal professionals and reviewed by an independent judiciary.

**Role of the Judiciary:** a pillar in a system of mutual institutional support:

Legal institutions are loyal to democratic rights in interpreting intent and rejecting inconsistent purposes w/in leg’n and democratic institutions respect civil rights, legal coherence, and long-term interests in the legal culture

### Dworkin: individual rights focus:

**ROFL:** concerns the person (the legal subject) ∴ ROFL is oriented around protecting human dignity and rights

**Mechanism of ROFL:** giving people individual dignity and respect when interacting with the law:

* Non-arbitrary procedure (∴ allowing the individual to predict outcomes)
* Law is a system of interpretation only – judges must interpret the law that came before them and apply it in new cases

**Role of the Judiciary:** Judges are the default keepers of moral integrity of the political order **but** not the only ones.

* Judicial intervention may be necessary to ensure respect for individual rights
  + The legal subject is entitled to demand the resolution of disputes over the content of rights through the legal system

## Case Law

### Roncarelli – Reading in ROFL requirements

|  |  |
| --- | --- |
| **F** | **R** (Π) owned a restaurant and (unrelatedly) was bailing several fellow Jehovah’s witnesses out of jail after they had been put there for distributing religious pamphlets.  **D** (Δ) is the super Catholic Premier and AG. He ordered R to stop bailing folks out and when R refused, he had the liquor board rescind R’s liquor license. R’s restaurant went out of biz.  **Enabling statute:** all of the powers of the QLC are to be vested in one person, the manager, who may cancel/refuse a license at any time |
| **I** | Was it okay that the QLC terminated the license, in this way, for these reasons? |
| **D** | No. |
| **RA** | Without express language, no act can be taken to contemplate unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature of the statute |
| **RE** | Public authorities (esp those with lots of discretion) are always constrained by ROFL, even where statute gives no explicit mention of power constraints  → where the statute is silent, must look to the purpose of the statute to determine whether the decision was legit  → if a delegated DM makes a decision o/s that purpose, it’s o/s their jurisdiction and ∴ invalid  *a type of rule of reason: determining that legitimacy derived from leg’ve purpose* |

A formalist interpretation to ROFL might say:

1. (as Cartwright did in his dissent) that there was nothing wrong with the decision because there were no rules laid down to guide the decision-making process. How could you have a ROFL problem, when he was exercising perfectly legitimate power? OR
2. (as Rand also did in his majority reasons) that the decision was made by the AG/Premier. As it was dictated by another person – an individual not empowered to exercise the QLC powers, the QLC effectively made no decision ∴ it’s invalid b/c it’s an arbitrary use of power and violation of legal principle of validity.

## ROFL in the constitution (written and unwritten)

**Unwritten:** implied from preamble to CA, 1867: “Canada will have a Constitution similar in principle to that of the UK.”

**Written:** Preamble to CA, 1982: “Canada is founded upon principles that recognize…the ROFL.”

***Provincial Judges Remuneration:*** ROFL has real content, among which is the idea that even prov’l judges must be independent

### Manitoba language rights – substantive rofl obligations

* MB repeatedly failed to enact bilingual leg’n, contrary to the prov’l constitution ∴ acted w/o legal authority, arbitrarily, and had permitted officials to act o/s the law
* Not complying w/ manner and form reqments = transgression of the principle of legality

**Ct characterised ROFL as principle of legality, understood in 2 ways:**

1. The law is supreme over gov’t officials and individuals ∴ excludes the influence and operation of arbitrary power
2. Law and order are indispensable elements of civilized life w/in a political community ∴ ROFL req’s the creation + maintenance of an actual order of positive laws which preserves and embodies the more general normative order

### Secession reference – binding unwritten principles

* **4 unwritten principles of CDN constitution:** Federalism, democracy, constitutionalism + ROFL, and respect for minorities

→ these can actually have the force of law – i.e. they are binding upon courts and give rise to substantive legal obligations – both general and specific – and may function as real constraints on gov’t action

* Ct created these unwritten principles and used them to trump leg’n and constrain parliamentary sov’ty
* They also used the principles to constrain their own power insofar as they stated that it was not w/in their jurisdiction to decide something like the legality of Quebec’s secession

## ROFL redux: the new minimalism

### Imperial tobacco – constraining the expansive rofl principles

Question of whether the BC gov’t can make a law req’ing tobacco companies to pay health care costs for the damage done to citizens who smoked.

**3-part test for ROFL:**

1. It is supreme over private individuals and gov’t officials, who are req’d to exercise their power non-arbitrarily and according to law
2. Reqs the creation and maintenance of a positive order of laws
3. Reqs the relationship between state and citizen to be regulated by law

\*\*also linked to the idea of judicial independence

**What ROFL does not contain:**

1. The ability of the ct to strike down leg’n on its content – the ct’s ability to constrain government is limited to the executive, the administrative, and the legislature **only** on matters of manner and form
2. The req’ment that law be prospective (except for crim law) or general
3. Prohibition on the conferral of special privileges on gov’t – except where necessary for effective governance
4. Assurance of a fair civil trial

→ When the legislature uses their power **validly but arbitrarily** and the content of such legislation **does not engage an express constitutional provision,** then citizens must rely on other forms of gov’t accountability for recourse – the cts can’t do it.

***Charkaoui:*** No positive rights granted by ROFL

***Christie:*** (re: 7% tax on legal services infringes ROFL b/c impeding A2J) → ROFL, an unwritten principle, cannot be used to strike down o/w valid legislation

***Insite:*** substantive arbitrariness of ministerial decision making goes against ROFL (difference here is that the actor concerned is exec not leg – determined to be arbitrary b/c o/s of statutory purposes)

***Trial Lawyers:*** (challenge to ct fees) Found to contravene ROFL by impeding A2J which made it untenable; it gets in the way of access to s. 96 cts which is unconstitutional PLUS ROFL protects A2J and judicial independence. (diff from Christie b/c about access to the actual cts, not about lawyers’ fees)

***Corn Growers:*** In cases of statutory ambiguity and where there are multiple interpretations that are reasonable, the ct should defer to the interpretation of the tribunal b/c of its expertise, privative clause, and the reasonableness of the decision.

# Regulations and rule-making

## Distinguishing concepts

**Regulations:** form of law developed by the exec that do not set general gov’t policy (like statutes) but rather explain how statues are supposed to work

|  |  |
| --- | --- |
| **Rule-making** | **vs. Adjudication:** |
| * Prospective | * retrospective |
| * Systemic | * individual |
| E.g. Baker case: regulations that allowed for board’s existence, guidelines around humanitarian relief, structure of dispute resolution → all happened *before* Baker got to the adjudication stage | |
| **Delegation** | **vs. discretion:** |
| Power/authority to exercise certain powers | how much leeway the delegated authority has in exercising their powers |
| **Hard law** | **vs. Soft law**: |
| * Legally binding reqments   ∴ power must be expressly granted by statute | * non-binding guidelines, developed by the exec   ∴ power to develop doesn’t need to be granted |
|  | **pros:** flexible, can come from anywhere |
|  | **cons:** questionable democratic legitimacy |
| Issues of expertise, time, and info arise for making both regulations and soft law | |
| **Rules-based** | **vs. principles-based approach to rule making:** |
| * detailed, certain, predictable, centralised, * need to control people making rules and guidelines | * general, flexible, unpredictable * desire to rely on the expertise of exec personnel |

## Theoretical perspectives on rule-making and delegation

**Kenneth Culp-Davis:**

* There’s a “sweet spot” in discretion where both accountability and flexibility are achieved
* Certain bodies need more discretion (e.g. SEC)
* Rule-making may be better than adjudication b/c:
  + Prospective
  + Prevention > cure
  + Ability to deal with systemic issues
  + More transparent
  + Can structure/restrain discretion

**Lorne Sossin:** Rule-making can have a participatory component which can support a revitalized welfare state through administrative discretion and a more involved citizenry

## Benefits and risks of delegation

1. **Reasons to delegate:**
   1. **Expertise:** the all-important consideration underlying much of admin law. There are too many specified areas of expertise that legislators are unlikely to know enough to make optimal rules
   2. **Time and information:** even if they had the expertise, it would not be practically feasible
   3. **Flexibility:** legislation is never going to be perfect b/c prediction will always fail in some respects and leg’n is hard to amend ∴ to allow for changing/unpredicted circumstances, decisions should be delegated
   4. **Technical decisions:** take the politics out of technical questions
   5. **Costs:** it’s cheaper to create an agency that is in charge of DM than expecting the legislature to do all of it
2. **Underlying Values of Delegation:**
   1. **Trust**
   2. **Reliance**
   3. **Best interests**
   4. **Public good/ general welfare**
3. **Risks of Delegation:** 
   1. **Principal-agent problem with two dimensions:** 
      1. Those who make rules are not following the legislature’s wishes
      2. Those in the legislature aren’t respecting the wishes of the public (the ultimate principal)

→ the same reasons that make agency relationships **desirable** in this context (more time, expertise, etc.) are what make problems arise b/c P cannot know whether A is actually doing a good job and acting in their best interests

* 1. **Possible outcomes of P-A problem(s):** 
     1. A might be following their own views of the public interest rather than P’s
     2. A might not even be trying to further public interest and instead trying to further their own interests:
        + E.g. regulated group, like an industry group, offers inducements to the rule-maker
        + A legislator delegates rule-making to avoid blame

→ close connection between ministers and their ministries may provide some accountability to legislators for those who are making rules inside it, but this is eroded where more power delegated to parties that are removed from gov’t

## Controlling the risks of delegation

### Structural Approaches:

* 1. **Breadth of Discretion:** 
     + dependent in part on how much the legislators can trust the agent to follow the legislator’s policy preferences
       - trust dependent on degree of legislative control (e.g. where cabinet has control over the ministry, the discretion may be broad)
       - This means a lot of power for the gov’t of the day; if cabinet is allowed to set the **scope of discretion** and then control the **exercise** of the same
       - ∴ degree of discretion may depend also on whether it’s a majority or minority gov’t (with a minority gov’t, other parties have more power and are less willing to grant broad discretion)
  2. **Choosing the Body/Agency:** 
     + Arms’ length committee? Agency? Ministry? Industry Member?
     + Who will the body report to?
  3. **Controlling Resources and Appointments:** 
     + Renewable terms of the appointees? Long-term? Short?
     + Limiting the ability for DM by limiting $ or staff

### Legislative Review:

* Giving the legislature or a specific committee the power to approve/amend/review/reject proposals

Challenges:

* Who gets the power? What can they do? Change the decision or just make suggestions?
* Generally no review for soft law
* Still the time/expertise issue (i.e. the reasons for delegating in the first place) ∴ P-A problem only partially solved
  + Further, legislators are likely either to defer to the original DM (∴ removing the purpose of review) or to go in hot, and substitute their own decisions (and increasing the risk of error)
* Too much oversight = delay

### Judicial review of substance

|  |  |
| --- | --- |
| **PROS** | **CONS** |
| * Theoretically an independent 3P who can monitor or review the substance of the rules * Keeps A w/in the bounds of delegated power (can control A when making mistakes/acting o/s of mandate) * Cts may review the substance of rules (***Enbridge***) for whether the regulation was o/s the grant of power * Cts also review for charter issues | * Can’t review legislative decisions/public policy/non-law stuff * Cts reluctant to review when the leg’ve grant of power is broad * Even less willing to review soft law instruments, except in the case of **fettering** (where a guidance/policy, b/c of the language or its practical effect is binding on a DM or treated as such ∴ revoking discretion) |

→ this ties into the structural limits b/c the legislature may decide to expand/contract the scope of JR through a privative clause of instituting a statutory right of appeal/internal appeal mechanisms that the applicant would have to go through first to get to the JR stage

**Reasons to Limit JR of Policy Decisions:**

1. Random (at best) and biased towards well-resourced parties (at worst): group seeking to challenge a rule might be experiencing narrow negative impacts but the rest of society might be experiencing net benefits – whether a challenge is brought depends whether there is someone powerful enough who is harmed enough to take it to court
2. Courts don’t have the expertise to be reviewing, even if they are going to be looking at the “right” disputes: as w/ legislative review, R comes at the cost of losing expertise
3. Creating yet another P-A problem? Judges have their own policy preferences and allowing them to review policy does not mean they’re going to try and determine the best possible interpretation of legislative power and the appropriateness of the challenged rule. There is an accountability/legitimacy issue if the ct substitutes its own decision

#### Thorne’s Hardware 1983 SCC

|  |  |
| --- | --- |
| **F** | Cabinet made OIC under National Harbours Board Act, extending the boundaries of Port of St. John. Applicant brought challenge, stating the decision was made in bad faith – that the cabinet had done this in order to increase revenues, which was o/s the scope of its powers under the Act |
| **I** | Whether the matter is properly reviewable by the cts |
| **D** | Extending the harbour was a matter of **economic policy** for which the Cabinet thought it had reasonable grounds ∴ Ct cannot enquire as to the **validity of such beliefs.** |
| **RA** | Decisions involving public convenience and general policy are not reviewable. Decisions made by gov’t, pursuant to a statute are reviewable for **jurisdiction or procedural error.** Quashing the OIC would require an **egregious case.** The ct cannot go into cabinet motives. |
| **ETC** | Hard line against reviewing cabinet decisions regarding OICs (a form of delegated rule-making) |

### Process Requirements

**Spectrum of Process Requirements:**

Full hearings/submissions from different groups & consulting over draft rules

No external info/consultation

Usually somewhere in the middle; public notice/comment are most common; public participation seen as key way to ensure better DM

**Public Participation:**

|  |  |
| --- | --- |
| **PROS** | **CONS** |
| * Gaining important information about costs + benefits to different parties * Promoting deliberation → leads to better understanding of the issues and growth of shared values and goals * Greater public scrutiny means less P-A problems * Potentially less domination of interest groups * Low cost | * Time-consuming and costly * Interest groups can still dominate the public forum * DMs might just be going through he motions rather than considering input * Public is bad at risk assessment, has low technical expertise, believes things for the wrong reasons, isn’t well informed * No scope for interaction/dialogue |

**Where do Procedures Come from?**

* No CL right to procedural fairness where a decision is of a **legislative and general nature** (most rule-making falls under this)
  + Legislative not necessarily “of the legislature” (***Inuit Tapirisat***); decision can be made by another **legislating body** – like a municipality. But in order to receive protection under this exception, the decision has to be **general** (i.e. cannot target an individual in the rule) (***Homex***)
* No CL right to consultation
* No omnibus process statute
* Some rules are found in federal acts/instruments (***Statutory Instruments Act; Cabinet Directive on Streamlining***)
* Procedures can be found in particular substantive areas of law at both levels
* Gov’t can be taken to ct for failing to fulfill such statutory procedure requirements

→ connects w/ JR of rule-making b/c the more expansive the public participation, the more likely a ct may be to defer but there’s no way to know whether the rule-maker actually took the public consultation into consideration

#### Cabinet Directive on Regulatory Management – Part 6

1. **Regulatory impact analysis statement:** summary of analysis undertaken to design a regulatory proposal + published in Canada Gazette
2. **Consultation:** broad consultation responsibilities to inform + engage all CDNs and include them in developing policy objectives, allow them to give input, and provide feedback on the outcome of consultations; specific mention of consulting w/ Indigenous peoples
3. **Identify and assess public policy issues:** Must identify, with knowledge and evidence, that gov’t intervention is necessary

* In assessing/documenting public policy issues, must:
  + Analyse issues, causes, context (including urgency, long-term, and immediate impacts)
  + Review (if available) evidence-based assessments, analyses, standards, peer-rev’d publications, etc.
  + Explain fully the nature of the issue to CDNs, how its impacts have changed over time, and why gov’t intervention is needed
  + Describe the evidence, uncertainties, ethical considerations, and public views of the issue

1. **Setting objectives, defining outcomes:** Set policy objectives w/ tangible outcomes:
   1. Set measurable objectives that address the issue and its causes
   2. Establish linkage to enabling leg’n and gov’t priorities to ensure relevancy + consistency
2. **Selecting appropriate “mix” of tools:** assess effectiveness and appropriateness of regulatory and non-regulatory instruments for achieving policy objectives
3. **Legal implications incl. int’l obligations:** ensure legal soundness
4. **Assessing costs & benefits, recommending an option**
5. **Coordination & cooperation**
6. **Planning for key aspects of program**
7. **Feedback loop: evaluating, reviewing**

#### Enbridge and Union Gas v Ontario Energy Board 2005 ONCA

|  |  |
| --- | --- |
| **F** | * Ontario Energy Board Act: give OEB the power to make rules governing the conduct of a gas distributor as such conduct relates to gas vendors * OEB made a rule (GDAR) that permits gas vendors to determine who will bill the consumer (vendor sends all bills vs distributor sends all bills vs both send individual bill) * Right of appeal under the act exists but only for Qs of law or jurisdiction * Enbridge a gas distributor, upset that the vendor can set the rules for billing |
| **I** | 1. Was the standard of review properly assessed as correctness? 2. Does the jurisdiction of the OEB include the power to enact a rule like GDAR? 3. In making GDAR, did the OEB follow the correct procedure set out in the Act for making rules? |
| **D** | Yes to all three – appeal fails; rule stands. |
| **RE** | 1. Standard is either ultra vires or correctness – it’s either within the power of the board to do or not; there’s no room for reasonableness b/c there’s no deference due to a tribunal on an issue of its own jurisdiction. Whether the review taken proceeds under UV or correctness, it makes no practical difference. 2. Nothing in the statutory language to suggest that GDAR was o/s jurisdiction of OEB; the effect on the distributor’s relationship with clients is incidental; regulation of gas distribution in Ontario is the purpose of the OEB ∴ GDAR is squarely within that broadly stated purpose 3. Purpose of notice and comment procedural reqs are to give interested parties the chance to make written submissions; the information about GDAR that the parties were given allowed them to make such submissions and, in fact, the parties participated extensively in the GDAR’s development |

# Remedies

## Remedial options at the tribunal stage

### Statutory Authority

* No general jurisdiction of a tribunal to grant remedies ∴ the power to impose remedies must be found w/in the enabling statute
  + If tribunal goes o/s the statute, its order is ultra vires and void
* Authorisation can be listed or general
* Authorisation can be explicit or implicit (i.e. even where a tribunal’s remedial powers are less certain, they must still be empowered to do the things necessitated by the statute)
  + However, orders for money (damages) can generally only be made by tribunals with the express power to do so
* No power to order interim injunctions (though statute may give it the power to seek one in ct)

### Novel administrative remedies

* B/c tribunals are charged with dealing w/ polycentric problems in a comprehensive manner
  + They have stronger theoretical justifications for remaining seized for a longer time
  + They may try to develop remedies that address underlying structural or systemic problems in a forward-looking way
* Subject-specific expertise, field sensitivity, and particular statutory mandates → greater likelihood of more novel remedies
* 2 interesting wrinkles:
  + New outsourcing of public functions to private bodies
  + Globalisation = domestic tribunals can’t act entirely freely of int’l/transnat’l agreements, organisations, etc.

|  |  |
| --- | --- |
| REMEDIAL CHARACTERISTICS | |
| Court | Administrative Tribunal |
| * Self-contained * Party-initiated; party on party * Private right at issue * Decided through doctrinal analysis and retrospective fact inquiry * Judge imposes relief which is understood as compensation for the past violation of an identifiable existing right | * Debate focused on the vindication of broader statutory or const’l policies * Not self-contained * About the parties to the dispute but also those ‘behind-the-scenes’ – i.e. the ability for polycentric considerations * Fact inquiry is predictive * Decision made by negotiation and judicial involvement (diachronic involvement available) * Affected by unique nature of membership and expertise * Different relationship to regulated communities * More efficacious: cheaper, faster, more accessible * Structure and quality of the tribunal will affect the remedies it is empowered and inclined to grant |

#### McKinnon v Ontario (Ontario BOard of Inquiry – HRC) 2002

|  |  |
| --- | --- |
| **F** | Indigenous man working @ TO detention Centre  Made numerous complaints about the racism and harassment he faced at work  Mgmt did nothing, condoned the acts, and participated  1998: human rights board ruled in M’s favour – damages ordered, as well as relocating the harassers, publication of the decision throughout the centre and ministry, and the establishment of a training program for anti-discrimination  → compliance with these orders was neither timely nor complete |
| **I** | Whether the ministry carried out the orders in good faith, with a view to making them effective  If yes: no jurisdiction to impose new set of orders BUT  If no: if the ministry failed to comply, then that req’s orders being revised in more specific terms which ensure their fulfillment |
| **D** | No. Ministry did not comply ∴ multiple orders made:   1. Ministry wide remedies, including implementing 3P recommendations and mandatory training of ministry staff 2. In the centre: mandatory anti-racism training program; complaints handled by 3P; establish a compliance committee 3. Publication 4. Remedies specific to the complainant 5. 3P program-developer and monitor 6. Final responsibility with the deputy minister   And the tribunal remained seized of the matter until the entire series of orders implemented and complainant’s remedial right met with full compliance and substantial conformity |
| **RA** | Superficial compliance with orders is insufficient. Compliance with the orders needs to be congruent with the reasons and findings on which the orders were based. |

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

|  |  |
| --- | --- |
| **F** | * Π has severe dyslexia; in class and tutoring support insufficient * the school district closed their diagnostic centre * Π goes to private school and learning drastically improves * discrimination on the basis of disability b/c he no longer had access to the appropriate and necessary resources at school * At HRT: Individual discrim = damages and reimbursement for private school tuition * Systemic discrim = the school district guilty of underfunding, closing the centre w/o reasonable alternatives for meeting LD needs & the province guilty of having an arbitrary funding model, of underfunding the district, failing to ensure mandatory essential services, and failing to monitor the district ∴ systemic remedies also ordered |
| **I** | Were the remedies within the jurisdiction of the HRT to grant? |
| **D** | Special education is not the service, it is the means through which you get access to the service of education. Failure to provide Π with such access was discrimination and was not justified.  Individual remedies: upheld  Systemic remedies: too remote – o/s the ambit of HRT’s power |
| **RA** | The HRT has no ability to dictate to the executive on matters of public spending priorities/policy |
| **ETC** | Squaring this with the McKinnon decision: concerned matters of public spending more than the McKinnon decision; also the ministry in McKinnon showed persistent failure to implement orders and bad faith handling of the matter; we’re also reading the SCC decision on the jurisdiction of the HRT versus the board’s decision in McKinnon (though the McKinnon decision was upheld at ONCA). |

### Charter remedies under s. 24(1)

s. 24(1): Anyone whose charter rights have been infringed/denied “may apply to a **court of competent jurisdiction** to obtain such remedies as the court considers just and appropriate in the circumstances.”

→ are admin tribunals courts of competent jurisdiction?

#### Conway 2010 SCC

|  |  |
| --- | --- |
| **F** | Π found NCRMD in 1984 for SA with a weapon; in 2006, he complained of various charter rights violations; brought an application for absolute discharge under s. 24(1) of the Charter before the Ontario Review Board  The Board rejected it b/c he was still considered a threat to society |
| **I** | Did the board have jurisdiction to grant the remedy Π sought? |
| **D** | No. |
| **RA** | **2 Step Analysis:**   1. Is the ct a ct of competent jurisdiction?    1. Jurisdiction to decide questions of law?    2. If yes, has the enabling statute removed that power? 2. If it is a court of competent jurisdiction, does the board have the jurisdiction to grant the specific remedy sought? (CASE-BY-CASE determination, based on: leg’ve intent, as discerned from the board’s statutory mandate, structure, and function) |
| **A** | 1. A.    1. Yes: quasi-judicial body, authorised to decide questions of law in relation to persons detained for wrongful acts for which they were not criminally responsible    2. Not removed by statute 2. If the patient poses a significant risk to the public, the board is barred by statute from granting an absolute discharge ∴ no, not empowered to grant the specific remedy sought |
| **ETC** | * If the remedy was available in the case, the board would have had to determine the charter rights issue on its merits but it never got that far * Still unclear, therefore, what the actual **content** is of s. 24(1) as a remedial provision in admin law b/c applicants are only allowed to ask for the remedies/orders that are already available under the statute |

### Enforcing Tribunal Orders

* Tribunal may seek to enforce its own order on its own or by transforming it into a court order:
  + Party noncompliant, statute may provide that tribunal may apply to ct for an order requiring the person to comply
  + Judges don’t inquire into the validity of the trib’s own underlying order
  + Once converted into a ct judgment, it can be enforced in the same way as a reg ct judgment
* A party may also want enforcement
  + Ct may be reluctant to enforce if there’s no statutory provision allowing them to do so
* Criminal prosecution may be available:
  + Many statutes provide for quasi-criminal prosecution of persons who disobey tribunal orders; Prosecuted by fed’l or prov’l crown (e.g. Securities Act, Fisheries Act – both allow for fines and imprisonment)
  + In the absence of other provisions (i.e. where there are no other options expressly provided in the **tribunal’s own statute** to enforce this), s. 127(1) of the criminal code, provides that it is a criminal offence to disobey a lawful order of a federal or provincial tribunal

# Challenging Administrative Actions

A party to an admin action challenging that action directly for: jurisdiction, procedure, impartiality, exercise of discretion, or substance of final decision. The following steps are in order of operations

## Internal tribunal mechanisms:

**Slip Rule:** All tribunals can fix things like clerical errors and factual errors made b/c of mistake/dishonesty w/o having the express statutory authority to do so

* Tribunals can also change their minds at any time before making a final decision
* Statute may provide the ability to rehear and reconsider decisions (common where a trib has ongoing regulatory responsibility over a specific domain)
  + Reconsider: all the same evidence is just considered again; appropriate if you can show a mistake of law, or a new piece of leg’n, new judgment from the same trib
  + Rehear: literally doing the hearing all over again; appropriate when there has been a fundamental flaw at the first hearing
* May be part of a multi-tiered agency that provides for appeals to bodies w/in the same agency
  + E.g. Tribunal Administratif du Quebec (super-tribunal that hears appeals from all admin decisions)

## External (non-Court) Mechanisms:

* **Ombudspersons:** form for citizens to bring complaints regarding their treatment by gov’t departments; they have discretion over whether to investigate further
  + **Problem:** The degree to which ombudspersons can assert jurisdiction over administrative tribunals and processes → most ombuds statutes provide that they are not allowed to investigate until after any right of appeal/review has been exercised or until the limitation date for doing so has passed
* **Other Ombuds-like People:** FOIP commissioners, auditors general, HRC
* Public hearings (hard to initiate as an individual)
* Media

## Using the courts – Statutory Appeals

Appeal is the norm – JR is the exception. Benefits: JR discretionary ∴ less predictable; may not be able to give you the remedy you want. However, appeals are not always provided.

|  |  |
| --- | --- |
| 1. Is an appeal available? | * Must be provided for in the statute, otherwise you’re stuck with JR * Generally not allowed to appeal interlocutory ruling ∴ decision needs to be final before it can be appealed * Usually the statute also sets out which ct should be appealed to:   + Federal act: FC/FCA   + Prov’l act: prov’l trial ct of general jurisdiction, div ct, or CA   + Rarely, appeal may be allowed to cabinet itself (GIC) * Why give SRA? Fairness // big/important decisions // affects a person’s rights // mistrust for tribunal? |
| 1. What is the scope of the available appeal? | * Also set out in the statute * If a tribunal mirrors the mandate and expertise of general cts, the broader the scope of appeal is likely to be * Even where scope is broad, ct will show some deference to a tribunal’s **fact-finding**    + But, unlike JR, the ct is not going to defer to the tribunal just b/c the leg’re chose the tribunal (not the ct) to be the adjudicator of first instance  Edmonton (City) v Edmonton East (2016) SCC What if you’re given SRA and the statute does not set out the scope? Does the appeal look like an appeal from a trial court or is it more like judicial review?  **RATIO: the default is treating it like JR – reviewing for PF/unfairness/correctness**  → what’s the point? If statutory appeals are supposed to be different from JR, why replicate it?    BCSC  Appeal treated like an appeal from JR (as JR of first instance)  BCCA  Admin tribunal  SRA; no scope ∴ treated like JR |
| 1. Is the appeal available as of right? | * Appeal can be as of right or only with leave – will also be set out in the statute * Leave can be of the original DM or the appellate body * Sometimes there are other statutory criteria to meet before appeal granted |
| 1. Is SOP of original decision automatic? | * Rules vary; stauttes may expressly empower the tribunal or the appellate bodies to which their decisions are appealed to stay the original order, pending appeal * ***BC ATA:*** appeal ≠ automatic – it’s only granted where the original tribunal orders * Unless a statute specifically bars it (like BC ATA), the superior ct that’s designated to be appellate body has the inherent authority to grant SOP |

## Using the courts – Judicial Review

Basic nature of JR is different because it’s about the **inherent jurisdiction** of the courts to **oversee and check administrative (i.e. executive)** power, in the interest of the rule of law. This makes its scope potentially very broad b/c it is review of executive action **beyond what the legislature has provided for.**

# getting to JUDICIAL REVIEW

## Discretionary Bases for Refusing Relief:

1. Adequate alternative remedies?
2. Premature?
   1. Meant to be more cost-effective than ct proceedings; undoing the savings if skipping to JR
   2. Preliminary complaints may become moot
   3. Ct is better able to assess the situation once full + complete record of the proceedings exists
3. Delay and acquiescence? Can apply even if LD for JR is met
4. Moot issue: dispute is over, not yet arisen, order has expired, litigant no longer wants the remedy that the tribunal would have ordered but for the error
5. Clean hands: seeking remedy to facilitate illegal conduct, obtain an unfair advantage, flout the law, or make misreps?

1990s: cts started denying JR even when applications were okay on these 5 bars – signalled more deference to the unique institutional role of tribunals/recognition that cts are not the only arbiters of ROFL

### Domtar v Quebec (scc 1993) What counts as unreasonable?

|  |  |
| --- | --- |
| **F** | * Employee injured on day 1 – plant closed on day 3 * He could be awarded 3 days disability pay or 14 days, even though he would not have been paid for 11 of them b/c the plant was closed at the time * Workers comp appellate tribunal (civil; part of the collective bargaining environment): 14 days * Labour ct (adjudicator of employer’s compliance w/ Quebec labour code; operates on BRD standard): 3 days |
| **I** | Can an inconsistency between two tribunal decisions provide an independent basis for JR? (i.e. where two tribunals interpret the same statute differently, does that in itself, make one (or both) unreasonable and therefore subject to JR? |
| **RA** | ROFL is not absolute – the value represented by the DM’s independence and autonomy goes hand in hand with the principle that their decisions should be effective. For the purposes of JR, ROFL must be qualified. |
| **RE** | Neither of the decisions is unreasonable or w/o jurisdiction. So should the ct intervene?   |  |  | | --- | --- | | YES: ROFL must trump | NO: ROFL must be qualified | | * Arbitrariness is abhorrent and contrary to consistency, equality, security, uniformity, and predictability in the law * Similar cases should be treated similarly * Flexible consistency is okay – outright contradictions are not | * Must respect the tribunal’s autonomoy, expertise, and effectiveness in the inst’l relationship * Risk that creating this as an independent ground of review would create a toehold for exercising JR * CT should only interevene where conflict is serious/significant – if not, JR can become an arbitrary tool itself * Tribunals have different mandates ∴ reasonable that they should come to different conclusions – that does not make them illegitimate | |

**Is *Domtar* still good law?**: Beginning in 2008, with ***Dunsmuir,*** ROFL is becoming more dominant again – w/ attempt to not unduly hamper admin powers

***Khosa:*** deference to tribunal is a reg. part of JR, not an independent reason for refusing to do it. Mere fact that JR is discretionary ≠ ROFL will be qualified.

***Mining Watch (2010 SCC):*** along w/ the 5 grounds for refusal, also consider **balance of convenience** of the parties

***Altus Group (2015 ABCA):*** directly contradictory decisions by same tribunal = 2nd one was unreasonable for not following the first.

## Is Judicial Review Available?

#### McDonald v Anishinabek Police Service (2006) ONSCJ

|  |  |
| --- | --- |
| **F** | Π is a constable with APS – during a training course with OPP, he was accused of sexual assault and was expelled from the course. APS fired him before Π had a chance to know the case against him and respond; fired before APS did any investigation itself. |
| **L** | Anishinabek Police Service agreement: a tripartite agreement (not a statute) establishing the Anishinabek Police Governing Authority and creates APS constables  APS Code of conduct: governs APGA and sets of procedures for investigation and discipline  *Police Services Act*: OPP commissioner can discipline; APS must be appointed by OPP to enforce CC and prov’l offences  *Labour Code*: APS is an employer under the federal regime |
| **I** | Whether the APS chief owed Π a duty of fairness in the decision to fire him → yes. |
| **RA** | The scope of JR is not limited to boards/bodies created by statute. It extends to bodies established by the exercise of prerogative power. The controlling consideration is the **subject matter,** not the **source** of the power. The decision will be amenable to JR will be amenable where it affects the rights of individuals or their legitimate expectations.  To determine whether a DM is public:   * Source of board’s power * Functions and duties * Gov’t created body? * But for the body, would gov’t occupy the field? * Extent of direct/indirect gov’t control * Body has power over public at large or just those who submit themselves voluntarily? * Nature of body’s members and how they’re appointed * How board is funded * Nature of decisions: effect on individual rights and interests * Whether the body’s constitutive document indicates duties of fairness are owed * Rel’nship of body to gov’t – is it a part of the machinery of gov’t? |
| **ETC** | Was cert available? Under ***JRPA,*** declarations or injunctions are only available where there has been an exercise of statutory power – mandamus, cert, and prohibition do not require. |
| **MINI** | 1. JR is available to supervise the general machinery of gov’t regardless of construction 2. If the DM fulfills a public function or is making decisions that have public law consequences, 3. Then JR is available and the duty of fairness applies |

## Does the individual have standing?

1. **Actual parties to the matter**
2. **Public Interest: (*Downtown Eastside Sex Workers v Canada (2012 SCC)):***
   * 1. Does the case raise a **serious justiciable issue?**
     2. Does the party have a **real stake in the proceedings?**
     3. Is this suit **a reasonable and effective way to bring it to ct?**
3. **Collateral Interest:** Tribunal’s standing in challenges to their own decisions will be at the discretion of the ct (***Ontario Energy Board v Ontario Power Generation (2015 SCC))***

## To which court must the party apply?

*Won’t be in the statute, because JR is an extraordinary remedy…*

Typically determined by the source of the impugned authority’s power:

* Prov’l tribunal → provincial superior court (BCSC)
* Fed’l tribunal → federal court

## Has the Party met the deadline?

* Check all the statutes for possible LDS: enabling statute, judicial review acts, rules of ct
* Cts can usually extend deadlines where warranted (there’s a reasonable explanation; no substantial prejudice would result; and there are prima facie grounds for relief)

## Has the Party Exhausted All other adequate means of recourse?

* JR is the remedy of last resort **except where:** 
  + An appellate tribunal can’t/won’t address the issue raised by the appellant
  + Appellate tribunal doesn’t have statutory authority to grant the remedy they request
  + Appeal on record but the record contains evidentiary errors/ does not contain relevant facts which the appellate tribunal cannot fix
  + Alternative procedures are too costly/inefficient
  + Can’t wait

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

|  |  |
| --- | --- |
| **F** | Student forced to withdraw from uni – reasons unclear (some docs said it was b/c of his grades, others stated it was b/c of his “neurotic behaviour”). Appealed to the university committee but he was dismissed w/o a hearing (committee failed to provide PF) **but** instead of appealing to next internal body, he sought judicial review |
| **I** | Was the senate appeal an adequate alternative remedy that Π should’ve sought first? |
| **D** | Yes. Being given no PF at the first level does not entitle him to skip the queue. Can’t assume that the senate would also be unfair to him. |
| **RA** | In determining whether the available appeal is an adequate alternative remedy, look at:   1. Procedure available on appeal 2. Composition of appellate body (and consequences thereof) 3. Efficiency, expediency, and costs   Need to show more than just a prior violation of PF in order to skip to JR – there must be “no other way to protect the right” |
| **A** | Start with enabling statute;  Reasons to do statutory appeal before JR:   * Respect legislative intent * Respect university’s decision making autonomy * Convenience: cheaper and faster for both parties |

## What remedies Are available?

* Application for JR ≠ SOP for tribunal’s order (discretionary SOP by either trib, ct, or both) → consistent with the view that JR is the last resort
* JR does not allow the ct to substitute its views on the substance of a matter for the tribunal’s views

**Remedies are based on the prerogative writs**

* + - * 1. **CERTIORARI:** “cause to be certified” → quashing the tribunal’s order/decision
        2. **MANDAMUS:** “we command” → compelling the tribunal to perform the mandated duty; often combined with cert. Ct can send back with clear instructions of appropriate procedures – it can only protect against unfair procedures and excesses of power though. It cannot direct or compel the exercise of discretion.

***Insite:*** Ct mandated that the minister exercise discretion and grant the exemption – this is an **aberration.** In light of the delay and cost to human life entailed by going through the DM process again, SCC just forced the issue, it seems.

* + - * 1. **Prohibition:** Pre-emptive; equivalent to an injunction – ordered to ensure a tribunal does not exceed its jurisdiction or to prevent a non-judicial officer/entity from exercising a power.
        2. **Declaration:** Judgment of the ct that states the legal positions of the parties or the law that applies to them. Public law variety: declares gov’t action unenforceable. Declarations are **unenforceable.** They are usually followed but they do not guarantee results – no automatic remedy.

***Khadr:*** wanted to be repatriated b/c charter rights were violated; Ct declared his rights had been violated but could not do more (and order the PM how to govern foreign affairs). But the gov’t did repatriate him.

* + - * 1. **Habeas Corpus:** “produce the body” → bring the person to court – let them out of detention. Rarely used in Canada.
        2. **Quo Warranto:** “by what warrant (authority)?” → what authority justified an act? Explain why something was done; usually combined with habeas. Also rarely used.

**Statutory reform of the writs:**

### Judicial Review Procedure Act, BC:

**"statutory power"** means a power or right conferred by an enactment

(a) to make a regulation, rule, bylaw or order,

(b) to exercise a statutory power of decision,

(c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,

(d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or

(e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

**"statutory power of decision"** means a power or right conferred by an enactment to make a decision deciding or prescribing

(a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or

(b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,and includes the powers of the Provincial Court;

**2** (1) An application for judicial review must be brought by way of a petition proceeding.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

(a) relief in the nature of mandamus, prohibition or certiorari;

(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

**3** The ct can set aside a decision because of error of law where it is made in the exercise of a statutory power of decision to the extent it’s not limited/precluded by the enactment conferring that power.

**5+6:** Clarifies mandamus and orders that the tribunal must consider the ct’s instructions upon rehearing

**s. 7:** If an applicant is entitled to a declaration that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may set aside the decision instead of making a declaration.

**s. 9:** Ct can refuse JR if the only allegation is an error in form. Can change the order to correct errors or make a declaration that it’s still valid.

**s. 11:** No time limit unless (a) another act bars it or (b) it would work substantial prejudice/hardship on another party

**Private Right of Action (for Monetary Relief):**

* When suing an admin agency (e.g. for negligence)
* fed ct has original jurisdiction for all actions against fed’l crown
* If the claim if **fundamentally private** you can go to private law and not ask for JR but you cannot use a damages claim to ask for JR remedies (***Telezone***)
* Most common tort: misfeasance in public office
  + it exists (established in ***Odhavji***) but very hard to make out
  + Π must establish:
    - 1. deliberate and unlawful conduct by someone in public office and
      2. that officer had subjective knowledge that the conduct was unlawful and likely to harm Π

e.g. ***McMaster****:* Prison officials intentionally neglected getting the prisoner shoes that fit despite his repeated requests. Should have known it was likely to cause injury. Tort made out.

## H. Judicial Review at Federal Court

* Same considerations of whether JR is available should be applied here
* Federal courts est’d pursuant to ***s. 101 (CA, 1867)*** – and do not have inherent jurisdiction
* They are statutory creatures and as such only have the powers given under their enabling statute: the ***Federal Courts Act***
* Federal courts need to be given explicit powers whereas prov’l superior courts have all the powers that are not explicitly removed
* FC has concurrent jurisdiction w/ s. 96 cts to hear claims brought against the federal gov’t

### The Federal Courts Act

* Not always the case that FC is the ct of 1st instance – under s. 28, there are certain tribunals that get JR-ed to FCA directly

**Extraordinary remedies, federal tribunals**

**18 (1)** Subject to section 28, the Federal Court has **exclusive original jurisdiction**

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

**Extraordinary remedies, members of Canadian Forces**

**(2)** The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of habeas corpus ad subjiciendum, writ of certiorari, writ of prohibition or writ of mandamus in relation to any member of the Canadian Forces serving outside Canada.

**Remedies to be obtained on application**

**(3)** The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

**Application for judicial review**

**18.1 (1)** An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

**Time limitation**

**(2)** An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

**Powers of Federal Court**

**(3)** On an application for judicial review, the Federal Court may

**(a)** order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

**(b)** declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

**Grounds of review**

**(4)** The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

**(a)** acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

**(b)** failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

**(c)** erred in law in making a decision or an order, whether or not the error appears on the face of the record;

**(d)** based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

**(e)** acted, or failed to act, by reason of fraud or perjured evidence; or

**(f)** acted in any other way that was contrary to law.

**Defect in form or technical irregularity**

**(5)** If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

**(a)** refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

**(b)** in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

**Interim orders**

**18.2** On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

**Reference by federal tribunal**

**18.3 (1)** A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

**Reference by Attorney General of Canada**

**(2)** The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

**Hearings in summary way**

**18.4 (1)** Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

**Exception**

**(2)** The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

**Exception to sections 18 and 18.1**

**18.5** Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

**Example:** Review to FCA provided for on question of law or jurisdiction from CRTC; can also request the GIC to ‘vary or rescind’ an order of the CRTC on any policy matter. This means that if you go straight to FCA on a question of law or jurisdiction, you’re barred from getting JR on that same matter. If you go to the GIC and they refuse, you can ask that the GIC decision be judicially reviewed (and you would go to the regular FC for that). So, in essence, there is no *direct* JR available under the statute.

### REDUX

* + - * 1. You must exhaust all remedies before requesting JR. ***Harelkin*** applies equally to provincial and federal acts. **However, check the enabling statute and the *Federal Courts Act*** to ensure that s. 18.5 does not apply, thus ousting the ability to get JR.
        2. STANDING/LIMITATION DATES:

1. JR exists as of right except for IRPA proceedings, where leave must be granted
2. 30 day limitation; clock starts running upon a final decision.

→ Even if extension is allowed, can still have remedy refused for delay.

1. Standing rules are same for prov’l
   * + - 1. GROUNDS FOR REVIEW: must fit into those listed at ***s. 18.1(4)***

NB: \*\***these do not set out standard of review\*\***

# Procedural Fairness

* Context-specific duty; content tailored to the circs
* Standard of review = correctness
  + No deference to tribunal
  + Cts more comfortable doing review for PF than for substance
    - Can become a normative question: what does the court think **ought** to happen before such a decision is made?
* About the fairness of the process, not the actual decision
* Utilitarian importance: decisions made w/ input from those affected = well informed opinions = better decisions = decisions made pursuant to transparent + participatory processes = enhancement of ROFL values
* Importance per se: allowing people to participate meaningfully in DM processes that affect them.

**Requires:** (1) right to be heard and (2) right to an independent and impartial hearing

**Sources of PF:**

* Enabling statute usually fairly thin; can look at broader statutes governing admin tribunals globally
* agency guidelines
* s. 7, Charter
* Bill of rights
* Mostly a feature of the CL

**Natural Justice**: used to be the source of procedural protections in admin law but only applied to judicial/quasi-judicial proceedings (o/w you get nothing); this changed w/ Nicholson – now, there is a general CL duty of fairness that applies to everything except purely legislative decisions

## Nicholson v Haldimand Norfolk Regional Police [1979] SCC

|  |  |
| --- | --- |
| **F** | PO dismissed w/in probationary period. Under statute, no provision of rights to POs dismissed w/in probation. After probation, substantial rights given. Not a quasi-judicial process. |
| **I** | Even though procedural rights are not explicitly given to POs under probation, is Π due some fairness? |
| **D** | Yes. Not as much as given to POs after probation but there’s something: notice and chance to be heard. Once he’s been heard, board can make whatever decision they want and it won’t be reviewable, though. |
| **RA** | A general duty of fairness applies to admin decisions; the subject of the administrative DM should be treated fairly, not arbitrarily. |
| **RE** | Impact on individual just as severe as any judicial proceeding – the distinction leading to PF vs no PF ∴ arbitrary. |

## Threshold: when is fairness required?

Three stage process:

1. Threshold
2. Content – how much fairness? More than X but less than Y.
3. Application to the specifics of the case at hand: specific bits to include (notice? Hearing? Counsel?)

### Cardinal v Kent Institution [1985] SCC

|  |  |
| --- | --- |
| **F** | 2 prisoners sent to segregation; segregation reviewed monthly by a board → board recommends their release → Kent goes against that and continues seg |
| **I** | What did PF require of the director in exercising his authority to continue the seg, despite the recommendation of the board? |
| **RA** | General CL principle lies as a duty on every public authority making an administrative decision **not of a legislative nature** and which **affects the rights, interests or privileges of an individual.** |
| **RE** | The denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing ct that it would not have resulted in a different decision. It is an independent, unqualified right. It’s not about the result reached, it’s about the process.  Specific content: inform prisoners of reasons; give opportunity to make representations, challenge decision and information; no obligation to make an independent inquiry into the allegations of what occurred @ previous institution  Remedy: Cert & habeas |

***Knight v Indian Head School Division [1990] SCC:*** considerations: nature of the decision (leg vs admin // prelim vs final); relationship between body and individual; impact on individual. *Glosses* ***Cardinal*** *but is undermined by Dunsmuir…*

### Applies to decisions

Not to investigations/advisory processes that may occur prior to the commencement of formal DM process. Though, may be applied to ostensibly preliminary decisions where it has de facto finality.

***RE: Abel (1979) Ont Div Ct.:*** NCRMD review board makes determinations based on institutional records and makes recommendations to LG. Abel asked to see his files and the board did not even consider his request. *PF given at board level?* Yes. Even though it’s not the technical final decision, it is as determinative as one. The board did not necessarily have to give him the files but they were req’d to consider the request.

***Dairy Producers Coop (1994) SaskQB:*** Human rights case – workplace sexual harassment claim goes to commission → commission appoints an investigator. Coop wanted the details gathered by investigator and were refused. Investigator determines there was probable cause and it goes to a tribunal hearing. *No question that PF applies at tribunal but does it also apply to investigatory stage?* No. Not final enough. Findings @ investigation do not determine the outcome.

***Irvine v Canada (1987) SCC:*** Antitrust action: hearing officer does a basic fact-finding inquiry → writes report → report reviewed by commission → commission decides whether to go to tribunal ( a de novo hearing). *Right to counsel given at the first inquiry stage. Does this right entail/imply any other PF rights?* No. It’s a quasi-criminal process and the law enforcement investigation process shouldn’t be complicated. Whether or not the report will be made public depends on commission ∴ PF concerns happen later down the line.

### That affect the rights, interests, and privileges of an individual

***RE: Webb (1978) ONCA:***

|  |  |
| --- | --- |
| **F** | [pre-Cardinal // post-Nicholson] Complainant in subsidized housing and has disruptive kids. There is no statutory entitlement to subsidized housing – to either receive or keep it. |
| **I** | Even though there is no statutory entitlement to the interest in question, is she still owed PF? |
| **D** | Yes. You can still have an interest in something you have no rights over. |
| **A** | No rights @ application stage for housing, but once she’s in, she had a right to know the case against her and respond. PF applies equally to the interests held by rich and poor. However, PF met here b/c a SW had warned her about her kids ∴ given notice and opportunity to respond. |

***RE: Hutfield (1986) ABQB:*** Doctor and member of college of physicians who applied to a hospital for hospital privileges and got rejected. Not given adequate reasons why. *Can you have PF right for an application?* If the denial of an application **casts a slur on somebody’s reputation** then they are entitled to PF. Sub-test for interests and rights: are the person’s rights **sufficiently directly and substantially affected?**

### That is not legislative in nature

* Primary leg’n is definitely excluded (exempt b/c separation of powers demands it): Legislature is subject to constitutional requirements for valid law-making but w/in their const’l boundaries, they can do as they see fit. The wisdom/value of their decisions are subject only to review by the electorate.
* Categorical exemption is more problematic when it’s extended to secondary leg’n and policy decisions (which do not have the same democratic legitimacy measures baked in)

#### RE: Canada Assistance Plan (BC) [1991] SCC

|  |  |
| --- | --- |
| **F** | CAP = cost-sharing bargain between feds + provs for social assistance  s. 8: to be a permanent arrangement as long as provinces maintained social welfare programs  Bill C-69: unilaterally reduced fed’l funding to BC, ON, AB (∴ contravened s. 8) |
| **I** | Does the doctrine of legit E create legally enforceable consultation obligations for DM, despite a decision being purely leg’ve in nature? |
| **RA** | No PF re: purely legislative functions or purely ministerial decisions on broad grounds of public policy. Legit E do not overcome this bar. |
| **RE** | Legit E do not create substantive rights and cannot constrain essential democratic features  Legislature is supreme (subject to constitution)  Constitutional and quasi-const’l statutes might bind future gov’ts but o/w parliament can’t bind itself |

#### Are cabinet + ministerial Decisions Exempt?

Not automatically but it’s easy to characterize them as being leg’ve and will usually be exempt, in practice.

##### Attorney General v Inuit Tapirisat [1980] SCC

|  |  |
| --- | --- |
| **F** | CRTC: admin body that holds hearings regarding rates for telecom services to determine whether a provider can raise their rates. They held a hearing and allowed Bell to increase their rates.  ITC (band council for Inuit Tapirisat): appealed to GIC, per s. 64 (allowed GIC to overturn CRTC decision on own motion or per inter partes dispute)  GIC heard from Bell, CRTC, and took advice from ministerial officials but left ITC out.  They rejected the appeal |
| **I** | Was ITC entitled to PF at the appeal to GIC? → No. |
| **RA** | 1. The fact that a statutory power is vested in GIC ≠ automatically unreviewable 2. Duty to observe PF does not need to be express **but** will not always be implied 3. Whether PF applies is a matter of construing the statutory scheme as a whole in order to determine the degree, if any, to which leg’re intended PF apply 4. The power here is of delegated legislation, broad discretion (no guidelines or procedural standards imposed), with an ability to decide on its own motion, power was hx located w/ leg’re, and it was a polycentric policy decision ∴ no PF. |
| **A** | Ability for GIC to overturn was meant to give cabinet ability to respond to emerging situations, shouldn’t unduly hamper this power.  Impractical to extend PF to executive action. |

**Critical responses to *Inuit Tapirisat:***

* Overstatement of difficulties w/ applying PF given its flexible content
* Not subject to same political scrutiny as leg’ve decisions ∴ shouldn’t be exempt
* How do they determine it’s purely legislative?
* Didn’t most admin powers historically reside w/ legislature?

#### Is subordinate legislation covered?

Less cause for concern w/ judiciary interference w/ subordinate leg’n b/c it’s made pursuant to executive authority w/ minimal democratic accountability. However, cts generally have not imposed PF on subordinate law-making.

**Municipal decision-making?** They are creatures of statute, not a separate arm of gov’t, and officially under the authority of the prov’l government [admin-like body] but municipality leaders are elected [legislature-like]

##### Homex Realty [1980] SCC

|  |  |
| --- | --- |
| **F** | Homex bought a piece of land regarding which the prior owner had an agment w/ the village next door. The owner promised to provide all services to the homes on the land. Homex does not plan to do this and wants village to provide services. Village passes a by-law to allow them to pull registration status from subdivisions in specific circs (i.e. the exact circs of Homex). |
| **I** | Does the legislative exemption apply to municipal by-laws? |
| **RA** | No automatic sheltering of municipal bylaws from duty of PF. They will be sheltered if the decisions are very akin to leg’ve decisions (broad discretion, polycentric policy). However, a public policy overlay does not allow municipalities to abrogate the rights of private parties w/o giving them PF. |
| **A** | Traditionally, where statute authorizes interference w/ property rights, cts have injected CL PF but that’s no longer the case.  The village’s motivation obviously had the motivation of resolving the dispute w/ Homex  SO:   1. Homex had the right to be heard 2. They were not adequately heard 3. But no remedy granted b/c homex didn’t come with clean hands. |

##### Canadian society of Immigration Consultants v Canada [2011] FC

|  |  |
| --- | --- |
| **F** | CSIC was an independent, self-regulating body of immigration consultants. Overhaul planned in light of CSIC’s apparent poor oversight. Original plan was to beef up CSIC but eventually the new plan involved axing CSIC and giving its regulatory powers to a different body. This was done through regulations to IRPA. |
| **I** | Whether the regulations triggered PF duty owed to CSIC |
| **RA** | The decision to terminate and hand over regulation to a new body is essentially legislative. Whether resulting from an act of Parliament or a regulation made by the executive. |
| **RE** | * In principle, regulations or policy decisions are not reviewable except in cases of excess of jurisdiction or failure to comply w/ legislative or regulatory requirements. * The duty to consult was satisfied in this case b/c the process of selecting a new body gave CSIC an opportunity to participate and was fair and transparent. * Unable to establish bad faith * Doesn’t matter if the regulations resulted from lobbying efforts of CSIC’s ‘rival’  1. JR over executive DM must consider the form of the decision and the nature of the DM’s functions in light of leg’n when deciding whether PF owed 2. True policy and leg’ve decisions (dictated by economic, financial, social, and political constraints/factors) are not reviewable. Having policy preferences ≠ bad faith 3. GIC decisions are not auto-immune from JR; the gov’t must always comply w/ ROFL – cts always allowed to intervene in egregious case or where bad faith shown 4. Assuming that ROFL applies to regulation-making, regs can’t be made for totally irrelevant purposes but party alleging improper purpose must show same 5. Not up to ct to determine the wisdom of the regs or to assess the validity according to the ct’s preferences 6. CSIC ≠ individual (w/in meaning of ***Cardinal***) |
| **ETC** | * If this is purely legislative, what wouldn’t be? * What does this mean about our ability to challenge regulations? |

#### Policy Decisions?

* See above: “a purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection.” (***CSIC***)
* Rationale is similar to protecting leg’ve decisions: essentially political and at least theoretically subject to accountability (exec can be voted out of office)
* Further, gov’t was elected to make policy decisions and they should be allowed to do so (as long as they comply w/ relevant const’l reqments)
* Difficult to determine what makes something a policy decision (which makes it easy for cts to simply abstain from getting involved when they don’t want to)

### Miscellaneous

**Public Employees:** no longer blanket PF owed to all public employees. ***Dunsmuir*** held that the law will no longer distinguish between public officer-holders and other employees in dismissal cases. If terms of employment are governed by K, ordinary contractual remedies will apply.

2 exceptions: Employees not protected by employment Ks or subject to employment at pleasure OR may arise by necessary implication in certain statutory contexts

**Emergencies:** PF = duties that apply **before** a decision is made. However, sometimes PF may be superseded until after a decision is made (e.g. national security, prison). “May postpone or limit PF in light of an emergency but cannot eliminate it.” – ***Cardinal***

## Content of Procedural Fairness

Step 2 of the 3-stage analysis: At this stage on an exam, you want to go through the ***Baker*** test and come to a conclusion: this person should get more fairness than X but less fairness than Y.

* the duty is flexible and context-specific
* requires adherence to some but not necessarily all elements of natural justice – cts look at whether the process was adequate not whether it was ideal
* Concerns less likely to be raised where oral hearings are req’d b/c the procedure is usually clear
* Some tribunals follow leg’n establishing procedural reqs, others operate pursuant to general statutory mandates, and others are empowered to make their own procedures in 2e legislation
* For the most part, however, CL considerations govern the scope and content of the duty of fairness

### Baker v Canada (Minister of Citizenship and Immigration)

**Threshold:** passed easily – it’s an administrative decision that affects the rights, privileges, or interests of an individual

**Content:** informed by the purpose of the duty of fairness: to ensure that admin decisions are made using a fair and open procedure, appropriate to the decision being made, its statutory, inst’l, and social context w/ an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the DM. Trying to achieve a balance between the need to treat individuals fairly, efficiency, and predictability of outcome.

**Baker argued for:** Oral interview // children and their dads should’ve been given notice of interview and the opportunity to participate // entitled to reasons // the officer’s notes created a reasonable apprehension of bias

**RATIO:** There are five criteria that should be used to determine the content of the duty of fairness in a given case, but the list is not exhaustive and should not detract from fairness as the overall goal.

|  |  |
| --- | --- |
| 1. The nature of the decision being made and the process the DM followed: | → judicial/ quasi-judicial likely to demand more extensive procedural protection than admin decisions |
| 1. Nature of the statutory scheme and the terms of the statute pursuant to which the body operates | → content 🡫 when steps are preliminary in a formal DM process   * protections 🡩 where 2nd level of proceedings available * > final = > fairness * > exceptional to normal regime = < fairness |
| 1. Importance of the decision to the individual(s) affected   \*\*this is where most cases are decided | > importance = > fairness |
| 1. Legitimate expectations | May increase content where:   1. Conduct of public authorities in certain circumstances (representations, promises, undertakings, past practice, current policy) lead to expectations of a certain process 2. “” lead to expectations of a particular *outcome* |
| 1. The choices of procedure chosen by the body itself | Procedural choices should be respected where:   1. Statute allows tribunal to make own process OR 2. When the agency has expertise in determining what processes are appropriate |

**Application:**

1. H+C ≠ judicial; lots of discretion involved with the decision; also dependent on multiple factors ∴ 🡫
2. H+C is an exception to general principles of CDN immigration ∴ 🡫

BUT no appeal procedure – only JR with leave of FC ∴ 🡩

1. Very high importance ∴ 🡩
2. Legitimate expectations? Convention on rights of the child is not a gov’t rep about how H+C applications will be decided nor does it suggest any increased procedural rights ∴ no enhancement
3. Lots of flexibility given to minister to decide procedure; immigration officers do not conduct interviews in all cases ∴ 🡫

**Conclusion:** Circumstances require a full and fair considerations of the issues, the claimant and those whose interests are affected by the decision must have a meaningful opportunity to present the various types of evidence relevant to their case and have it considered. This was met by the ability to produce complete written documentation in relation to all aspects of her application.

REASONS: entitled to reasons; but this was met by the officer’s notes – NB: this case shows that importance of a decision may give rise to a positive obligation to give reasons.

CHARTER: Only resort to Charter where admin law unable to produce remedy

→ ultimately the decision was overturned b/c the officer’s notes gave rise to a reasonable apprehension of bias

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

|  |  |
| --- | --- |
| **F** | Under IRPA, if individuals sponsored by family claim social assistance (contrary to sponsor’s undertaking of support) the sponsor is deemed to have defaulted and either prov’l or fed’l gov’t may recover the costs of such assistance from the sponsor. The sponsorship agreement is a contractual agreement but is supplemented, structured, and controlled by fed’l leg’n. |
| **I** | Is the gov’t constrained by PF when making enforcement decisions in relation to these debts? → Yes. |
| **L** | “The minister may choose not to take enforcement action to recover money from me if the default is the result of abuse or in other circumstances. The decision not to act at a particular time does not cancel the debt. The Minister may recover the debt when circumstances have changed.” |
| **RA** | Legitimate expectations are only created where representations are clear, unambiguous, and unqualified. Proof of reliance on the reps is not req’d.  Legit E created by the wording of the undertakings; gov’t can’t proceed w/o notice or w/o permitting sponsors to make a case for deferral or other modifications to enforcement procedures. |
| **RE** | 1. Threshold: Public decision? Yes, the minister has discretion of enforcement – not just a private law context. 2. Content:    1. Nature: debt collection; not ct-like; parliament made it clear in the statutory scheme that it intended to avoid complex admin processes ∴ 🡫    2. Statutory scheme: Decision final and specific (no appeals) ∴ 🡩    3. Individual impact: Significant ∴ 🡩    4. Legit E: Telling sponsors that they have discretion to defer enforcement in cases of abuse means they have to provide the opportunity to explain such circs, where they exist, sufficiently precise to be capable of enforcement if it were made in a private law context ∴ 🡩    5. Process choices: Leg’n offers a measure of discretion when carrying out enforcement duties and ON’s procedure is compatible w/ efficient debt collection and fairness (> deference = < fairness) |
| **A** | Content of PF requires the following in these circs:   1. Notice to sponsor 2. Opportunity to explain in writing his/her relevant personal/financial circs that might mitigate against immediate collection 3. To consider any relevant circs brought to its attention while being mindful of the fact that the sponsor’s undertakings were the essential conditions precedent to allowing the immigration to Canada in the first place 4. Notice of the gov’t’s decision 5. Reasons are not req’d |

## Specific Components of the duty

|  |  |
| --- | --- |
| **NOTICE**: the most basic aspect of PF and the starting point for being able to participate in DM process   1. Provide enough **time** to allow the recipient to respond 2. Provide enough **info** to allow the recipient to make an informed response | * Req’s often in tribunal’s rules of procedure/leg’n governing hearings * An ongoing duty: arises prior to DM begins and continues throughout the process such that the individual is kept apprised of any relevant issues arising through the hearing |
| **DISCLOSURE/DISCOVERY:** ultimately satisfied if a party has sufficient information to make informed submissions in regard to a particular matter | * DM disclosing the information that they relied upon in order that the individual **knows the** **case against them** * Where oral hearings are req’d, disclosure reqs usually put in rules or generic procedural statutes * Must be tempered by the needs/rights of the authorities in particular circs or those of other parties (info can be vetted by ct to determine relevance and materiality and may disclosed only to counsel w/ instructions as to further dissemination) * Incomplete disclosure may be mitigated by: disclosure after the fact; JR; rights of appeal * May be enhanced where” stigma of result high (e.g. HRT) |
| **ORAL HEARINGS:** often req’d where a decision depends on findings of credibility (***Singh v Minister of Employment and Immigration***) | * Often demanded, seldom granted * Too costly and time-consuming |
| **RIGHT TO COUNSEL:** often in proceeding with an oral hearing, it will be allowed; also usual to allow in oral hearings | * Usually set out in lge’n * May allow access to a lay-rep * May be limited (not an all or nothing consideration) * Not a general constitutional guarantee *but* when s. 7 is engaged, POFJ may require provision of counsel in admin hearings (***New Brunswick (Minister of Health and Community Services) v G(J)***) |
| **RIGHT TO CALL EVIDENCE AND X-EXAM WITNESSES:** Normally a part of oral hearings but not absolute | * Guiding principle: Party must be afforded a reasonable opportunity to present their case |
| **TIMELINESS/DELAY:** DMs usually not under any statutory timeline to hold hearings or come to a conclusion. No Charter right to a hearing in reasonable time. | * Delay may reach the level of deprivation of s. 7 rights’ may also impair the fairness of the hearing and could result in an abuse of process but it must be a contextual inquiry where the interests of other parties are also considered (***Blencoe v BC*** – rights of complainants must be considered) * In cases where there’s been a breach of PF/Charter, the remedy is likely to be mandamus, requiring the tribunal to do the hearing/make decision expeditiously |
| **REASONS** | Where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circs, some form of reasons should be req’d – ***Baker*** |

# Constitutional Protection of Procedural Fairness RIghts

Approaching a s. 7 question:

1. Threshold met?
2. If yes, have they been impaired in accordance of POFJ?
   * Content of POFJ informed by CL (Oral hearings, disclosure, reasons, timeliness)
   * CL also informs which contexts demand which procedures
   * The processes used by a DM will be examined on a standard of correctness
   * Leg’n might be able to curtail PF but not POFJ
3. If no, can still look to:
   1. CL principles of PF (***Baker***)
   2. Bill of Rights (***Singh***)

## Threshold

### Charter

**Section 7:** Protects a single right: to not be deprived of life, liberty, or security of the person except in accordance with the POFJ

* So, where life, lib, sec is challenged (i.e. the threshold is met) POFJ must also be met in order to make the action const’l
  + Life: right to live and be free of state conduct which increases the risk of dying
  + Liberty: Freedom from physical restraint and ability to make fundamental life choices
  + Security: to be free from threat of or action causing physical harm and the imposition of severe psychological harm
* Limit built into s. 7 and then there is a separate limit in s. 1 “Charter…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 + democratic society

**Section 32(1): Application:** Charter applies (a) to the Parliament and Gov’t of Canada … and (b) to the legislature and gov’t of each province

**S. 52(1) Supremacy:** the constitution is the supreme law and any law that is inconsistent with the provisions of the constitution is of no force or effect

→ How does this work with **s. 24(1)** and the ***Carter*** decision where it was determined that you can’t get any Charter remedies that are not already available under the statute?

### Bill of Rights

***s. 1(a)****:* 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

**Individual:** natural person only // **Property protected** // **Due process:** is this different from POFJ/CL PF?

***s. 2:*** every law of Canada shall, unless it is expressly declared by an act of the Parliament … be so construed and applied as not to abrogate, abridge, or infringe…any of the rights or freedoms herein recognized.

**Law of Canada:** Not provs/territories // **Unless explicit** = *can* explicitly abrogate

***(e)****:* Deprive a person of the right to a fair hearing in accordance with the POFJ for the determination of his rights and obligations

**POFJ:** Same as Charter POFJ? Same as CL PF? → no good answers

## Content

### Oral Hearings: Singh v Minister of E&I (1985) SCC

|  |  |
| --- | --- |
| **F** | Challenge to statutory design of Immigration Act rather than a particular application   * If refugee status denied – move to ss. 70 and 71 which provides an internal appeal to the Immigration Board for redetermination * Immigration Appeal Board considers the application; Iff they are of the opinion that there are reasonable grounds to believe that a claim could, upon the rehearing of the application, be established, a redetermination will be reordered [at this stage, the Minister gets notice and the opportunity to be hear but the claimant does not) * If redetermination is allowed, the applicant gets FULL PF * But the previous step is a potentially final one |
| **I** | Whether POFJ requires that the applicant be given certain procedural rights at the application stage. (Yes) |
| **RA** | Generally, where s. 7 rights are challenged and credibility is at stake, an oral hearing will be required. (The leg’n explicitly precluded giving an oral hearing) |
| **RE** | |  |  | | --- | --- | | Wilson (for 3 Judges) – Charter Reading | Beetz (for 3 Judges) – Bill of Rights Reading | | * “everyone” = every human being physically present in Canada * Security interest = freedom from the threat of physical punishment + from the punishment itself * Procedures infringe s. 7 rights by jeopardizing security rights * Were they in accordance with POFJ? No. * Where credibility is at stake, as in almost every refugee case, the claimant should be entitled to prior discovery of the Minister’s case, and an oral hearing. * Saved by s. 1? No. Cannot save it merely because it would be ‘inconvenient’ to hold hearings | * Resort to charter should be reserved for only those cases not solvable through other means * There is a benefit to layered rights protection * Don’t let admin law and bill of rights fall into neglect * According to admin law and the bill of rights: determination of rights and obligations = fair hearing in accordance w/ POFJ = provisions inoperative rather than void but it’s the same effective result. | |

### Disclosure + Right to Reply: Suresh v Canada (minister C&I) 2002 SCC:

|  |  |
| --- | --- |
| **F** | Suresh was a convention refugee but in 1995, CSIS wrote a report stating he was involved w/ Tamil Tigers and a security certificate was issued in respect of him |
| **I** | Do the procedures engage s. 7? What is required to meet POFJ? If POFJ not met, are procedures NTL saved under s. 1? |
| **L** |  |
| **RA** | Implicit in the right to reply is a right to disclosure b/c the relevant facts and contentions must be known before one is able to reply. When the ***Baker*** framework is applied in the context of a s. 7 claim, it may result in a substantive duty to give reasons (as a POFJ). The same principles underlie POFJ and CL PF although they are not necessarily exactly replicative. S. 7 requires at least what PF would have. |
| **A** | Threshold met.  Content? *Apply* ***Baker*** *in the s. 7 context:*   1. Nature of decision: nat security concerns = 🡫 But decision is final = 🡩 2. Nature of statutory scheme: PF given at other stages – why take it away at this point? It’s arbitrary to not give PF here = 🡩 3. Individual importance: 🡩 4. Legit E: Reverse of the ***Baker*** determination: Canada is a signatory on the Convention against Torture ∴ higher expectations = 🡩 5. Choices by body: lots of ministerial discretion = 🡫   What does POFJ Require?   * Informed of case to be met * Opportunity to respond and to challenge Minister’s info * Written reasons   Does s. 1 justify the s. 7 infringement?   * Valid objectives do not alone justify infringements * Limitations in the Act are not connected to the objective, nor ar they proportional   ***NB:*** It is possible that deportation to torture could be justified, just not in this case. |

### Duty to Give Reasons

***Suresh:*** Reasons require: the Minister herself (not a delegated officer) provide responsive reasons that demonstrate (1) that the individual is a danger to Canada **and** (2) there is no subst’l reason to believe s/he would be subject to torture upon return.

* Usually a duty to provide reasons will be satisfied if any form of reasons is provided
* Inadequate reasons probably not a stand-alone reason for quashing a decision for breach of POFJ (***Newfoundland and Labrador Nurses’ Union***)

### Right to State-Funded Legal Counsel

* Where a decision impairs a s. 7 interest, the state may be required to provide the individual with legal counsel (***New Brunswick (Minister of Health and Community Services) v G(I)***)

### Undue Delay

***Blencoe:*** Delay ≠ in and of itself a violation of POFJ; must disrupt the right to a fair hearing

### Ex Parte (W/o Party), IN Camera (Closed) Proceedings

#### Charkaoui v Canada (C&I) (2007) SCC

|  |  |
| --- | --- |
| **F** | * Minister able to issue a certificate of inadmissibility under IRPA – security certificate gets vetted by FC   FC Process: **can be ex parte,** **in camera,** on crown’s request, if judge believes that disclosure of some/all of the evidence on which the certificate is based could undermine national security.   * Judges can hear and rely on evidence that would be inadmissible in a ct of law (uncorroborated hearsay provided by foreign security agencies known to use torture). * If FC finds the certificate is reasonable, auto detention for foreign nationals and can apply for detention of PRs → permits detention // No JR, no appeal |
| **RA** | S. 7 does not permit a free-standing inquiry into whether a particular leg’ve measure strikes the right balance between individual and societal interests in general (that should be done under s. 1). Security concerns cannot excuse the ministry from adhering to basic POFJ. [POFJ are v similar to CL PF] |
| **RE** | 1. Threshold: S. 7 engaged? → Yes, doubly: detention pending deportation (lib) and deportation to potential torture (security, life) 2. Was s. 7 violated? Yes. Failure to provide a fair hearing 3. What was req’d by POFJ? → Fair hearing by an independent judge and knowledge of the case to be met and the opportunity to respond.    1. Hearing? Met.    2. Independent judge? Met    3. Fairness req’s the judge to decide the case on the basis of all the relevant facts and law – Not met.       1. FACTS: Judges don’t have power of inquest in the adversarial system – where the other party is unable to test the crown’s evidence, the judge is forced to decide the reasonableness of the Crown’s version of the facts only       2. LAW: Person unable to make legal arguments or raise objections w/o having knowledge ∴ not a full picture of the law either    4. Knowledge? Not met. Incomplete information is okay as long as there is some substitute/compensation made therefor 4. Is it NTL justified under s. 1? No.  * Pressing and subst’l objective but means are not proportional; evidenced by the old SIRC system, air india trial counsel undertakings; UK special advocate system – there are other ways to balance the competing objectives which better protect individual rights |

#### Harkat v Canada (C+i) (2014) SCC

There is an **incompressible minimum** of information necessary to comprise knowledge of the case against you in a national security context:

1. Can you give meaningful instructions to your counsel?
2. Can you give meaningful guidance and info to the special advocate so they can challenge info and evidence presented by the other side?

→ a case-by-case analysis but just having counsel in the room does not solve the information problem.

#### Carter v Canada (AG) (2015) SCC

While the Court has recognized a number of PsOFJ, 3 have emerged as central in the recent s. 7 jurisprudence: Laws that impinge on life, liberty, or security of the person must not:

1. Be **Overbroad**
2. Be **Arbitrary**
3. Have consequences that are **grossly disproportionate** to their object.

# impartiality, independence, and bias

Notions centred on the requirement of fairness in DM process; must always keep in mind the wide variety of administrative actors/contexts

**Independence:** the means of achieving impartiality - looking at structural factors and relationships: is your job set up in a way that it will lead to biased results?

***\*\*NB:*** independence is not the goal in itself, it serves to protect other important values: public acceptance of and faith in justice system, etc.

**Impartiality:** the global 'good thing', the ideal state; truly open mind, no improper influences // because this is hard to find we look at independence

**Bias:** the global 'bad thing'; partiality towards a particular outcome

→ Need to be both independent and have no reasonable apprehension of bias in order to be impartial.

## Sources of the guarantee of an independent Tribunal?

1. Common law: nemo judex and audi alteram
2. Constitutional or quasi-const’l documents and/or principles of ROFL? Probably not…

**What is Tribunal Independence?** When the DM is in an isolated zone, the public has greater confidence that the decision is based on only the relevant considerations (i.e. the facts and the law) – for cts this means freedom from interference by the exec. But there is an inherent difficulty w/ administrative tribunals b/c they have intrinsic connections with the executive branch, so what counts as (in)appropriate interference?

## The Law of Tribunal Independence

### Wave 1: Judicial Independence to tribunal independence

(i.e. using the judicial independence ideas as a foundation on which to mould the concept of admin independence)

***Beauregard v Canada:*** Independence means complete liberty of individual judges to hear and decide cases that come before them: no outsider, be it gov’t, pressure group, individual, or even another judge – should interfere in fact or attempt to interfere with the way the judge conducts his/her case and makes his/her decision.

**Determining Whether Judicial Independence Exists:**

Impossible to tell whether someone is actually independent ∴ can only structurally constrain situations

1. Security of tenure
2. Financial security (serves two purposes)
   1. Gov’t can’t alter pay after a judge gives an unsatisfactory judgment
   2. Judge won’t seek other remuneration (∴ less susceptible to financial temptation)
3. Administrative control: who gets to hear what cases, resources at the court house, etc.
4. Adjudicative independence: not a structural one but rather it depends on the internal process of decision making

***Valente v The Queen* [1985] SCC:** First SCC case to suggest applying judicial theory of independence to administrative tribunal; est’d the **test for** **admin tribunal independence:** Would a reasonable, well-informed person, having thought the matter through, conclude that an admin DM is sufficiently free of factors which could interfere w/ his/her ability to make impartial judgments?

***Canadian Pacific Ltd. v Matsqui Indian Band* [1985] SCC:** test for structural independence must be applied in light of the functions being performed by the particular tribunal, the interests at stake, etc.

***Regie* [1996] SCC:** Admin DMs don’t need life appointments, they just need to avoid the situation where DMs can be dismissed at pleasure. Fixed-term appointments are acceptable b/c DMs can only be dismissed for specific reasons and could contest such dismissals in court. Also stated that it’s not unusual to have contact between admin body and the exec, so long as the minister in charge cannot **direct** tribunal decisions.

**Factors to be Considered when Determining Appropriate Level of Administrative Independence:**

1. Adjudicative role vs. executive/policy-making?
2. Where gov’t a party to the adjudication, more independence?( and potentially other situations where parties have a power imbalance?)
3. Where expertise req’d for board members, total independence may not be possible b/c you’re drawing from a limited pool of applicants
4. Self-governing professions:
   1. Maybe this results in professionals ‘covering’ for one another OR treating someone more harshly out of protection of the profession?
5. Statutorily prescribed (const’lly consistent) structural independence issues are okay

### Wave 2: Parliamentary Supremacy vs Interference

#### Ocean Port Hotel v BC (General Manager, Liquor Control Branch) [2001] SCC

|  |  |
| --- | --- |
| **F** | * OP repeatedly violated their liquor license * Off. tait: investigates and imposes suspension // Off. Jones: determines whether suspension is justified and, if so, grants it (they’re colleagues w/ incentive to affirm one another’s work) * Hearing done essentially on hearsay evidence BUT the liquor appeal board (internal appeal mech) would be a trial de novo w/ full PF rights * LAB affirms the suspension |
| **I** | Does the unwritten const’l guarantee of jud’l independence (found in preamble to CA) extend to admin tribunals? If so, the LAB members were not sufficiently independent, as indicated by their insecure tenure. (the only way to argue independence, given the statutory prescription) |
| **L** | Subs. 30: LGIC appoints people to LAB who then serve at his pleasure; they are paid ‘reasonable expenses’ as determined by LGIC. In practice, this meant that they were 1 year appointments for part-time work. One chair is appointed and they got a steady income while the others only got per diems and the chair gets to decide who sits on what panel. [this scheme would clearly violate judicial independence] |
| **D** | There are no gaps to be filled by the CL b/c the leg’n is unambiguous. There is no freestanding const’l guarantee of administrative independence. The will of the legislature should prevail in determining how much independence a given tribunal should have |
| **RA** | As a general rule, admin tribunals do not attract quasi-const’l reqments of independence but certain tribunals may be subject to such req’ments by their nature. The cts do not occupy the same const’l role as admin tribunals: judicial independence meant as a way to keep executive out of the judiciary but admin bodies are not separate from the exec – they are explicitly created for the purpose of implementing executive policy. Therefore they do not require the same protections. |
| **RE** | Although admin tribunals may serve an adjudicative function, their **primary purpose** is as an extension of the exec ∴ their level of independence is properly the subject of their constituting leg’n. |

#### Keen v Canada [2009] FC

|  |  |
| --- | --- |
| **F** | * Canadian nuclear safety commission (CNSC)’s mandate: to regulate nuclear activities and facilities in Canada to ensure compliance with health and safety, and security obligations as well as int’l obligs * President of CNSC (Keen) made a decision to close a nuclear plant b/c it failed to meet safety standards * Medical isotopes are produced at this plant and the closure created a massive worldwide shortage * Minister of natural resources brought emergency leg’n to force the plant to remain open * He then wrote to keen, advising her that he was considering asking GIC to remove her as president, which he did. |
| **L** | Nuclear safety and control act, s. 10:   1. Commission consists of not more than 7 **permanent members** to be appointed by the GIC 2. Notwithstanding (1), GIC may appoint temporary members of the commission whenever necessary 3. GIC shall designate one of the permanent members to hold office as president… 4. …. 5. Each permanent member holds office **during good behaviour** for a term not exceeding 5 years and may be **removed at any time by GIC for cause.** |
| **I** | Minister stated he removed her as president under (3), which was an at pleasure appointment. Is this a proper construction of the statute or does she hold the appointment as a permanent member *and* as president on good behaviour? |
| **D** | Appointment = at pleasure. The circumstances of her removal were sufficient to satisfy fairness req’ments |
| **ETC** | Should the president appointment be at pleasure? – arguably, because the president is the one making the final decisions, they should be **more** protected from gov’t interference   * The leg’n does not make individual cases before CNSC subject to ministerial oversight – the outcome is not meant to be dependent on ministerial pressure and allowing such interference should be written into the leg’n |

### Wave 3: Reasserting the push for administrative independence?

#### McKenzie v Minister of Public Safety & Solicitor General, et al. [2006] BCSC

|  |  |
| --- | --- |
| **F** | * Π was an RTB adjudicator who had her appointment rescinded mid-term * Argued that the unwritten const’l guarantees of jud’l independence should be expanded to RTB adjudicators (it was recently expanded to JPs so why not?) * At the high end of adjudicative spectrum – the same matters heard in RTB would have been heard in regular courts, but for this carving out |
| **I** | Whether the position of RTB adjudicators was protected by const’l guarantees of independence, including security of tenure |
| **D** | Yes. |
| **ETC** | McKenzie lost at BCCA…so we’re still going with Wave 2 and Ocean Port. |

## Bias

* Commonly raised objection
  + Must demonstrate a real possibility/likelihood – can’t just be a suspicion // likened to BoP
* Must be raised @ first opportunity
* Effect, if successful = decision quashed, returned to be decided by a newly constituted tribunal
* Certain contexts allow for more bias than others – the more adjudicative, the easier RAB is to prove
* Keep in mind: 3 modes of policy making in admin bodies:
  + Decision-making
  + Informal rule-making through soft law (guidelines, bulletins, manuals)
  + Formal rule-making through delegated leg’n

***Committee for Justice and Liberty* (1978) SCC:** Test is **reasonable apprehension of bias**, constituted by a belief which is:

1. Reasonable, and
2. Which would be held by reasonable and right-minded persons
3. Who are applying themselves to the question and obtaining the required information

### Individual Bias

Types of situations where individual bias might be found:

1. **Pecuniary/Material Interest**
   1. Pecuniary:
   * ***Dimes v Grand Junction* [1852]:** Decision of lord chancellor set aside b/c of his SH interest in a company that was a party to the proceedings
   * ***Energy Probe v Canada***: Board renewed the operating licence of a nuclear generating station run by ON hydro; Part-time member of board was a past director and SH of a company which had supplied machinery to ON Hydro. His interest was seen as too indirect.
   * If a DM might gain but the gain is no more than that of the average person in a widespread group of beneficiaries, it is probably not enough
   1. Non-Pecuniary: e.g. decision of band council to evict a band member so that his house could be given to a bigger family – set aside b/c one of the councillors was an intended occupant (***Obichon v Heart Lake First Nation***)
2. **Personal Relationships w/ Parties:** CONSIDERATIONS:
   1. How significant is the relationship? (i.e. husband? Father? Friend’s second cousin?)
   2. Passage of time?
   3. Does the structure expect partiality?
   * e.g. tripartite labour panel, where mgmt. and labour reps are nominated by respective groups exactly for their sympathy towards its members.
   * Statutory authorization of bias usually insulates DM from allegations of bias
3. **Prior Knowledge/Information:** depends on the nature and extent of DM’s knowledge

* ***SEIU* (1997):** Entire OLRB disqualified from hearing case b/c they rec’d info earlier @ a plenary meeting which they claimed contradicted the facts as presented by one or more parties. But they were prevented from their oath of office from revealing what they knew
* ***Wewaykum* (SCC 2002):** Binnie J, when he was federal ADM of justice, was in a mtg where this case was being discussed. He had seen 4 pieces of correspondence, 15 years ago. He played no active role in the case, which was fairly quickly transferred to a separate office. ∴ no bias.
* **Mediation Privilege:** If board were involved in/privy to mediation = RAB b/c parties may have said things against their own interests in a mediation setting which would be unfair to have revealed in an adversarial setting.

1. **Prior Involvement in the Matter:** depends on the nature and extent of the DM’s prior involvement

* NEB receives applications and issues certificates for pipelines. The chair of NEB had previously been involved in authoring a study that argued Canada was underserved by pipelines. → RAB (***Committee for justice and liberty***)
* MoE had been involved in decontaminating a site. The site was sold and MoE sued for not cleaning it up properly. Then Imperial Oil bought it. MoE ordered IO to clean the site up and IO alleged RAB, unsuccessfully. IO had acquired the obligations when it bought the land – MoE having been sued as the prior owner is separate from his current actions, taken in a policy-enacting context. (***Imperial Oil v Quebec (MoE)* (SCC 2003)**)

1. **Attitudinal Predisposition Towards a Particular Result:**

* Can be gleaned from DM’s comments and attitudes in the course of the hearing or outside the hearing
  + Antagonism towards litigants, ex parte communications, irrelevant/vexatious comments, adjudicator taking on advocate’s role
  + NOTE: past decisions ≠ RAB
* The general test for this is still RAB, but perhaps on a spectrum?
  + Where a body is multifunctional, it may be permissible for it to hold a fixed view during an investigative/policy-making stage vs at an adjudicative one
  1. RAB when adjudicative context:
  + ***Chretien v Canada* (Fed Ct 2008):** commission of inquiry into sponsorship scandal – 3 months in, justice Gomery states the program was run in a “catastrophically bad way” which was “dismaying.” → given it was an investigation into corruption scandal, involving prior PM, probably not allowed to have any hints of bias ∴ RAB.
  + ***Great A+P* (1993):** Constance Blackhouse, prominent feminist scholar, particularly in the field of workplace discrimination, appointed to be an adjudicator on a human rights panel. The case was about workplace discrimination → Not RAB (past advocacy ≠ auto disqualification)
  1. “Closed Mind” test when policy-making context:
  + ***Old St. Boniface:*** test when it comes to elected officials who are elected on a certain platform and then go on to sit on boards which may impact those platform areas/matters is whether the person has a **completely closed mind.**

### Institutional Bias

**Key difference** between admin tribs and cts: need for inst’l policy-making, collaboration and consistency

* Often leads to bias allegations
* Generally, policy-making is meant to further the law that the tribunal has been mandated to administer but the tension arises when such policies appear to infringe upon adjudicative independence

**Test for Impartiality in a substantial number of cases:** Whether the system is **structured** in a way that created the reasonable apprehension of bias on an institutional level.

→ What factors should be considered in looking at the system’s structure? The tribunal, its operation in practice, and any safeguards that may be in place to prevent incidents of bias in practice.

#### Consolidated Bathurst (1990) SCC – Full Board Meetings

|  |  |
| --- | --- |
| **F** | * Union-company dispute goes to panel of OLRB * Panel asks for full board meeting (FBM) to discuss whether a legal test should be changed * Parties to dispute not invited to participate * No minutes kept, no attendance taken, no evidence introduced (i.e. facts not discussed) * Panel makes their decision + upholds current test – company alleges bias |
| **I** | Whether the FBM breached a principle of natural justice (he who hears must decide) by putting adjudicators in a situation to be influenced by others who had not heard evidence/arguments. |
| **D** | No breach. |
| **RA** | The audi alteram principle imposes 2 conditions on FBMs:   1. Discussions must be limited to LAW or POLICY, not factual issues. 2. Should any new grounds arise @ FBM that would affect the parties, the parties should be given a reasonable opportunity to respond |
| **RE** | Rationale for allowing FBM:   * Benefit from acquired experience of all members * Tripartite nature of the board makes it even more important to foster exchanges between mgmt. and union reps on policy issues * Fostering coherence (though not going so far as to compromise panel members’ capacity to decide for themselves)   Discussion ≠ pressure/improper influence:   * Discussions with colleagues does not lead to auto assumption of improper influence * The DMs may have changed their minds b/c of the meeting, but that doesn’t matter – what’s important is that DM is still able to make his/her own decision * Meetings were designed to foster discussion w/o trying to verify whether a consensus had been met   Natural Justice = context-specific:   * Tribunals were created to increase efficiency and it’s unrealistic to expect them to act exactly like cts in this respect * The board faces may inst’l constraints * The nature of the admin body will affect the entitlements that parties are allowed. |
| **DIS** | * FBM could have been very influential * Policy matters should be treated like facts, not law (i.e. shouldn’t be discussed by non-adjudicators w/o parties present and able to respond) * While uniformity is important, it can’t be promoted at the expense of natural justice |

***Tremblay***

|  |  |
| --- | --- |
| **F** | * Applicant went to social services board to get reimbursed for bandages * Panel decided in her favour * Panel decisions are vetted before being confirmed – vetted by legal counsel or the president of the board * The vetters are also allowed to call a ‘consensus meeting’ |
| **RA** | Imposition of consultation meetings by a board member who is not on the panel = inappropriate influence. |
| **RE** | Problems with the meetings:   * Who initiates? (unlike in ***Bathurst***, the panel members didn’t call the meeting) * Compulsory consultation for panel – imposition of this goes against leg’ve intent * Procedures instituted for the meeting: voting, minutes, attendance = pressure to decide one way * Structure was internally created ∴ more easily scrutinized for bias concerns than leg’vely created structures |

#### Geza v Canada (Minister of C&I) – Lead Cases

***Geza* [2005] Federal Ct**

|  |  |
| --- | --- |
| **F** | * IRB created a ‘lead case’ that would be representative of the issues at play for several similar refugee claims and would provide a full evidentiary record for all * Dealing with a large influx of Hungarian Roma claimants for refugee status |
| **I** | Whether the lead cases led to RAB regarding the IRB. |
| **D** | No; insufficient evidence. |
| **RA** | Two-part test for RAB on institutional level (from ***Lippe*** and modified by ***Matsqui*** for the admin context:   1. Having regard to the context of the DM, will there be a RAB in the mind of a fully informed person in a substantial number of cases? 2. If no, allegations of bias must be dealt with on an individual, case-by-case basis. |
| **RE** | * Emails do not show that IRB’s motive was to reduce # of Roma refugees accepted * Bubrin’s involvement was as an expert – nothing wrong with his participation in both the lead case setup and in the IRB as a panel member * IRB’s liaisons w/ CIC minister was only @ a very high policy level – nothing to suggest improper influence on IRB decisions * Drop in successful # of Roma claimants does not give rise to RAB – could have happened for any number of legitimate reasons. |

***Geza* – Federal Court of Appeal**

|  |  |
| --- | --- |
| **I** | Whether RAB exists regarding the establishment and use of the lead case in determining the appellants’ refugee claims. |
| **D** | Based on entire factual matrix, a reasonable person would conclude that the lead case initiative was designed not only to generate consistency but also to reduce the number of successful Roma refugee claims and to deter future applications ∴ RAB.  HOWEVER, although there was bias in developing the lead case, this does not vitiate any subsequent decisions that relied on findings of lead cases  [FORD: probably a practical decision here b/c it doesn’t make any logical sense] |
| **RA** | Although the board must develop ways to be efficient and consistent, the resultant procedures must not be adopted at the expense of the duty of IRB to afford each applicant a high degree of impartiality and independence. |
| **RE** | * Bias = DM has been influenced by some improper/extraneous consideration → in determining propriety, legit interests of an agency in the overall quality of its decisions can’t be ignored * Board’s previous decisions on Roma applicants had been overwhelmingly positive, and there was v little evidence of inconsistency → leads to the appearance that IRB adopted the lead case method on the basis of its meetings w/ CIC (which was concerned about the high # of successful claims) * IRB’s selection of the lawyer and cases as lead cases, w/o consultation w/ refugee bar or NGOs or public notice = appearance of one-sided consideration * Bubrin’s place on hearing panel linked the adjudication of claims with mgmt. activities |
| **ETC** | Questions about this case…   1. What if the pre-lead case applicants really did have illegitimate claims, and the lead case was in fact leading to more accurate decisions of IRB? Would this change the finding of RAB?   → No. RAB is a freestanding concern – it is separate from the question of whether the right outcome was reached, at the end of it.   1. What if, as a policy, the CIC wanted to put a cap on the # of Hungarian Roma refugees allowed in per year?   → If that’s the policy they want to pursue, they have to implement it as such. It cannot effect this result by making IRB decide cases in a biased way. |

#### Adjudicative Independence and Legislative Process

***Communications, Energy + Paperworkers Union v Alberta LRB:*** Executive branch consulted w/ ALRB for their knowledge of the field, in their efforts to implement a new legislative policy. How should feedback from the industry be given to the exec dept that is responsible for the tribunal? How can tribunal maintain impartiality and independence while giving exec necessary information?

#### Multifunctionality

* Polycentric issue considered by tribunals → reflected in the diversity of expertise req’d of the tribunal → reflected by the appointments process to that tribunal
* Common complaint is that the tribunal is acting as both judge and prosecutor in the same matter
  + Generally, overlapping functions are ok as long as they are set up by statute and const’l (***Regie***)
* Also, tribunal may set up its own measures to reduce likelihood of RAB.

# Standard of Review

|  |  |
| --- | --- |
| Appeal from Trial Court Decision | Judicial Review of Tribunal/Agency Decision |
| * Uniform procedure * Substantive review of context: there is one right answer * SoR = Correctness   + Error of law: must be corrected   + Error of fact: must correct a “palpable + overriding error”     - Deference to trial ct’s firsthand engagement w/ the facts | * Procedure is not uniform * BUT SoR of PF is still correctness * Substantive review of content: reasonableness or correctness * “deference as respect requires not submission but a respectful att’n to the reasons offered or which **could be offered** in support of a decision.” |

**LEGISLATIVE INTENT:**

* 1. **Jurisdiction-conferring clauses:** gives ‘exclusive jurisdiction’ to a particular body to decide things under the Act. → Message from leg’re to court**:** stay out
  2. **Privative clauses:**

Full: finality provision (“this decision is final/conclusive”) + ouster provision (“this decision is not open to review in any court”) → Message to court: stay out

→ **NB**: privative clauses, b/c they are **statutory,** should arguably override the ct’s ability to determine jurisdictional boundaries, which is a CL protection.

* 1. **Statutory Appeal Provisions:** “May appeal to X court” explicitly set out in the act → Message to court: you have a role to play

## Pre-1979 Judicial Strategy

* Statutory interpretation is the purview of the ct ∴ they get to police the boundaries of the admin body’s acts for being intra or ultra vires
* Used idea of ‘preliminary question’ to get into JR: i.e. did the admin body have the jurisdiction to hear this question?
  + Jurisdiction includes: over parties; over the dispute; and over the remedy sought

→ changed w/ the ***CUPE*** decision

### CUPE local 963 v New Brunswick Liquor Corp (1979) SCC

|  |  |
| --- | --- |
| **F** | * Union-mgmt dispute: lawful strike held by liquor store employees; mgmt. runs the tills while the employees are striking * Q before the PSLRB is whether the act’s provision that prohibited replacement of striking employees with new employees, included management * In order to do this, the board had to determine the purpose of the act overall and in the provisions on strikes * Board: act is about maintaining peaceable relations between labour and mgmt. * CA: split 3 ways |
| **L** | Act granted jurisdiction to PSLRB over complaints; had a full privative clause |
| **RA** | The interpretation of the provisions at hand would seem to lie logically at the heart of the specialised jurisdiction conferred on the board…in that case, not only would the board be **entitled to be correct** in it its interpretation, but one would think that the board would be **entitled to err** and any such error would be **protected from review** by the privative clause |
| **A** | Dickson’s 3-part analysis:   1. **Jurisdiction:** board had jurisdiction; cts should not be too quick to brand something as jurisdictional in order to be able to review it (if it’s a jurisdictional Q, SoR = correctness) 2. **Privative Clause:** Constitutes a clear statutory direction from leg’re that public sector labour matters are to be decided by the board 3. **Standard of review:** It can’t be correctness all the time ∴ created **two standards**    1. Jurisdictional Qs: correctness    2. Re: content within the board’s jurisdiction: patent unreasonableness |

## Development of Standard of Review Post-Cupe

***Crevier*** and***Paisenchyk***: Ct cannot be completely ousted from doing JR of administrative action; Jurisdictional Qs remain in ct’s authority, regardless of privative clause [Pseudo-constitutionalization of JR?]

***Bibeault* (1998):** Central Q: what did the legislature intend to be the jurisdiction of the admin body? Leg’ve intent indicated by: wording and purpose of statute; reasons for tribunal; expertise; nature of problem

***Pezim* (1994)*, Southam* (1997):** Factors to be considered:

|  |  |
| --- | --- |
| * No privative clause * Broad statutory right of appeal * Q of mixed law and fact | * W/in jurisdiction * Expert tribunal w/ unique membership |

→ What is SoR? Can’t be correctness b/c of expertise; but can’t be PU b/c there’s statutory right of appeal

**Result:** new (3rd) standard of review: *reasonableness simpliciter*

→ what’s the difference between PU and RS? **Immediacy/obviousness of the defect**. If it’s apparent on the face of it, then PU. If it takes some significant searching or testing to find the defect, then the decision is just normally unreasonable

* + When reviewing on the reasonableness standard, ct must look to see whether any reasons support it – defects are to be found in evidentiary foundation or the logical process

### Pushpanathan (1998) SCC

|  |  |
| --- | --- |
| **F** | P seeking refugee status; was convicted of an indictable offence (conspiracy to traffic in narcotics)  Under the convention, refugee status is auto unavailable for anyone who is guilty of acts “contrary to purposes and principles of the UN.”  ∴ Issue for IRB = whether conspiracy to traffic in narcotics = contrary to purposes and principles of the UN |
| **I** | What is the SoR for the IRB’s decision? |
| **D** | The proper standard is correctness |
| **L** | Jurisdiction conferring clause + privative clause (suggests reasonableness)  But, JR provisions: review by FCA of FCTD’s decision req’s FCTD to certify a “serious question of general importance” (suggests there are some matters o/s the scope of the board’s expertise and amenable to JR |
| **RA** | Focus on **legislative intent:** did legislature intend for the IRB to have jurisdiction over **this particular Q?** |
| **RE** | **Four Factors:**   1. Privative Clause? Full? Partial/equivocal? 2. Expertise? \*\*the most important factor\*\* decided on 3-part sub-test:   THE ONLY PART OF THIS CASE TO BE USED IN AN EXAM   1. Expertise of tribunal? 2. Expertise of court? 3. Who is better placed to make this decision? 4. Purpose of the act and the particular provision:  * Polycentricity suggests deference * Adjudicative role – suggests non-deference vs. policy making role – more deference req’d  1. Nature of the problem 2. Q of law? (of general law?)   More general Qs of law = < deference b/c it matters that these Qs decided in a consistent way   1. Q of fact? 2. Q of mixed law and fact? |
| **A** | * Privative clause   + But, downgraded by the statutory appeal provisions which suggest that there are some areas where a tribunal does not have expertise * Involves Q of general law * IRB has no expertise in this and is not acting in policy-making capacity |

## Dunsmuir and Beyond

**Standard of Review:** became a messy, unpredictable process…

1. Judicial uncertainty exemplified in:
   1. ***Mossop* (1993):** 6 judges thought SoR was correctness (of those, 4 thought the decision was correct and 2 thought it was incorrect); 1 judge thought the standard was PU ∴ 4:3 split on the final outcome
   2. ***TWU* (2001):** applied ***Pushpanathan***; divided over whether SoR was correctness or PU (though a unanimous outcome)
2. Patent unreasonableness?
   * What is the value added (if any) of adding “patent” to unreasonable?
   * Is it a problem that decisions which are just shy of patently unreasonable are upheld?
     + Is this a principled method for DM?
3. ***Pushpanathan***: 4 factors really come down to legislative intent vs. expertise
   * Why is expertise more important that privative clause (which shows leg’ve intent)?
     + Privative clauses are *never* taken as determinative, despite being a very clear indication of legislative intent
     + Now, the reverse situation holds where only the absence of a privative clause is really meaningful, b/c it’s uncommon and may ∴ be taken as an invitation for jR
   * How does one determine expertise?
     + Automatic experts in home statute? Or just some provisions?
     + Do you look at the board overall or just at the individual members?
4. Subject matter: Not an ‘official’ consideration, but a fairly accurate predictor of SoR:
   1. If the board hears matters of science, economics, or it’s the law society: deference owed
   2. If the board considers other matters (social services, human rights, etc.): no deference.

### Dunsmuir v New Brunswick (2008) SCC

|  |  |
| --- | --- |
| **F** | * D was a ct clerk – a non-unionized position; appointed by LGIC to hold office at pleasure * But also under an employment contract ∴ hybrid situation, covered by 2 statutes: the ***Civil Service Act*** and the ***Public Service Labour Relations Act*** * He was terminated “not for cause” but D’s work hx not perfect, had been reprimanded before   + D argued that the termination **was** for cause, and was therefore owed PF * D grieves and his complaint goes to PSLRA arbitrator who must decide:   + - 1. Whether he has jurisdiction to hear the case…Is he allowed to inquire into the reasons for D’s dismissal? → He says yes       2. Merits of the case: → used ***Knight*** to find that D was entitled to PF as a statutory office-holder; termination procedure did not follow PF ∴ Dunsmuir reinstated |
| **L** | ***Public Service Labour Relations Act***  ***s. 101(1):*** Except as provided in this Act, every order of the adjudicator is **final and shall not be reviewed**.  ***(2):*** No JR…to question, review, prohibit or restrain the board.  ***s. 97(2.1)*** [**the remedy**] Where an adjudicator determines that an employee has been discharged or o/w disciplined by the employer **for cause…**the adjudicator may substitute such other penalty…  ***s. 100.1(2)*** An employee who is **not included in a bargaining unit** may…present to the employer a grievance w/ respect to discharge **[i.e. even though D not in union, he can still bring a grievance]**  ***(3)*** employee unsatisfied by employer response can refer matter to adjudicator.  ***(5)*** ss. 97+101 apply to a grievance referred in accordance w/ (3) [**remedy should apply to D**]  ***Civil Service Act***  ***S. 20:*** subject to the provisions of this Act or any other Act, termination of the employment…of an employee shall be governed by the ordinary rules of contract |
| **D** | 3-way split [3 concurring reasons] but all end up quashing adjudicator’s decision |
| **RE** | **Bastarache [Majority]**:   1. PURPOSE OF JR:   JR is intimately connected with the preservation of the rule of law but must be sensitive to foundational democratic principle // need to **balance 2 priorities**:   1. **ROFL maintained** b/c courts have final say on the jurisdictional limits of a tribunal’s authority 2. **Leg’ve supremacy** upheld b/c SoR determined by reference to leg’ve intent 3. 2 STANDARDS OF REVIEW – no more patent unreasonableness 4. There can’t be shades of irrationality – PU is subsumed w/in reasonableness standard    * **Reasonableness Definition:** deferential standard animated by the principle that certain questions do not lend themselves to one, specific result. Instead they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation w/in the range of acceptable and rational solutions 5. Determining Reasonableness [2 parts]:    * Was the **process** that the tribunal used reasonable? (Justified, transparent, intelligible?)    * Was the **outcome** w/in a range of reasonable outcomes?(Defensible in respect of the facts and law?) 6. Why do we need reasonableness?    * Different **expertise/field sensitivity** to the imperatives + nuances of the leg’ve regime    * **Respect of the leg’re’s choice** to leave some matters in the hands of admin DMs    * Respecting the **differing roles of cts + admin bodies** w/in CDN const’l system 7. Correctness  * Determining Correctness:   + Reviewing ct will not show any deference to DM’s reasoning process; it will undertake its own analysis of the Q;   + Such analysis will determine whether ct agrees w/ tribunal – if not, ct will quash * Why do we need Correctness?   1. Must be maintained re: jurisdictional Qs and **some other Qs of law**   2. Promotes just decisions and avoids inconsistent and unauthorized applications of law ∴ protects fund’l ROFL values  1. DETERMINING SOR **2 stages** 2. Is there a precedent? → If so, then no need to go through stage 2 3. Consider the following factors 4. Privative clause? → strong indication of R 5. Q of fact, discretion, or policy? → automatic R 6. Where legal + factual issues intertwined + can’t be readily separated → R 7. **Questions of law:** must look at **nature** of Q:    1. Tribunal interpreting its own statute or statutes closely connected to its function w/ which it will have particular familiarity → R    2. Where tribunal has developed particular expertise in the application of a general CL or civil law rule in relation to a specific statutory context → R    3. Discrete and special administrative regime in which DM has special expertise (e.g. labour relations) → R    4. Q of law of central importance to the legal system and o/s the special area of the expertise of the admin DM → C    5. Other const’l Qs → C    6. True Qs of vires or jurisdiction → C    7. Qs RE: jurisdictional lines between 2+ competing specialised tribunals   ***\*\* NB:*** RE: PF, the only metric is whether the proceedings were fair or not ∴ SoR not applicable  → Application to case at hand  Full privative clause; Specialized labour regime; Leg’ve purpose: to provide for prompt and final non-jud’l remediation; Q of law; but not one of central importance **∴ reasonableness applies**  Was the decision reasonable?  → No; Majority went into complex statutory interpretation + applied correctness in all but name |
| **RE** | **Binnie (Concurring):**   * By reducing # standards, all of the analysis goes into **whether the standard was met** but the problem hasn’t actually been solved b/c reasonableness, as a single standard, is not well defined   + People don’t know what this standard means and so it is hard to meet   + If the cts care about justified, transparent, and accountable decision-making with reasonable outcomes, they should do better in defining what that means * The reasonableness standard here was constructed for reviewing tribunal but what about the myriad other administrative actors? * Starting presumption should be reasonableness, unless the following apply: const’l Q; jurisdictional Q; or PF [in such cases, correctness should apply] * Prefer clarity over needless complexity   → Application:   * Reasonableness applies * Adjudicator unreasonable; manipulated the law too far in order to reach a conclusion favourable to D |
| **RE** | **Deschamps (Concurring):**  Approach: look at the substance of the case rather than SoR = it shouldn’t be more complex than a decision to intervene/overturn a lower ct decision   * Questions of law should always attract correctness   Application:   * Nature of this Q = Q of law involving CL rules of contract * Adjudicator has no expertise; Not home statute * Even under a reasonableness standard, the decision would have been unreasonable. |

### Edmonton (city) v Edmonton East (2016)

|  |  |
| --- | --- |
| **F** | * Shopping centre [EE] assessed @ $31M for city tax purposes * EC disputes the city’s assessment @ assessment review board (ARB), says it should be $22M; city finds classification error & requests board increase value to $45M * Board increases assessment $41M |
| **I** | 1. What is the SoR for the Board’s implicit decision that it could increase the assessment? 2. Does the decision withstand scrutiny on that standard? |
| **D** | 1. Reasonableness  2. Yes.  It was reasonable for the board to interpret the statute as permitting it to increase the assessment at the City’s request. This is consistent with the ordinary meaning of “change” and the overarching policy goal of the MGA: to ensure assessments are correct, fair, and equitable. The alternative would permit taxpayers to use the complaints process to prevent assessments made in error from being corrected ∴ frustrating the MGA’s purpose. |
| **L** | Alberta’s ***Municipal Gov’t Act***:  **305 (1)**If an error, omission or misdescription in any of the information shown on the assessment roll,  **(a) the assessor may correct** the assessment roll  → Majority reads this as suggesting that the assessor (city) can make a change if it discovers that it made an error, omission, etc. in the assessment roll (i.e. not just taxpayer who can instigate a change)  **(5)**If a complaint has been made under section 460 …, the assessor must not correct or change the assessment roll in respect of that property until a decision of an assessment review board or the Municipal Government Board, as the case may be, has been rendered or the complaint has been withdrawn.  **460 (3)**  A complaint may be made ***only by an assessed person or a taxpayer***.  **467 (1)**  ARB may …make a ***change*** to an assessment roll or tax roll or decide that no change is required.  **(3)**  An assessment review board must not alter any assessment that is fair and equitable  → EE argues that b/c the only party who can make a complaint is a taxpayer, who would only ever ask for a decrease, the only power available at the hearing is the ability to adjust the assessment down.  **470 (1)**  An appeal lies to the Court of Queen’s Bench ***on a question of law or jurisdiction*** with respect to a decision of an assessment review board.  → Statutory right of appeal  **(5)**  On hearing the application … the judge may grant permission to appeal ***if the judge is of the opinion that the appeal involves a question of law or jurisdiction of sufficient importance*** to merit an appeal and has a reasonable chance of success.  → limits the issues available for appeal; suggests desire for consistency on important issues but also meant to limit the amount of people who are able to appeal (conserving judicial resources, etc.)  **470.1 (2)**  In the event that the Court of Queen’s Bench cancels a decision, the Court must refer the matter back to the assessment review board, and ***the board must rehear the matter and deal with it in accordance with the opinion of or any direction given*** by the Court on the question of law or the question of jurisdiction. |
| **RA** | Default presumption is SoR = reasonableness |
| **RE** | ***Dunsmuir* Factors RE: Standard of Review:**   * Statutory right of appeal → suggests correctness * No privative clause * Nature of the Q: Law   + Not a Q of general law; Not a const’l Q; Not a jurisdictional question → suggests reasonableness * Decision maker interpreting own statute? Yes. → suggests reasonableness * Maybe a specialized admin regime → unclear   → Court splits 5/4  **Karakatsanis (Majority):**   * Precedent? No. ∴ Must go on to other factors * Starting point should be reasonableness if tribunal interpreting home statute or those closely connected   + Presumption only displaced if Q falls into one of the categories from Dunsmuir   + Statutory right of appeal ≠ a new category     - 6 previous cases considered tribunals w/ SRA and none of them decided on correctness   **Expertise:**   * contextual and may arise for a number of reasons: day to day understanding of leg’ve scheme; embeddedness in a context where field sensitivity developed to the imperatives and nuances of leg’ve regime; members might be req’d to have particular skill set * **Inheres in a tribunal itself as an institution**   **Reasonableness is the appropriate SoR**  Decision reasonable b/c it conforms to ordinary meaning + policy goals of statute  \*\*NB: this does not really look like reasonableness review – doesn’t go through the Dunsmuir analysis but rather goes into intensive stat interp |
| **DIS** | **Côté & Brown JJ for Dissent:**   * Not arguing for SRA to be category of correctness – it’s about **leg’ve intent** * Comparison to ***Pushpanathan*** (limited SRA was evidence of leg’ve intent):   + leg’re designated important Qs of law and jurisdiction to be subject of SRA;   + where a review results in the ct quashing the tribunal’s decision, it is binding on the board;   + other Qs will just be reviewed through normal JR so there must be something different about these questions * Presumption of deference has been rebutted: deciding the matter exclusively on categories w/o any role for context is overly formalistic and would be a significant departure from Dunsmuir   + If presumption so strong that even SRA can’t rebut it, it becomes insurmountable * Expertise: Agencies can be (relative) experts in some things but are not entitled to blanket deference b/c of expertise in all things   + Expertise arises either when habitually making findings of fact in a specialized leg’ve context (**institutional**) or b/c the DMs have expert qualifications/experience (**specific**)   + It’s a bridge too far to say that it inheres in the institution b/c there would be no room for anything but deference   + Must leave room for leg’re to create a body that has expertise in some things but not others (leg’ve supremacy) * SoR = correctness   + Decision incorrect; while board not totally barred from increasing an assessment, it was limited to the specific matters raised in EE’s complaint. It had no authority to consider the general fairness/equity of the assessment or to consider the new assessment proposed by the city there |

**Philosophical Difference Between Decisions:**

Majority concerned w/ not deferring enough to admin expertise; dissent more w/ respecting legislative intent.

**Things Clarified:**

* Expertise: Still matters; still imprecise and defined differently
* Presumption of deference // default SoR = reasonableness
* Continued avoidance of “true Qs of vires” (maybe b/c of checkered past of cts overreaching?)

**Things not Clarified:**

* Statutory rights of appeal: What effect do they have? Dissent compelling.
* Applying the SoR: majority purports to do reasonableness but does v. close stat interp
* Unclear how often does choice of SoR actually changes outcome

**Romantic & Skeptical Accounts of Substantive Judicial Review:**

**Romantic**: constitutional pluralism where both admin + judiciary have a unique role to play in development of “new” roue of law

**Sceptical:** Tug of war, irreconcilable differences; actually just a “Shell game” hiding vast judicial discretion

**Correctness in Practice:**

* What does it mean to be correct “correct”? In line with common law / civil law? – OR In line with statutory purposes?
* When is there only one right answer?
* Why do we employ the correctness standard? B/c there **is** only one answer – OR This topic is in Court territory – OR Court is safeguarding the Rule of Law

## Correctness Review

### Northrup Grumman (2009) SCC

|  |  |
| --- | --- |
| **F** | * NG went to Canadian International Trade Tribunal (CITT) and argued Public Works Canada had not evaluated its bid for a gov’t K in accordance w/ the agreement on internal trade (AIT) * CITTAct states CITT takes complaints from “potential suppliers” of “designated Ks” under the AIT (and other agreements) * CITT had to first decide whether they had the authority to hear NG’s complaint, as a non-CDN company→ decided it could * Canada sought JR on CITT’s decision |
| **I** | What is the SoR for considering CITT’s decision? Does it pass muster on requisite standard? |
| **D** | Correctness; no. |
| **L** | ***CITT Act:***  Standing: Must be a **potential supplier** under a **designated contract**  Potential supplier = bidder/prospective bidder under a designated K  Designated K = defined by the Regs as being one described in NAFTA, WTO, CCFTA, or AIT (These trade agments = doors into the CITT’s jurisdiction)  → Only one applicable to this situation is AIT  ***AIT:*** *NOT a leg’ve document – it’s an agment reached by the executive gov’ts of provs + territories*   * Application (art 502): relates to **procurement w/in Canada (no specific definition in AIT** ∴ must fill in w/ context**)** * **Purpose** of AIT (art 501): ensuring equal access to procurement for **all CDN suppliers** * Canadian suppliers = those w/ place of biz in Canada (art 518) * Preamble + other articles: parties to agment = gov’ts of Canada;   + Clarify that the agment made in order to reduce barriers to internal trade |
| **RE** | * Deciding SoR: Precedent for this – all parties agree SoR is correctness * In applying this standard, ct launches into its own analysis of the matter * **Purpose of CITT** better understood w/ reference to both CITTA and AIT – AIT is essentially a domestic free trade agreement   CLF wanted to focus on 5 points:   1. Although French version of AIT could be read acontextually as procurement merely reached in Canada, the phrase read in context of AIT’s scope and purpose leads to conclusion that such procurement req’s supplier to be CDN, as defined in art 518. 2. Circularity argument: CITT says a potential supplier is bidder on designated K and designated K is one which takes into account the circumstances of a potential supplier. → ct says No; conflating the definition of “potential supplier” under CITTA w/ “supplier” under AIT – CITTA definition is necessarily broader b/c it’s meant to apply to all of the trade agments listed in the regs while AIT “supplier” has CDN nationality req’ments 3. Article 504 states CITT available to “suppliers” wishing to make a complaint; b/c there is a distinction in art. 518 between “suppliers” and “Canadian suppliers”, the reference in 504 to “suppliers” must mean any supplier is able to access to CITT. → No. meaning of the section, in its context clearly indicates that suppliers must be CDN to get access to CITT 4. Article 504(6) uses supplier to refer to CDN and non-CDN suppliers, so it would be illogical not to extend access to non-CDN suppliers → No. 504(6) creates rules about CDN content and the ability for a procuring party to limit tendering to CDN content – this does not create positive rights for foreign entities; this provision is only meant to ensure adequate competition and optimizing CDN content b/c taxpayers will be paying for eventual K. 5. NG says CITT an efficient dispute resolution mechanism and access to it should be open and ready → efficiency notwithstanding, CITT is a statutorily created body and the statute provides that access to it is pursuant to specific trade agreements. NG is not left w/o a remedy – able to ask for redress through JR.  * Negative impact on int’l trade if *any* foreign corp could gain access to rights under AIT, despite exclusion of those same rights from the int’l trade agments negotiated w/ their home nations * No reason for CITT regs to refer to specific trade docs if CITT just had jurisdiction over any corp making a bid to the CDN gov’t |

## Reasonableness Review

* It’s not just giving the tribunal a pass – or “not looking” at the tribunal’s reasons
  + Nor is it the “right to be wrong” because that would infer that the ct was deciding what’s right and wrong
* Example of Dickson’s analysis in ***CUPE*** which includes careful appraisal of the tribunal’s reasons (i.e. not just evaluating the decision against the statutory purposes but also in light of the tribunal’s own reasoning about those purposes
  + Stay close to the reasons – but don’t reweigh the factors that the tribunal considered
  + Reasonableness will vary on the context

### Reviewing Discretionary Decisions

Discretion: The concept of discretion refers to decisions where the law does not dictate a specific outcome or where the **DM is given a choice of options** within a statutorily imposed boundaries

Discretion in statutory language:

* Authorizes administrative action and/or decision aimed at individual or small group
* “may” (not “shall”)
* Delegates broad powers, often through vague language
  + E.g. council may make provisions for “good gov’t” or “good rule”
* Subjective vs objective grant of discretion
  + Minister may make any rules that it deems necessary → subjective grant, which is broader b/c minister gets to decide both what’s necessary and what rules to impose
  + Minister may make rules necessary to prevent fraud → objective grant

Judicial Review of Discretionary Decisions:

* Between 1959-1999, the courts could not review discretionary decisions at all; they were considered law not policy
  + The only way to review was to show **abuse of discretion** (improper purpose; bad faith; dictated decision; wrongful delegation of powers; fettering [being bound by rules or guidelines which would interfere with your discretionary power])
  + ***Baker*** rolled discretion into the SoR analysis

***Baker v Canada (C&I)***

***Immigration Act, s. 114(2)***: GIC *may, by regulation, authorize the Minister* to exempt any person from any regulation…or otherwise facilitate the admission of any person *where the Minister is satisfied* that the person should be exempted or that the person’s admission should be facilitated ***owing to the existence of compassionate or humanitarian considerations.* [subjective discretion]**

* The traditional grounds of review functioned according to 2 core ideas: that a DM must be given leeway to exercise the conferred discretionary power **BUT** they must also act w/in certain limits
  + ∴ there’s no strict dichotomy between discretionary and non-discretionary decisions so they shouldn’t be separated
* SoR = reasonableness

Application:

* The manner in which the decision was reached was **inconsistent w/ the values underlying the grant of discretion** + failed to give weight to:
  + Interpretive context: humanitarian and compassionate statute
  + Relevant factor: children’s interests
* Didn’t get into the weeds in statutory interp/looking at what’s correct; rather, looked at the values + statutory scheme as a touchstone [what do H+C mean **within the limits of the statute**]

Takeaways:

* Discretionary grant of authority = leg’re intended cts to be deferential
  + BUT cts are still allowed to look at discretionary acts
* Reasonableness review as tied to the values baked into the statutory scheme

***Suresh v Canada (Minister of C&I)*** → Modifies ***Baker*** re: discretion

* Can’t reweigh the factors considered by the admin DM in order to determine whether their decision was reasonable
* Reviewing ct must limit analysis to ensuring that only relevant considerations have been taken into account
  + i.e. whether there were irrelevant factors considered or whether there were factors that should have been considered but were not

### How to do a reasonable analysis

***Nor-Man Regional Health Authority* (2011) SCC**

|  |  |
| --- | --- |
| **F** | * Labour dispute RE: whether a vacation bonus for an employee begins when the job starts or when the employee joins the bargaining unit under a collective agreement * Nor-Man said it starts when you get into the unit; Union said it starts when the person begins work * Experienced labour arbitrator agreed with the union but determined that b/c the union had not brought it up over 5 successive rounds of collective bargaining over the past 20 years, the union is **estopped** from making that argument   + Estoppel req’s that the party knew at the time that they were compromising their own legal position but there was no evidence that the union ever intended to compromise their legal position ∴ arbitrator actually interpreted the legal rule incorrectly |
| **I** | 1. What SoR? → Reasonableness 2. Was the standard met? → Y |
| **D** | In a contextual approach to reasonableness review, the first thing to be considered is the **statutory scheme.** Even when a legal principle is interpreted incorrectly, it may NTL be reasonable if it advances the goals of a statutory scheme. |
| **RE** | 1. SoR:  * No suitable precedent * Privative clause, labour tribunal (which has a ‘different mission’ than cts as fosterers of peace in the labour context)  1. Was the decision reasonable?    1. Process:  * Arbitrator used previous decisions which also used estoppel in the same way * Their interpretation of “estoppel” was alive to the principles underlying estoppel; they’re not req’d to apply equitable and CL principles in the same manner as cts * Process was transparent, intelligible, and coherent ∴ reasonable   1. Outcome: * This was an “arbitral remedy” not a strict application of law; allowed to adapt legal principles to the grievances they see * Decision was consistent w/ the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix |

***Catalyst Paper Corp v North Cowichan District* [2012] SCC**

|  |  |
| --- | --- |
| **F** | * Π a paper mill in Δ municipality. Municipality begins to grow, more folks moving in; Δ didn’t want to raise residential property taxes b/c it would disproportionately affect the longer term, fixed income residents. Instead, raised Π’s taxes such that they were paying a seriously disproportionate rate. * Municipality agrees that Catalyst’s rate should be decreased and begins doing so slowly but Catalyst needs it to happen faster b/c they’re losing money hand over fist * No reasoning process to test b/c it’s a bylaw, not an adjudicative decision w/ reasons (recall, no PF right to reasons in leg’ve decisions) |
| **I** | 1. Can municipal taxation bylaw be judicially reviewed at all? 2. If so, what is SoR? 3. What does reasonableness require in this case? |
| **RE** | 1. JR Available?  * ***Thorne’s Hardware:*** policy decisions might be made for a variety of reasons and cts shouldn’t meddle; but that was a decision of LGIC (a const’l role) whereas this is a municipal policy decision (and municipalities have only delegated authority from the leg’re ∴ must operate w/in jurisdiction) * JR must be possible to ensure that delegated leg’n complies w/ the rationale and purview of the statutory scheme under which it is adopted (ROFL argument)  1. SoR? → **Reasonableness** [privative clause; distinct admin regime; discretion; policy decision; maybe mixed law and fact?] 2. Reasonable?  * What factors should the ct use in determining what lies w/in the range of reasonable outcomes? → narrow group of objective consumption-related factors urged by Catalyst? Or broader spectrum of social, economic, and political factors as urged by Cowichan?   + → determined by looking at the scope of DM power conferred by the leg’n   + S. 197 authorizes the imposition of a tax, not a fee – a tax need not bear any rel’nship to the costs of the services being provided – to require otherwise would prevent municipalities from exercising their authority     - Municipal tax by-laws, in previous decisions are reviewed on a v deferential standard: only if the bylaw is one that **no reasonable body informed by these factors could have taken** will it be unreasonable   Process:   * proper processes for passing bylaws must be used   + Municipalities don’t have to give reasons ∴ not a disqualifying fact   Content:   * Substance of bylaws need to conform to the rationale of the statutory regime; * cannot act for improper purposes * bylaw favoured residential property owners but not unreasonably partial   CLF: still the reasonableness standard but what counts as reasonableness is a higher bar |

## Reasonable Reasons

### Newfoundland Nurses (2011) SCC

|  |  |
| --- | --- |
| **F** | * Labour dispute over whether workers should be allowed to count time as casual employees in calculation of vacation entitlement occurring after becoming permanent employees   + In the collective agment, casual employees given some benefits but expressly excluded from vacation entitlement calculations * Adjudicator’s decision covered: relevant factors; parties’ argument; collective agment prov’ns; interpretive principles BUT did not include **why** she made the decision (no reasons in the reasons) |
| **I** | Whether the labour arbitrator’s reasons for decision satisfied the requirements of demonstrating “justification, transparency, and intelligibility” and whether the reasons engaged PF → Yes; no. |
| **RA** | Reasons don’t need to be completely comprehensive. If the reasons allow the ct to understand why the tribunal made its decision and permit it to determine whether their conclusion was w/in the range of reasonable results, reasonableness is satisfied. |
| **RE** | **SOR = Reasonableness:**   * No reasons = PF concern vs. questionable reasons = reasonableness review   + Quality of reasons falls w/in reasonableness b/c it’s about the reasoning and result of the decision, not the procedure * Presumption of reasonableness when interpreting home statute   **What does reasonableness require in this instance?**   * Deference req’s careful att’n to the reasons offered or **which could be offered**    + Ct needs to seek to supplement deficient reasons before seeking to subvert them   + Adequacy of reasons ≠ stand-alone basis for quashing   + Reasons may not include all the arguments, statutory prov’ns, jurisprudence, or other details the ct would have preferred but that does not impugn the validity of the reasons or result under reasonableness review * Reasonableness meant to be an organic exercise: reasons are just a part of how the ct determines reasonableness * Tribunal doesn’t have to make an explicit ruling on each constituent element   Context of the decision:   * Labour arbitration supposed to be efficient, economical, and informal   + Board was writing for the parties, not the cts   + It was a straightforward Q for the board   + The arbitration process would be paralyzed if arbitrators were expected to respond to every argument or possible line of analysis * The ultimate way to change the situation is not through JR but in future collective agment negotiations |

### Alberta (INformation and Privacy Commissioner) v Alberta Teachers’ Association (2011) SCC

|  |  |
| --- | --- |
| **F** | * ATA allegedly disclosed certain private info; commissioner began inquiry into allegation * Adjudicator delegated by commissioner found ATA had breached * ATA asks for JR of decision and raises a new issue there RE: commissioner’s compliance w/ statutory timelines |
| **L** | ***s. 50(5), PIPA:*** “An inquiry into a matter that is the subject of a written request referred to in s. 47 must be completed w/in 90 days from the day the written request was received by the commissioner unless the commissioner”  (a) notifies the person who made the written request, the org concerned + any other person given a copy of the request that the commissioner is extending that period, and  (b) provides an anticipated date for the completion of the review |
| **I** | 1. Should timelines issue have been considered on JR if not raised before adjudicator? → Yes. It was implicitly decided w/ adequate evidence + no alleged prejudice. 2. What is SoR? → Reasonableness 3. On applicable SoR, does the adjudicator’s decision survive JR? → Yes. |
| **RA** | If there exists a reasonable basis upon which the DM could have decided as it did, the ct should not interfere – the decision should be upheld as reasonable instead. If there is **no reasonable basis,** then it should be bounced back to the trib to give them the opportunity to provide reasons. |
| **RE** | 1. **Issue not raised before tribunal:**  * Usually, JR not going to be exercised in favour of an applicant where issue could have been but was not raised before the tribunal   + Leg’re entrusted admin bodies w/ determining certain issues + cts should respect this choice by giving tribunal the ability to consider the issue first + provide reasons before doing JR (esp. true where issue relates to the trib’s specialized functions/expertise)   + Could unfairly prejudice opposing party + deny the ct evidentiary record   + Can’t keep ace up your sleeve + pull it out when trib doesn’t decide in your favour, in order to argue trib didn’t give reasons * THIS CASE: no evidence req’d + no prejudice allege ∴ ct doesn’t need to bounce it back to the tribunal so they can give reasons; it can be considered on JR b/c it was IMPLICITLY decided that extension after 90 days ≠ automatic termination of inquiry  1. **Standard of Review**  * Had the issue been raised @ trib, trib’s decision would’ve been subject to reasonableness; the fact that the decision was implicit doesn’t move it into correctness and eliminate deference * Obviously an implicit decision can’t be reviewed w/ ref to the process’s justification, transparency, or intelligibility, nor to the trib’s reasons   → Doesn’t it actually **lack** transparency, then??   * This is where reasons which could be offered come in  1. **Applying reasonableness:**  * Reasons which could be offered Is not carte blanche to reformulate   + Ct can’t overlook crazy reasons and provide good ones   + Adjudicators also aren’t absolved from providing reasons     - If no duty to give reasons or when only ltd reasons req’d, it is appropriate for cts to consider reasons which could be offered * Adjudicator has prior reasons reported on language of an almost identical prov’n which is instructive * Safe to assume that the numerous and consistent reasons in such decisions would have been the same in this case (despite the fact that one major decision was decided **after** this case) * Adjudicator’s other reasoning: “within 90 days” only refers to the time w/in which inquiry must be completed, rather than the time w/in which inquiry must be cont’d   → isn’t this a binary decision? Either it’s completed or it’s not, in which case it needs to be cont’d. A condition for continuation seems to be notice on/before that date…   * Interpretation informed by the practical realities which make it impossible to provide an anticipated date of completion before 90 days (i.e. arguing that the law is not X b/c X doesn’t work for us?) * Why have the provision then?  1. In most cases that require an inquiry, the parties will be involved + will already know it’s going to be > 90 days (seems to say: redundant to give this info before 90 days) 2. Even if provided after 90 days. It still provides info to the parties. (seems to say: it’s still worth giving, as long as we do it at some point?) |
| **DIS** | **[Binnie + Deschamps]** Dunsmuir noted that the purpose of reasonableness review is to ensure justification, transparency, and intelligibility → the ct should be providing the same but instead “reasonableness” is allowing all sorts of different levels of deference among which a reviewing judge gets to pick + there’s no predictability of what reasonableness will actually entail anymore |

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

|  |  |
| --- | --- |
| **F** | * Minister denies H+C relief to alleged terrorist b/c it’s “not in Canada’s national interest” * Assumed that minister had the duty to provide reasons for the decision   + Expected that the min would follow IRPA guidelines in making determination     - Didn’t mention the guidelines in his reasons   + Got a staff briefing note about Agraira – stating he should be given relief – didn’t follow that   + Didn’t define “national interest” in his reasons |
| **I** | SOR? Standard met? → Reasonableness; yes. |
| **RE** | * Applied ***Alberta Teachers*** + used it to find **INFERRED REASONS** * “after having reviewed and considered the material and evidence submitted in its entirety” = implied minister considered the briefing note; b/c briefing note referred to the guidelines, Min must have also considered those   + Ct found that min not req’d to refer to each piece of evidence * “had the minister expressly provided a definition of the term ‘national interest’ it would have been one that related predominantly to nat’l security + public safety but did not exclude other important considerations from guidelines + analogous sources”   + Inferred content into definition employed by minister + support this w/ their own statutory interpr of the term   → looks a lot like ct is given carte blanche to (re)formulate reasons (contra alberta teachers)…what is the limit of inferred reasons? |

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

* McLean a securities broker who committed misconduct 10 years ago
* License revoked in ON 5 years after the incident & BC license revoked 10 years after incident
  + Securities argued that the triggering incident was not her misconduct but rather ON’s revocation 5 years ago (necessary in order to get around the 6 year limitation date)
* SCC used the arguments of the securities exchange executive director (who is the equivalent to Crown in a criminal case) as the reasons of the commission itself
* “Although reasons **would have been preferable,** there is nothing to be gained from requiring them.”

→ How is this not a procedural fairness issue? There are zero reasons!

## Charter Implications

**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?

### Administrative Jurisdiction to Apply the Charter

* **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 (2010) SCC

|  |  |
| --- | --- |
| **F** | Conway wants an absolute discharge from mental health institution, b/c of an alleged Charter violation |
| **I** | 1. Is ORB a court of competent jurisdiction” for purposes of **s 24(1)**? 2. If so, does it have jurisdiction to grant remedy sought? |
| **Background to the case:**   * ***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 admin acts are subject to the ***Charter*** * ***Cuddy Chicks*** trilogy: 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 * ***Cooper* (1996):** CHRT did not have power to apply Charter to its own leg’n b/c it did not have the power to consider questions of law.   + McLachlin’s dissent: The charter isn’t some holy grail that only cts can touch; it belongs to the people. * ***Nova Scotia (WCB) v Martin* (2003):** agreement w/ ***Cooper*** dissent - Canadians are entitled to assert rights and freedoms in most accessible forum.   + → Look to enabling statute for explicit/implicit jurisdiction to consider Qs of law, and **assume “law” includes Constitution;**   + Then consider any evidence of contrary leg’ve intent   + Agencies **must** apply the Charter if they have jurisdiction     - Their decisions re: Charter interpretation will be reviewed on **correctness standard** | |
| **D** | 1. Yes, ORB is competent 2. No jurisdiction to grant remedy. Cannot grant absolute discharges to NCR patients who are clearly not intended to have such a remedy ∴ such remedy cannot be sought via charter – C’s appeal is dismissed. |
| **RA** | **What Tribunals can do vis-à-vis the Charter:**   1. Admin agencies with the power to decide questions of law and no clear contrary leg’ve intent can resolve constitutional questions before them 2. Whether an admin body can grant the particular remedy sought, given the relevant statutory scheme, determined by discerning legislative intent.   → what this means in practice is that the Charter remedy requested can’t be broader than the remedies provided in the statute  \*\*also note that admin agencies are req’d to act consistently with “charter values” when exercising statutory functions |

### How to judicially review a Tribunal’s Charter-implicated decision

|  |  |  |
| --- | --- | --- |
| ***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*** |

**CHARTER-BASED APPROACH:**

1. Is the charter right infringed?
2. Is it saved under s. 1?

#### Multani v Commission Scolaire Marguerite-Bourgeoys (SCC 2006)

|  |  |
| --- | --- |
| **F** | * Multani and his family are observant Sikhs; Multani carries a kirpan and one day dropped it at school * School told him he couldn't take it to school anymore but the school board reached a reasonable accommodation whereby he could sew it into his clothes and continue to wear it * The governing board refuses to ratify the school board agreement and that wearing the kirpan violates a rule of the board’s code of conduct b/c kirpan = prohibited weapon |
| **I** | 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 –Whether the enforcement of the code of conduct in such a way as to ban the kirpan unjustifiably infringed upon Multani’s charter right to equality. |
| **RE** | **Majority: Charter Approach:**   * Focus in this case is the Charter right not the School Board’s interpretation of the Charter or their jurisdiction * If Charter rights are at stake, use a Charter analysis * Const’l law standards shouldn’t be collapsed into admin law * The *Oakes* 2-step analysis should apply whether this is a decision of an admin agency or a statute   **Result:** Council decision violated s. 2(b) and was not saved by s. 1.  **Concurring: Admin Law Approach:**   * Interpreting a statute is not the same as acting pursuant to statutory authority (i.e. acts and orders)   + Charter should only be used to challenge statutes, not acts     - 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. * the administrative law concept of reasonable accommodation is the standard to be used rather than minimal impairment   **Result:** SoR = reasonable ; Decision was unreasonable b/c it failed to take into account Multani’s Charter rights, which makes the decision ipso facto unreasonable. |

|  |  |
| --- | --- |
| Charter Analysis [Dickson’s 2-step] | Admin law analysis [Dunsmuir SoR] |
| 1. Define Multani’s Charter right and what it entails; ask was there a violation of that right in this case? → Yes. 2. Was the school demonstrably justified, etc. in doing so? → No. | 1. SoR: 2. Reasonableness? Not about interpreting a charter right, but rather about what reasonable accommodation looks like in this context; also a board with field sensitivity/expertise/insight in determining what such reasonable accommodations look like? 3. Correctness? It’s a constitutional question; or a general question of law, of central importance, etc. 4. Standard Met? |
| Advantages:  Avoids doing SoR and is therefore more clear (doesn’t need to get into the weeds about what reasonableness and correctness standards actually look like in practice)  More structured approach  Incorporates social values which is something that doesn’t appear in admin law b/c the SoR analysis only looks at the statute | Advantages:   * Awkward to try and fit admin acts into s. 1 analysis? * Admin law principles can be just as demanding as s. 1 analysis, but are better designed? * Avoids a blur between admin law and con law? * It’s a good thing to insist that charter rights can be incorporated into admin law – it doesn’t need to all be one standard.   + Other areas also need to be robust in rights-protection |
| Disadvantages: Stunting the growth of admin law? | Disadvantages: Allows breaches of Charter rights to be upheld on a lower standard – i.e. allows an administrative DM to get away with breaching a Charter right w/ sub-optimal explanation  General mushiness of admin law standards remains unresolved |

### Dore v Barreau du Quebec 2012 SCC

|  |  |
| --- | --- |
| **F** | D had a case before a judge and judge criticized D in his written reasons and also during D’s argument. D wrote a letter to the judge calling him “loathsome, arrogant, and fundamentally unjust”, etc. Bar association of Quebec filed complaint against D finding that he breached ethical rules upholding objective, moderate, and dignified conduct of their barristers. They rejected his s. 2(b) argument about infringing his freedom of speech. |
| **I** | Whether the Council’s decision to reprimand D reflected a proportionate balancing of the lawyer’s expressive rights with its statutory mandate to ensure that lawyers behave with “objectivity, moderation and dignity” in accordance with art. 2.03 of the *Code of ethics.* |
| **D** | In light of the excessive degree of vituperation in the letter’s context and tone, the Council’s decision that D’s letter warranted a reprimand represented a proportional balancing of D’s expressive rights with the statutory objective of ensuring that lawyers behave with “objectivity, moderation and dignity”.  The decision is, as a result, a reasonable one. |
| **RA** | 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 * Reasonableness = proportionality (i.e. 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 it reflects a proper balance of the mandate with [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) protection, it is reasonable. |
| **RE** | Appropriate framework for reviewing admin decisions for Charter compliance:  **There is a difference:** adjudicated admin decision or act ≠ statute that could be justified by the state under ***Oakes***   * SoR of a tribunal’s Charter interpretation = correctness * Administration decision or act = reasonableness   + Reasonableness b/c:     - Disciplinary panel precedent, Dunsmuir concurs     - Home statute     - Deference is still justified on the basis of the decision-maker’s expertise and its proximity to the facts of the case.  Even where [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html)values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) values *on the specific facts of the case*. * Calls for a “richer conception of administrative law”   + The legitimacy of admin DMs is linked to their ability to take people’s rights seriously   + They should apply **Charter values** into their day-to-day exercise of statutory discretion * Assessing a law for Charter breach is diff from assessing an admin action for charter breach; the question in the former is, **has the decision-maker disproportionately, and therefore unreasonably, limited a** [***Charter***](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) **right**.  In both cases, we are looking for whether there is an **appropriate balance between rights and objectives**, and the purpose of both exercises is to **ensure that the rights at issue are not unreasonably limited.**   What does reasonableness require?   * When applying [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) values in the exercise of statutory discretion, an administrative decision-maker must balance [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) values with the statutory objectives by asking how the [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) value at issue will best be protected in light of those objectives.   + i.e. **proportionality:** did DM appropriately balance the severity of the interference of the [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html)protection with the statutory objectives.   + First, consider the statutory objectives   + Then, ask how the charter value at issue will best be protected in light of those objectives * On judicial review, the question becomes whether, in assessing the impact of the relevant [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html)rights and values at play. |
| **A** | * In dealing with the appropriate boundaries of civility for a lawyer, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the [*Charter*](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html), and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular.   + ∴ balancing fundamental importance of **open, and even forceful, criticism** of our public institutions **with the need to ensure civility** in the profession. * Proper respect for expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism but it does not = an unlimited right for lawyers to breach the legit public expectation that they will behave with civility |

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

|  |  |
| --- | --- |
| **F** | * Requirement that high schools include an ethics course where students would learn about different ethical value systems * Catholic religious teaching in high school in contravention to the mandatory “impartial”/secular/ethics education policy * They asked for an exemption – they were denied b/c Catholic teaching not seen as “equivalent” |
| **I** | How to review Minister’s discretionary decision? What does Charter values mean?  → Did the minister’s decision disproportionately limit the Charter values in balancing with the statutory objectives? |
| **RE**  **/D** | Unanimous on result but…   * **Majority:** Minister’s decision requiring that *all* aspects of teaching be taught neutrally limited freedom of religion more than necessary given statutory objectives   + Using *Doré*, “reasonableness requires proportionality”, not proportionate. * **Minority**: pure Charter analysis! S. 24(1), crafts its own remedy rather than remitting to Minister.   + No reference to *Doré*, no mandamus.   + CLF thinks this decision is v problematic; just a few years prior, Dore asked the ct to look at a richer version of admin law, and the minority (including CJ McLachlin) just ignored it! |

### TWU v LSBC (2016) BCCA

|  |  |
| --- | --- |
| **F** | * LSBC did not approve law school @ TWU b/c of their community covenant which does not recognize same-sex marriage * Initially, benchers approved it but then there was backlash * So they held a referendum and agreed to be bound by the outcome – a majority voted against approval and benchers reversed their earlier position * Benchers abdicated their responsibility to make the decision entrusted to them by the leg’re and failed to weigh the impact of the decision on the rights engaged * It was not open to them to simply adopt the majority opinion * TWU sought JR * BC Supreme Court quashed the Law Society’s decision on the basis that the Benchers had unlawfully delegated their decision-making powers to the members, and had fettered their discretion by agreeing to be bound by the results of the referendum |
| **I** | Whether the LS met its statutory duty to reasonably balance the conflicting Charter rights engaged by its decision: the sexual orientation equality rights of LGBTQ persons and the religious freedom and rights of association of evangelical Christians. |
| **D** | No. The LSBC’s decision not to approve TWU’s law school is unreasonable because it limits the right to freedom of religion in a disproportionate way — significantly more than is reasonably necessary to meet the Law Society’s public interest objective. |
| **RE** | Subdelegation: where an enactment delegates rule-making or DM authority to a particular person, that person is entitled to exercise that power directly but is not entitle to delegate its exercise to another.   * LPA: delegates power to the bencher to establish requirements for admission to the profession. Provide that a law faculty that has been approved by the federation is an approved law faculty for the purpose of admission to LSBC UNLESS the benchers pass a resolution to the contrary – nothing to suggest they’re entitled to sub-delegate that power * the resolution declaring TWU not to be an approved law faculty was a resolution passed by the Benchers. While the Benchers considered themselves bound to pass such a resolution as a result of the referendum vote, the actual exercise of the statutory power was undertaken by them. ∴ not sub-delegation.   Fettering: Whether the LS properly exercised its discretion. Benchers considered the referendum to have eliminated their discretion completely. But, they’re allowed to choose to bind themselves through referenda.  Consistency with Statutory Duties:   * Benchers cognizant of the Charter implications * Where Charter values are implicated in an admin decision and the decision might infringe a person’s charter rights, the DM is req’d to balance the potential charter infringement against the objectives of the admin regime   + Where an admin tribunal does such balancing, it’s entitled to deference   → Benchers did not enage in any exploration of how the charter values at issue in the case could best be protected in view of the objectives of the LPA; they made no decision and instead deferred to the majority vote   * + They can’t have fulfilled their statutory duties w/o undertaking the balancing process   + ∴ they fettered their discretion in a manner inconsistent with their statutory duties   **Charter Rights Engaged:**   * 2(a) protecting freedom of conscience and religion is engaged: the covenant is an integral and important part of the religious beliefs and way of life advocated by TWU and its community of evangelical Christians; rights’ holders: faculty and students, perhaps “TWU itself” * Conflicting charter right is s. 15, protecting the equality rights of LGBTQ persons * This isn’t a direct contest of rights: not an LGBTQ person who’s been denied admission b/c refusal to sign covenant; nor a barring of evangelicals to the practice of law; instead it’s a statutory body making a decision under its home statute that effectively bars from the practice of law evangelicals who choose to attend the TWU law school     Question on JR:  did the decision of the Law Society not to approve TWU’s faculty of law interfere with freedom of religion of at least the faculty and students of that institution no more than is necessary given the statutory objectives of the Law Society?   * b/c ct decided the LS is not entitled to deference on this question, they go into its own balancing exercise (i.e. correctness…) * Denying approval would not enhance access to law school for LGBTQ students * In contrast, a decision not to approve TWU’s law school would have a severe impact on TWU’s rights → would mean they can’t operate a law school and ∴ cannot exercise fund’l religious and associative rights o/w guaranteed under s. 2 of the Charter * “ … while the standard of review for decisions involving the Doré/Loyola analysis is reasonableness and there may in many cases be a range of acceptable outcomes, here (as was the case for the minority in Loyola) there can be only one answer to the question: the adoption of a resolution not to approve TWU’s faculty of law would limit the engaged rights to freedom of religion in a significantly disproportionate way — significantly more than is reasonably necessary to meet the Law Society’s public interest objectives.” |
| **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*)** | |

## Reflecting on Standard of Review

**Determining SoR:**

* Conflicts continue only w/r/t questions of law of central importance: what does this mean?
  + Doesn’t include Qs brought up through statutory appeal as per ***Pushpanathan*** b/c statutory language virtually replicates “questions of law…” verbatim
  + Brings up the question about what respect for leg’ve intent really means b/c it couldn’t have been clearer, seemingly, that leg’re wanted cts to have final word on such questions
* Majority in Ed. E. further confounds b/c it totally ignores leg’ve intent
  + Creates categories of correctness rather than looking at the factors which tend one way or another
  + Also another question is related to expertise – how does the ct respect leg’ve intent that a tribunal have only ltd expertise – risks creating an irrebuttable presumption of reasonableness

**Perspectives on what’s to be done with the current mess?**

1. Maybe ***Dunsmuir*** didn’t go far enough in clarifying SoR?

* As Binnie said, if everything gets shoved into reasonableness, it can’t possibly be a singular standard – despite the protestations that it is **not** a spectrum
  + If that’s the case, perhaps we don’t need correctness at all – maybe it needs to be developed into one spectrum (like ***Chevron*** deference in USA)
  + Or have a system wherein Qs of law = correctness but everything else = reasonableness (like UK)
    - As Deschamps argued in ***Dunsmuir***, it shouldn’t be more complex than regular appeals in other areas of law

1. The category of vires going extinct?

* Rothstein in ***Alberta Teachers***: Does is even *exist* anymore? Maybe we need to accept that it’s no longer useful?
  + Perhaps at a practical level, but as a conceptual matter, it definitely still exists
    - There *are* jurisdictional boundaries o/s of which admin bodies cannot act
    - Just b/c it’s been overused in the past and the ct is hesitant, does not mean it no longer exist; the ct’s own unwillingness to engage in a vires Q means that litigants prob won’t bring it up either

1. Issues with codification: although codification may be useful for clarification purposes, the world changes and the statute stays fixed which creates its own issues:

* E.g. ***FCA*** uses language and concepts of jud’l/quasi-jud’l/admin bodies but that’s no longer the test for SoR
* E.g. ***ATA:*** still uses patent unreasonableness?

**What reasonableness *really* means:**

* Not any more certain in terms of predicting outcomes: lawyers might be able to tell clients that the standard will be reasonableness but it’s unclear what that is going to entail in a given case…
  + How is the ct going to determine whether result is reasonable w/o first determining what they think is the *right* answer?
    - ***Suresh:*** can’t **re-weigh** the factors used by the admin tribunal – can only determine if the factors were the relevant ones → but in reality, there are several cases where reasonableness review reweighs the factors
* Range of what reasonableness review might look like:
  + ***Catalyst Paper:*** a municipal bylaw is reasonable **only if** no municipality would have enacted it (patent reasonableness?)
  + ***Nor-Man:*** usage of incorrect notion of “estoppel” but ct let it slide – probably what reasonableness should look like – but are we comfortable with that?
  + ***TWU:*** b/c LSBC had fettered its discretion, ct determined that it was “not in a position to defer” but they are apparently still w/in reasonableness review?
* The empty husk of reasons as a matter of reasonableness
  + Does it make sense that the ct said in ***McLean*** that it wouldn’t make a difference to send the case back to the SEC so we won’t bother? → seems like this should belong in PF – there are no reasons, so it’s a breach, right?
  + Did ***Dunsmuir*** set the bar too high for expecting justification/intelligibility/transparency? Or has the pendulum swung too far in favour of deference?

# Statutory Reform: Administrative Tribunals Act

* ATA was an effort to streamline/simplify/standardize the process
* White paper: “purpose [of admin tribs] is to provide informal, accessible, and efficient mechanisms for DM + DR”
  + Such a framing clearly indicates where they intend to go
* General recommendations from the white paper:
  + Improve quality and timeliness of **initial decisions**
  + More and earlier chances for informal review and reconsiderations
  + More statutory powers to compel DR
  + Greater finality and certainty (∴ eliminating unnecessary appeals and reviews)
  + Establish/restructure tribunals – bundling
  + Structure tribunal mandates around **expertise (**rather than around legal principles or social justice, etc.)
* 5 main focuses:
  + independence, accountability, appointment on merit
  + Inst’l design focus and ensuring tribunals have basic statutory powers
  + Dispute resolution efficiency
  + Charter, human rights jurisdiction
  + Standard of review
* An omnibus statute but applies to diff tribunals differently
  + Only applies where tribunal’s enabling leg’n opts in
    - ONLY APPLIES TO PROV’L STATUTES

## 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. 58:*** Standard of Review with Privative Clause

* ***S. 58(1):*** you can read this in a way consistent w/majority of Edmonton East (Expertise is developed at the tribunal level)
  + Or consistent with the minority (that expertise attaches to some things but not all, so must first determine the area of exclusive jurisdiction)
* ***S. 58(2)(a):*** fact, law, or exercise of discretion [and, implicitly, mixed law and fact] = PU standard
* ***S. 58(2)(b):*** if it’s a procedural fairness question, the standard is whether the tribunal acted fairly
* ***S. 58(2)(c):*** everything else = correctness
  + What is everything else? Maybe questions of general law o/s the area of expertise of the tribunal? Jurisdiction?
* ***S. 58(3):*** a patently unreasonable discretion for the purposes of (2)(a) is: arbitrary, bad faith, improper purpose, based on irrelevant factors, or fails to take statutory req’ments into acc’t

***s. 59:*** Standard of Review without Privative Clause

* ***S. 59(1):*** standard is correctness except for discretionary acts, findings of fact, and PF
* ***S. 59(2):*** Court must not set aside a finding of fact UNLESS there is: no evidence OR if it is otherwise unreasonable
* ***S. 59(3):*** must not set aside discretionary decision UNLESS it’s patently unreasonable
* ***S. 59(4):*** defines what patent unreasonableness means for a discretionary decision
  + Per Pacific Newspaper Group Inc. (2014 BCCA) adopting definition from Law Society of NB v Ryan (2003 SCC): 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”.
    - This is the definition of PU for decisions that are not discretionary ones
* ***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

**REDUX:**

* 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
* What happens if neither ss. 58-59 apply to a tribunal? Must go to CL (same for when ss. 43-46 does not apply)

## Khosa v Canada (C&i) [2009] SCC

|  |  |
| --- | --- |
| **F** | * K: citizen of India, immigrated to Canada @ 14 y.o.; @ 18 y.o. he was convicted for crim negligence causing death * Removal order made to send him back to India; K appealed to the Immigration Appeal Division of the IRB * IAD denied special relief on H+C grounds * FC: applied PU standard + upheld IAD decision * FCA: applied reasonableness + set IAD decision aside |
| **I** | The extent to which, if at all, judges exercising statutory powers of JR under ***ss. 18/18.1 of FCA*** are governed by the CL JR principles as set out in Dunsmuir. |
| **L** | ***FCA s. 18.1(4):*** The federal ct may grant relief under (3) if satisfied that the federal board, commission, or other tribunal:   1. Acted without jurisdiction, beyond jurisdiction or refused to exercise its jurisdiction; 2. Failed to observe a principle of natural justice or procedural fairness; 3. Erred in law in making a decision or an older whether or not the error appears on the face of the record; 4. Based its decision or an order on an erroneous finding of fact that is made in a perverse or capricious manner or without regard to the material before it; 5. Acted or failed to act by reason of fraud or perjured evidence; or 6. Acted in any other way that was contrary to law. |
| **D** | ***s. 18.1*** is intended to be interpreted + applied against the backdrop of the common law. |
| **RA** | Leg’re has the power to specify a standard of review if it manifests a clear intention to do so. However, where the leg’ve language permits, the cts:   1. Will not interpret grounds of review as standards of review; 2. Will apply Dunsmuir principles to determine the appropriate approach to judicial review in a particular situation; + 3. Will presume the existence of a discretion to grant or withhold relief based on the Dunsmuir teaching of restraint in jud’l intervention in admin matters. |
| **RE** | **Binnie (Maj):**   * + - 1. Does Legislation Replace SoR? → No. * Where there’s JR leg’n, must analyze that first   + ***S. 18.1*** has to be read flexibly (can’t have been Parliament’s intent to create a single, rigid, Procrustean standard across all admin decision-makers)   + The language of ***s. 18.1*** sets out threshold ground which permit but do not require the ct to grant relief; the common law is used to discover the applicable SoR (“open-textured language of the ***FCA*** is supplemented by the CL”) * ***S. 18.1(4)(d)***: somewhat problematic – doesn’t it have **some content** for standard of review?   + No; the leg’re is just channelling     - 1. SoR → Reasonableness          1. Precedent? → Yes; indicates reasonableness          2. Even though precedent exists, goes into factors anyways (but uses ***Pushpanathan*** factors)       2. Application * Reasonableness is a single standard that takes its colour from the context * Not the function of the reviewing court to reweight the evidence * This is the sort of factual dispute which should be resolved by the IAD in the application of immigration policy * IAD decision was reasonable * **Reasons:** “justification, transparency, and intelligibility” requires reviewing court to look at reasons;   + The **‘reasons which could be offered’** should not dilute the duty of tribunal to provide adequate reasons |
|  | **Rothstein (Concurring):** Fundamentally different view of the act and the role of the cts   * ***S. 18.1*** obviates the need for CL SoR analysis   + Clear in (d) that there’s a standard; where Parliament wanted a deferential standard, it used clear and unambiguous language to that effect   + ∴ where it didn’t want deference, it didn’t use that language * SoR analysis developed as a means of reconciling tension that privative clauses create b/w ROFL and leg’ve supremacy * To apply ***Dunsmuir*** o/s the context of a strong privative clause departs from the conceptual and jurisprud’l origins of the SoR analysis   + Privative Clause → use ***Dunsmuir*** analysis to discover SoR     - No Privative clause → Correctness applies. * Tribunal expertise is what gives rise to priv. clause – i.e. privative clause protects the tribunal’s area of expertise; expertise is not a standalone basis for deference   **Conclusion:**   1. Treat tribunals like lower cts:    1. Defer on Qs of fact and Qs of mixed law and fact which can’t be separated    2. Don’t defer (i.e. use correctness) where:       1. Q of law can be extricated AND no privative clause 2. Only do SoR analysis if:    1. Priv clause and    2. Statute doesn’t prescribe SoR 3. Grounds of review/SoR distinction not useful: “there is no justification for imposing a duplicative CL analysis where leg’re expressly provides the applicable SoR” |
| **DIS** | **Fish:**  Too much focus on K’s denial of street racing; unreasonable to base decision on that factor alone, given ample evidence that he poses no risk. The decision does not fit comfortably with the principles of justification, transparency, and intelligibility req’d to withstand reasonableness review. |

|  |  |
| --- | --- |
| **BINNIE** | **ROTHSTEIN** |
| * w/ or w/o privative clauses, tribunals are entitled to *some* deference on the basis that leg’re chose to give them authority over that Q * Might be more than 1 right answer, even to legal Qs * Procrustean beds = bad * Even PU in BC continues to evolve through broader admin law cases * ATA specified SoR but not the content of SoR * Sees self as progressive, forward looking | * W/o privative clause, SoR on Qs of law is automatically correctness * Rejects ***Pezim, Pushpanathan, Dunsmuir*** for not taking leg’ve intent seriously enough * Procrustean bed? Can’t be more rigid than the two buckets created by Dunsmuir * BC legislator would be troubled by the majority’s judgment * Sees self as common sense, practical |

Questions raised by ***Khosa:***

* Can the prohibition on revisiting weight be adhered to?
  + If so, how? (without coming into conflict with the rule of law concern about public justification?)
    - ***Baker*** asserted that DMs must demonstrate they have been alert to a range of legal considerations at play and the weight of such considerations; also specifically req’d DMs to be alert to the critical interests of the individuals affected by their decisions
    - Might this be used as a basis for overseeing the weight accorded to competing factors in a legal test where that test is determinative of a decision affecting critical interests?