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PLEASE NOTE THAT BLACK INDICATES NOTES FROM THE READINGS, AND RED INDICATES SUPPLEMANTARY NOTES FROM LECTURE

# Chapter 1

## II. THE CHANGING NATURE OF ADMINISTRATIVE LAW

* Admin law governs the processes and mechanisms of the welfare and regulatory states
* It plays a role when someone, other than a court or a legislature, makes a decision, which affects someone's rights or interests
* Admin law is about *delegated* government action
  + Decisions are made not by legislature, but by Cabinet, federal and provincial government departments, municipalities, board and tribunals

## III. A BIT MORE ON BOARDS AND TRIBUNALS

* Through statutes, legislatures give these tribunals and boards power over others
* The legislature makes a conscious choice to devolve decision making away from the legislature to an administrative body
* A board or tribunal may have specialized expertise that a court arguably should not second guess

## IV. ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW

* Admin law cannot provide applicant with opportunity to overturn a piece of legislation
  + Rather, applicant is trying to ensure that governmental power is used in an accountable way vis-a-vis the ordinary citizen
* While the Charter does not normally apply to decision making by universities, hospitals, or Crown corporations, admin law sometimes will

## V. SO WHERE DO WE START?

* Courts deferential to admin boards and tribunals where it seems this is Parliament’s intention
* Admin law can be divided into 3 parts:
  1. Procedural fairness
  2. Substantive fairness
  3. Remedies and the legitimacy of judicial review

## VI. REVIEW FOR PROCEDURAL FAIRNESS

* The court, in reviewing actions of tribunal, not interested in actual decision of tribunal, but in procedures followed

### A. Threshold Question

* Whether or not there should be any entitlement to procedural fairness at all

### B. Content of Procedural Fairness

* Court must address what those procedures will be
* *Baker* identified five relevant factors in determining general level of procedural fairness
  + 1. Nature of the decision and the process followed in making it
    2. Nature of the statutory scheme
    3. Importance of the decision to the individual affected
    4. Legitimate expectations of the parties
    5. Procedure chosen by the tribunal
* Often the legislation will expressly lay out the kinds of procedures that applicants are entitled to

### C. Bias

* More fully explored in chapter 6

### D. Independence

* Systematic structure of a board or tribunal as opposed to individual decision-making
* Do the members of the tribunal have financial security or do they have security of tenure?
* Will they be perceived as being able to make an independent decision?

### E. Institutional Decision-Making

* Degree to which boards and tribunals can consult with others to whom the person affected will not have had the opportunity to present his/her case

## VII. REVIEW FOR SUBSTANTIVE ERROR

* Regarding a decision, the courts ask what the standard of review is
  + How big an error must the tribunal make before the court will get involved?
    1. Standard of correctness
       - Most exacting standard
    2. Standard of reasonableness
       - Middle ground
    3. Standard of patent reasonableness
       - Most forgiving standard

## VII. REMEDIES AND THE LEGITIMACY OF JUDICIAL REVIEW

* 3 sources of review power

### A. Original jurisdiction

* Ordinary courts have jurisdiction over decisions of admin decision-makers when challenged by way of direct actions of citizen in contract or tort on grounds the state has infringed an individual’s private legal right

### B. Statutory Right of appeal

* Must be contained in a statute

### C. Courts’ inherent judicial review jurisdiction

* Superior courts in each province may review decisions made by institutions and officials that administer public programs, through courts’ inherent judicial review jurisdiction
* Superior courts may hear any matter unless there is a specific statute that says otherwise or grants exclusive jurisdiction to another court or tribunal

## X. A BRIEF HISTORY OF THE ANGLO-CANADIAN MODEL OF JUDICIAL REVIEW

* RoL requires, at a minimum, that governmental activity affecting individuals is subject to law
* If courts are continually second guessing admin tribunals, this will undermine reason for establishing specialized tribunals in the first place

## XI. CONSTITUTIONAL RIGHT TO REVIEW ADMINISTRATIVE DECISION-MAKERS AND S. 96 COURTS

* S. 96 of *Constitution Act:* appointment of superior court judges is responsibility of federal government
* 3 part test to determine if an administrative tribunal is acting like a s. 96 court
  + 1. Historical inquiry
       - Whether impugned power broadly confers to a power exclusively exercised by a superior, district or county court at time of Confederation
    2. Is impugned power “judicial” power as opposed to admin or legislative power?
       - Judicial: private dispute between parties adjudicated through application of recognized body of rules, consistent with fairness and impartiality
    3. Has the power in its institutional setting changed its character sufficiently to negate broad conformity with superior, district or county jurisdiction?
* *Crevier:* landmark case: provincially constituted statutory tribunal cannot constitutionally be immunized from review of decisions on matters of jurisdiction by the Superior Courts
* Trend in case law: implicit in ss. 96-100 there is constitutionally guaranteed right to seek judicial review of administrative action on the grounds of jurisdictional error or illegality
  + This jurisdiction cannot be removed from the superior courts by either level of government without amending the Constitution

## XII. BAKER

* Most important SCC decision on administrative law in the last 20 years
* Issues:
  + What fairness required regarding Ms. Baker’s procedural rights to participate in decision making process
  + Duty to give reasons
  + Scope of that duty
  + Bias
  + Relevance of international treaties ratified but not yet incorporated in domestic law
* Justice L’Heureux-Dube said that the duty of fairness required that Ms. Baker be accorded more than minimal procedural rights even though she was seeking a highly discretional benefit
* Important interpretation of doctrine of legitimate expectation in terms of ramification for procedural and substantive rights (see case)
* Court found that the federal government signature to the *Convention on the Rights of the Child* should not be viewed as a representation
* Baker came to Canada, stayed illegally with 4 children born here and 4 children born in Jamaica
* She has mental issues, lost her children to social services for a time
* She applied to stay on humanitarian grounds
* What factors should affect the context of procedural fairness
  + Importance of the right to the person
  + Is there a review or appeal process?
  + Administrative efficiency
  + Power of party being affected
  + She didn't come to this process with clean hands
  + Statutory requirements
  + Policy considerations

# Chapter 2 – The Tools of the Administrative State and the Regulatory Mix

## III. THE TOOLS OF THE ADMINISTRATIVE STATE

### C. Agencies, Government Departments, and Other Institutions

#### 1. Agencies

* Administrative actors include various administrative agencies that function separately from government and the public service
  + They enjoy a measure of independence from government departments
  + They render decisions
  + They follow a generally uniform decision-making process
  + They are specialized

#### 2. Cabinet Ministers and Government Departments

* Cabinet is often empowered to make subordinate legislation or regulations to address aspects of the regulatory regime
* Legislation may also authorize specific Cabinet ministers to make certain decisions

## V. ASSESSING TOOLS AND THE ADMINISTRATIVE STATE

### A. Five Criteria

* + 1. Effectiveness
       - The extent to which a tool achieves its intended objective
    2. Efficiency – considers both:
       - Results
       - Costs
         * To governments
         * To regulated parties
         * To others
    3. Equity
       - Basic fairness: distribution of benefits and costs more or less evenly among those eligible
       - Redistribution of benefits to those who have previously not had them or had them disproportionally less – or focuses on concerns that burdens are being imposed disproportionately
    4. Manageability
       - Issues of implementation
    5. Legitimacy and political feasibility
       - A program that can win political support

# Chapter 3 – Dogs and Tails: Remedies in Administrative Law

## I. INTRODUCTION

* Law’s role vis-à-vis administration action is often focused on what tools courts have to police and intervene in administrative agencies’ actions
  + To ensure that those agencies observe the rule of law and basic principles of justice
* Legislative drafters may use various tools to limit the available scope of court intervention in tribunals’ decision making processes
  + Privative clause
  + Provide avenues of appeal internal to the tribunal itself
    - This limits recourse to judicial review, since it is only available after a party has exhausted all avenues of appeal, including internal appeals

## II. REMEDIAL OPTIONS AT THE TRIBUNAL STAGE

* Tribunal does not have general jurisdiction of court; power to impose remedy must be provided for in tribunal’s enabling statute

### A. Statutory Authority

* A tribunal cannot make orders that affect individuals’ rights or obligations without authority from enabling statute

## B. Novel Administrative Remedies

* Legislators often delegate detailed policy making decisions to administrative tribunals
  + Many larger administrative agencies have formal policy making departments
* In traditional adjudication a suit involves the private parties before the court
  + It is self contained and party initiated
* In public law litigation Chayes argues the debate is more focused on the vindication of broader statutory or constitutional policies
  + The lawsuit is not self-contained
* Admin bodies are charged with managing complex and often polycentric problems
  + Stronger justifications for remaining “seized” of a case over a longer period of time
  + May try to develop remedies that address underlying structural or systematic problems
    - Forward looking rather than retrospective rights-oriented
  + Administrative tribunal members are a more diverse group than judges are
    - Reflects explicit attempt to represent different interest groups
* Globalization means that domestic administrative tribunals don’t act free of international and transnational agreements, organizations, standard setting bodies and national commitments

## III. ENFORCING TRIBUNAL ORDERS AGAINST PARTIES

* After a tribunal makes a decision and imposes an order enforcement powers become available

### A. The Tribunal Seeks to Enforce Its Order

* Rarely, a tribunal may enforce its own orders
* Commonly, tribunal must make application in court to enforce order
* Once tribunal converts order into court order, it can be enforced in same manner as court judgment
  + Contempt proceedings are available if party continues to disregard order

### B. A Party Seeks to Enforce a Tribunal’s Order

* Party to admin action may bring action in court against another party to enforce tribunal’s order

### C. Criminal Prosecution

* Many courts provide for quasi-criminal prosecution of persons who disobey tribunal orders
* Criminal offense to disobey lawful order of federal /provincial tribunal ( 127(1) of *Criminal Code*)
  + This provision is available where no other penalty is expressly provided for by law
  + Most administrative tribunals do not have ability to make contempt orders on their own

|  |
| --- |
| McKinnon v Ontario (2002, Ontario Board of Inquiry)  * McKinnon, Aboriginal Canadian * April 2009 R found in breach of s 9 of Human Rights Code for infringing complainant’s rights   + Liable for poisoned atmosphere * Order for remedy   + General damages   + Compensation to A for work related stress leave and failure to be promoted   + Promotion to complainant and his wife   + Relocation of employees who were found to have harassed complainant   + Ministry cause the orders to be read at parade, copied to pay slips, in the newsletter etc   + The Ministry should establish a human rights training program * Issue: whether Ministry carried out orders in good faith with a view to make them effective * The training program was inadequate   + Insufficient time devoted to racial issues   + Inadequate emphasis on training of managers   + Managers failed to attend required training sessions   + Sessions covered too much information in too little time   + No follow up training   + No consequences for non-compliance * Discriminatory behavior went underground and management engaged in avoidance instead of dealing with it * Incidents taken together reveal workplace environment that remains poisoned for complainant * Having found orders not complied with, adjudicator is required to do something about it   + The Ministry sought judicial review on this point     - Reviewing court found sufficient evidence to support Board’s finding that Ministry had not complied with Board’s 1998 order to implement adequate training program     - It would be contrary to intent of Human Rights Code to force complainant to initiate a new proceedings to address non compliance     - Open to board as part of its ongoing obligation to oversee implementation to recast its original orders to meet what it found to be a continuing problem * The Board then issued a series of orders   + Implementation based on the Devlin WDHP Report     - Appointment of advisors to oversee implementation   + Executive training of Deputy Minister, Assistant Deputy Ministers and Regional Directors on racial discrimination   + Skills based training for senior management   + Performance appraisal forms for above   + Anti-racism training program with mandatory attendance   + Investigations of complaints be conducted outside of Ministry   + Establishment of compliance committee   + Publication of decision     - Summaries sent to all employees, read at parade, etc     - Full copies of this decision kept on hand   + Complainant and wife granted leaves of absences until orders are complied with   + Promotion of complainant and his wife   + Third party appointed to carry out these duties   + Adjudicator remains seized of these matters until they are fully implemented * His original complaint is to his employer who don't do anything   + Then he complains to the Minister with no success   + Then he complains to OHRC which passed complaint on to Board of Inquiry (now Human Rights Tribunal)     - They ruled in favour of McKinnon and ordered all sorts of remedies   + He complained that the orders were not complied with     - The Ministry seeks judicial review * The last major decision was in 2007 and really criticizes Ministry's behavior * The tribunal did not have the power to enforce their own order   + Most of the time you have to convert your order into a court order, and the court will enforce for you |

## IV. CHALLENGING ADMINISTRATIVE ACTION

* A party to an administrative action may decide to challenge that administrative action directly
  + May challenge tribunal’s jurisdiction, procedure, impartiality, exercise of discretion, substance of its final decision

### A. Internal Tribunal Mechanisms

* All tribunals can fix certain things, such as clerical errors or factual errors due to mistake or dishonesty without express statutory authority
  + This is known as the “slip rule”
* Tribunals can also change their minds until the time a final decision is made
  + What constitutes a final decision becomes important
  + Some enabling statutes specifically provide tribunals with ability to reconsider and rehear decisions they have made
* In Quebec the *Act Respecting Administrative Justice* creates *Tribunal administrative du Québec* (TAQ), supertribunal that hears “proceedings” brought against almost all administrative tribunals and public bodies in province, including governmental departments, boards, commissions, municipalities and health care bodies

### B. External Non-Court Mechanisms

* Non-legal avenues
  + Ombudspersons or similar positions exist by statute in every Canadian province
  + Most ombuds statutes provide that an ombudsperson is not authorized to investigate a tribunal decision until after any right of appeal or review on the merits has been exercised or until after the time limit for doing so has expired

### C. Using the Courts: Statutory Appeals

* 2 main ways by which a party to a tribunal action can access the courts to challenge that action
  + Appeal
    - Major questions a party must ask:
      * Does the tribunal’s enabling statute provide for a right of appeal?
        + Right of appeal must be provided for in enabling statute
      * What is the scope of appeal available?
        + Determined entirely by enabling statute
        + Appellate courts generally review tribunal court decisions for error of law, or more rarely, for palpable and overriding error
      * Is appeal available as of right or is leave required?
        + If leave is required, who may grant it?

As of right: file papers on time, and they must hear you

As of leave: they get to decide whether to hear you

* + - * Is a stay of proceedings automatic, or must one apply for it?
        + Will order be stayed (put on hold) while you go through appeal?

Most of the time there will be an automatic stay

Sometimes you have to apply

* + - * + Judicial stays are never automatic
    - To get an appeal/review you must establish an error of law or a culpable and overriding error of fact
  + Judicial Review

### D. Using the Courts: Judicial Review

* Judicial review: inherent jurisdiction of courts to oversee/check admin action in interest of RoL
* Unlike appeals which are statutorily created, judicial review is review of executive action beyond what executive itself provided for
  + Only on judicial review will courts investigate tribunal’s procedural fairness or alleged bias of its members
* This remedy is deeply discretionary
* Domtar Inc v Quebec:
  + In deciding not to intervene to resolve conflict on legal interpretation between two tribunals construing same statutory language, SCC stated that advisability of judicial intervention … cannot … be determined solely by triumph of RoL
  + For purposes of judicial review, the principle of the RoL must be qualified
  + Should a court try and fix an inconsistency on the basis of the inconsistency alone?
  + Domtar’s employee injured 3 days before plant scheduled to close; everyone would be off for 2 weeks
    - He was entitled to 90% of his salary for 2 weeks
    - But then he would be paid more than everyone else, because they weren't being paid for the time the plant was closed
  + CALP: employer should pay 90% of net salary for 14 days, regardless of plant closure
* Labour Court looked at this and said:
  + Employer should be acquitted because 14 day period that occurred in a layoff raised RD about scope of employer's obligations
* Should there be judicial review for administrative inconsistency?
  + The worry is that consistency isn't a neutral value
  + For purposes of judicial review the principle of the rule of law must be qualified
  + The lack of unanimity is the price we have to pay for independence in tribunals
* 1. Is judicial review available?
  + Key threshold question: whether tribunal whose actions are being challenged is in fact a public body
    - Only public bodies can be subject to judicial review
  + Does party have standing to challenge a tribunal decision
    - Other persons with collateral interest in matter may want to challenge tribunal order not directly affecting them
  + A party seeking to challenge administrative action should determine to which court he or she should apply for judicial review
  + A party should ensure that he/she has not missed any deadlines
  + A party must exhaust all other means of recourse for challenging tribunal’s actions
  + Appeal mechanisms provided for by statute will be inadequate where
    - Appellate tribunal lacks statutory authority over, or is not willing to address issues raised by appellant
    - Appellate tribunal does not have statutory authority to grant remedy requested
    - Appeal must be based on record before original tribunal, but that record does not include evidence relevant to applicant, or includes evidentiary errors that appellate tribunal lacks authority to correct
    - Alternative procedure is too inefficient or costly

### E. Remedies on Judicial Review

* Unlike an appeal, an application for judicial review usually does not automatically stay enforcement of underlying tribunal order,
  + Tribunal or court or both may have power to stay tribunal’s order on application
* 1. Introduction to the Prerogative Writs
  + *Certiorari:* proceeding by which superior court requires inferior tribunal, board or judicial officer to provide it with record of its proceedings, for review for excess of jurisdiction
    - Successful certiorari application results in quashing (invalidating) of tribunal’s order or decision
    - Generally court cannot substitute its decision for decision of tribunal that the court finds has erred
      * Court has not been granted statutory decision making authority and does not have expertise of tribunal ­
    - Ex post facto remedy
  + *Writ of Prohibition:* issued by appellate court to prevent lower court from exceeding its jurisdiction, or to prevent a non-judicial officer or entity from exercising a power
    - Kind of CL injunction
    - Used to obtain relief preemptively
  + *Mandamus:* (we command) writ issued by superior court to compel lower court or government agency to perform duty it is mandated to perform
    - Variation: court’s ability to send matter back to tribunal for reconsideration with directions
  + *Declaration*: judgment of court that determines legal position of parties, or law that applies to them
    - Public law variety
      * Used to declare some government action ultra vires
      * Main concern of administrative law
    - Private law variety
      * Used to clarify the law or declare a private party’s rights under a statute
  + *Habeas Corpus:* writ employed to bring a person before a court, most frequently to ensure that the person’s imprisonment or detention is not illegal
  + *Quo Warranto:* writ used to inquire into what authority existed to justify acts by or powers claimed by a public office
* 2. Statutory Reform
  + Some provinces enacted omnibus statutes governing judicial review or statutory/civil procedure
    1. The statutes generally provide for simplified application procedures
       - * New judicial review application combines old writs of certiorari, prohibition, mandamus, public law declaration and injunction
    2. The statutory schemes provide for simplified remedies
       - * Includes power to set aside decision or direct tribunal to reconsider its decision with or without directions
    3. The statutes generally clarify who may be parties
    4. The statutes generally provide for a right of appeal
    5. The statutes may address inability of judicial review mechanisms to challenge interlocutory orders and to resolve interim issues
* 3. Discretionary Bases for Refusing a Remedy
  + CL discretionary grounds for refusing relief have survived statutory reform of judicial review
    - Most important basis: that adequate alternative remedies are available
* Policy rationales that underlie dismissals for prematurity include
  + Administrative action is meant to be more cost-effective than court proceedings
  + Preliminary complaints may become moot
  + Court will be in a better position to assess the situation after a full and complete record of tribunal proceedings exists

### F. Private Law Remedies

* These remedies are outside scope of administrative action and judicial review
* In some circumstances, unhappy parties may prefer monetary relief to available remedies under judicial review
* The Crown and its servants can be liable to private parties for monetary relief
* To seek damages the tort is: misfeasance in a public office
  + There are no damages available for judicial review

# Chapter 4: Rule of Law in the Administrative State

## II. RULE OF LAW IN THEORY

* Rule of law has 3 interrelated features:
  + Jurisprudential principle of legality
  + Activity or practice of law-making among and within institution of government
  + Distinctive political morality
* The rule of law is about relationships between public institutions (based on legitimate power, respect institutional roles) and between the state and individuals
  + The law is accessible
  + No one is above the law
  + Law applies equally
  + Ideas of access to justice
  + Judicial independence

### A. Purpose of the Rule of Law: the Non-Arbitrary Rule of Men (and Women)

* RoL means that government action must always be sourced in law and therefore bound by law in order to be considered both valid and legitimate
* Arbitrariness connotes an indifference about procedures chosen to reach an outcome
  + Arbitrariness can be associated with a unilateral mode of decision-making
    - Or one that is not fully reciprocal, consultative, or participatory
  + Decision itself may be arbitrary in substance because it is biased, illogical, unreasonable, or capricious
  + Such a decision may exhibit a lack of care, concern or reflection on the part of the decision maker towards the affected individual or group
  + A decision that is unsupported by evidence
    - Unsupported by logic or reason
  + Not following the procedures in play
  + Distinction between procedural and substantive arbitrariness
    - Procedural:
      1. Uncontrolled, unconstrained decision making
      2. Abuse of power
      3. Oppression
    - Substantive
      1. Doesn't treat the person in front of you with respect

### B. Attributes of the Rule of Law

* Principle of legality restrains arbitrary power in 3 ways
  + Constrains the actions of public officials
  + Regulate activity of law-making
  + Seeks to minimize harms that may be created by law itself
* Dicey:
  + Dicey’s RoL
    - Absence of arbitrary authority in government
    - Formal legal equality; treat people alike
    - Constitutional law
  + According to Dicey judge made law combined with an unwritten constitution represented a better mode of legal constraint than written codes and constitutions because they were less vulnerable to executive attempts to suspend or remove rights
    - In this model, Parliament is sovereign and supreme
  + He doesn’t trust the executive or administrative agencies
* Fuller:
  + Inner morality of law represents procedural approach to understanding principle of legality
  + 8 principles
    - Laws must be general
    - Laws must be promulgated and public
    - Laws must be prospective, not retroactive
    - Laws must be non-contradictory
    - Laws must have constancy
    - Laws must be reasonably clear
    - Laws must be capable of being performed
    - Congruence between the rules as announced and the rules as applied must exist
  + Unlike Dicey, Fuller’s conception of legality does not assume that administrative bodies are inherently lawless
  + Law making is a communal activity
    - Not about what the courts or Parliament does, but rather what society does
  + Purpose of law is to create and sustain a framework for successful social interaction
* Raz:
  + Believes it is possible to reduce the RoL to 1 basic idea:
    - Law must be capable of guiding behavior of its subjects
  + As with Fuller, his principles aim to guide the formation and application of law
    - Laws should be prospective, open and clear
    - Laws should be relatively stabled
    - Particular laws should be informed by open, clear, stable and general rules
    - Independence of the judiciary must be guaranteed
    - Principles of natural justice must be observed
    - Courts should have limited review powers
    - Courts should be easily accessible
    - Discretion of crime prevention agencies, such as the police, should not be allowed to pervert the law
  + Because law creates danger of arbitrary power, RoL acts to minimize this risk
    - Thereby minimizing harms created by the law itself
  + He trusts law less than Fuller does
  + He puts more emphasis on judicial independence and limiting police power
* SCC identified 3 objective conditions necessary to guarantee functional independence (see chapter 6)
  + Security of tenure
  + Financial security
  + Administrative control

## III. THE SUPREME COURT OF CANADA ON THE RULE OF LAW’S SIGNIFICANCE

### A. The Heart of the Canadian Rule of Law

* *Roncarelli v Duplessis*
  + Concerns ability of courts to control abuse of power in administrative state
  + Contains several examples of arbitrary power
    - Existence of unlimited discretionary powers in an agency
    - Decision maker acting in bad faith
    - Inappropriate responsiveness to an individual situation where important interests are at stake
    - Consideration of irrelevant factors in the decision
    - Disregard for the purpose of a statute
    - Dictation of the decision by an external and unauthorized person
  + Duplesis acted as both premier and AG
  + Invoking unwritten principle of the RoL, court held no public official is above the law
  + Substance of decision was incompatible with purpose of statute
  + Rand J, writing in a concurring judgment for majority: public authorities are always constrained by unwritten constitutional principle of RoL
  + Public decision makers must not act outside their authority, must not abuse their authority, and must be seen not to do so either
  + He was a Jehovah's Witness, and was paying to bail his friends out of jail
    - He had his liquor license pulled
  + Classic statement of rule of law
    - Post Dicey pre Charter
  + Legislature sets scope of admin power
  + Admin agency acts within jurisdiction, justifies decisions affecting people
  + Courts check for arbitrariness, but show deference
  + Rand J for majority
    - The problem here is that Mr. Archambault wasn't making his own decision
      1. It was dictated by Mr. Duplessis

### B. A Foundational Principle, but an “Unwritten” One

* Constitution includes customary law, conventions, judge made or common law, civil code, unwritten principles in addition to legislation and written constitutional documents
  + As an implicit constitutional principle, RoL appears in CA, 1867 preamble
    - RoL applies to entire constitutional order, and every part of government
* In *Manitoba Language Rights Reference* the SCC considered several features of the RoL including
  + Principle of legality
  + Institutional arrangements entailed by the idea of the RoL
  + Its broader connection with Canadian political culture
  + RoL:
    - Law is supreme over government officials as well as private individuals
      1. Excludes influence and operation of arbitrary power
    - Law and order are indispensable elements of civilized life within political community
  + Constitution is deeply intertwined with principle of parliamentary sovereignty
    - Constitution is a statement of people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of powers of legislature and government
  + Manitoba ignores a requirement that all laws be bilingual
  + Uses the RoL as a basis for making all of Manitoba's laws invalid
  + The court gives Manitoba time to make their laws bilingual
* In *Secession Reference*
  + Quebec tries to separate
  + RoL forces a dialogue
  + Court identified 3 unwritten principles that animate the Canadian constitutional order
    - Federalism
    - Democracy
    - Constitutionalism and the RoL
    - Respect for minorities
  + These principles do not stand alone
  + RoL constrains the principle of parliamentary sovereignty

### C. The New Minimalist Rule of Law

* RoL incorporates familiar themes and embraces at least 4 principles (Imperial Tobacco)
  + Supreme over private individuals and government officials,
    - Required to exercise authority non-arbitrarily and according to law
  + Requires the creation and maintenance of a positive order of laws
  + Requires the relationship between the state and the individual to be regulated by law
  + Linked to the principle of judicial independence
* *Charkaoui*
  + Upholds s 7’s requirement of fair procedure for determining issue of vital importance to a detainee
  + Court’s reliance on a formal conception of the RoL inhibits purchase of RoL values implicit in unwritten or CL constitution
* *Christie*
  + Access to justice may guarantee a legal right to legal services
  + But RoL does not underwrite a general right to legal services, to legal assistance, or to counsel in relation to court and tribunal proceedings
    - It therefore cannot constitutionalize a particular type of access to justice, such as a specific institutional form of legal aid
* Unwritten principles like RoL have no direct legal effect; merely influential constitutional values

### D. Lower Court Unruliness?

* Court signaled unwillingness to engage in any “gap-filling” through use of unwritten principles
* *Lalonde and Roncarelli* illustrate how judges can craft a decision that is grounded in the unwritten constitution but also further a distinctive Canadian political morality using principles of justice drawn from administrative and constitutional law

## IV. Administering the Rule of Law

### F. Institutional Dialogue and the Canadian Rule of Law

* Dworkin’s theory: vision of consitutionalized public morality he calls “rights conception of RoL”
  + RoL necessarily entails judicial determination of rights through principled interpretation in hard cases where a legal answer must be crafted by judges rather than “given” by existing legal sources
  + Advances a strong political morality
    - Central focus: concept of justice designed to further political principles of autonomy, dignity, equality, liberty for all individuals in the political community
* Three aspects of RoL (legality, institutional practices and distinctive political morality) argue for understanding of political order as joint effort in governance from institutions and citizens
* Liberty democratic theory: no branch of government should possess complete control of sovereignty
  + Should public power be shared equally among the state institutions
  + Or should one branch retain overall supremacy?
* Some argue: Charter reinforces constitutional commitment that all persons, individuals, corporations and state actors, must adhere to RoL, respect fundamental constitutional values

### G. Other Routes to Accountability in the Administrative State

* Judicial review represents an important, but not the sole route to security administrative accountability

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| Domtar Inc. v Québec (1993, SCC)  * A (employee of Domtar – R company) injured in an industrial accident three days before a temporary closure of the Quebec plant   + The company refused to compensate the employee for more than those three days * Domtar sought judicial review via evocation, Quebec’s version of certiorari * Issue: whether, in the absence of patently unreasonable error, conflicting decisions by administrative tribunals may give rise to judicial review   + *Act Respecting Industrial Accidents and Occupational Diseases* (AIAOD)     - Injured employee should receive 90% of his net salary for 14 days * BRP is intermediary level of jurisdiction   + CALP is body to which BRP decisions can be appealed   + CALP decisions are final, not subject to appeal, protected by a privative clause * Superior Court and CA both agreed on general rule: CALP’s judgment receives deference from courts unless shown that CALP exceeded jurisdiction or given statutory provision in question an interpretation so unreasonable that it could not be rationally supported on relevant legislation   + CA: this traditional stance in favour of curial deference overridden in this case, where s 60 of the AIAOD had been given different interpretations by CALP and Labour Court * Issue: was CALP’s decision patently unreasonable?   + If not, does the fact that there were divergent interpretations of the same legislative provision by two administrative tribunals give rise to judicial review? * Standard for review for these decisions is patent unreasonableness * Decision making must be based on a degree of consistency, equality and predictability in application of law * Real risk that superior courts, by exercising review for inconsistency may be transformed into genuine appellate jurisdictions   + Substituting one’s opinion for that of an administrative tribunal in order to develop one’s own interpretation of a legislative provision eliminates its decision making autonomy and special expertise * There are undoubtedly clear cases of inconsistency where the dictates of equality and consistency in the application of the law will have full effect * But this case, two bodies interpreted the same legislative provision differently, one in the context of penal, and the other in an administrative context   + Is this a conflict of decisions? * The solution required by conflicting decisions among administrative tribunals remains a policy choice which should not be made by courts * Allow the appeal |

# Chapter 5 – The Duty of Fairness: From Nicholson to Baker and Beyond

## I. INTRODUCTION

* Historically, judicial decisions required to be made in accordance with rule of natural justice
  + Audi alteram partem required a decision maker to hear the other side of a dispute
  + Nemo judex in sua causa precluded a man from being a judge in his own cause
* Administrative decisions could be made without regard to any such rules

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| Nicholson v Haldimand Norfolk Police Commissioners (1979, SCC)  * Nicholson employed as police constable for under 18 months when Regional Police terminated his employment without providing any reasons or an opportunity for Nicholson to respond   + He was not given reason for dismissal, nor notice prior to dismissal or allowed to make any representations   + Legislation established right to hearing for those employed 18 months or more, but not for those employed under 18 months * Nicholson brought application for judicial review * Starting with Nicholson we don't talk about natural justice;   + Rather we now talk about procedural fairness   + This case created a spectrum between purely legislative decision (no procedural fairness) and a sliding scale of general admin law duty of fairness * Laskin CJ:   + Although the A cannot claim procedural protections afforded to a constable with more than 18 months of service, he cannot be denied any protection     - He should be treated fairly, not arbitrarily     - General duty of fairness applies to admin decisions   + Not entitled to a hearing under regulations prior to his dismissal, nor was his dismissal a judicial or quasi-judicial decision to which CL natural justice protection applied   + A should have been told why his services were no longer required, and given an opportunity, whether orally or in writing, to respond * Martland J: (dissent)   + The very purpose of the probationary period was to enable the R to decide whether he wished to continue his services beyond the probationary period     - Under no duty to explain to A why his services were no longer required, or give him an opportunity to be heard     - Would have been a courtesy, but failure to do so not breach of legal duty to A |

* Judicial review does not include damages because the prerogative writs did not include damages
* The only tort available is misfeasance in a public office, and even then, it is an unlikely remedy
  + So the only remedy available is judicial review
  + A court will not give you misfeasance if you can get judicial review
* Duty of fairness: concerned with ensuring public authorities use fair procedures in making decisions
  + Has nothing to say about the substantive decisions they make
  + Well informed decisions are likely to be better decisions
* In general, the duty of fairness requires 2 things
  + The right to be heard
  + Right to an independent and impartial hearing
* This duty may be satisfied by different things in different decision making contexts
  + A full and formal hearing will be required in some cases
  + Other cases, the duty of fairness will be satisfied by minimal, informal procedures
* 2 questions concerning alleged breach of duty of fairness
  + What is the threshold for the application of the duty?
  + How is the content of the duty of fairness determined?

McDonald v Anishinabek Police Services

1. Trainee with the police services had to do the same police training as all others in Ontario
   * After a few days, a few of the other students made sexual harassment complaints against him
   * He was interviewed immediately but was not told exactly what the complaints were, and didn't have a lawyer present
   * He was kicked out of the college
2. From a procedural fairness point of view, this was not procedurally fair
3. Issue: are the police services a public enough body to be able to seek judicial review
   * They are governed by a self determination provision within their territory
   * We have the Anishinabek Police Services Agreement (not statute)
   * APS Code of Conduct
     + Procedures for investigation and discipline
     + Not statute
   * Canada Labour Code
     + APS is an employer
   * Police Services Act
     + Aboriginal police officer must be appointed by OPP
     + OPP Commission can discipline
4. Prerogative writs:
   * It can't be the case that only things created by statute are subject to judicial review
   * The question isn't the source of the power, but rather the nature of the power
     + Is the nature of the power public enough?
       - If this body wasn't serving the public, would the government fulfill the purpose?
       - It is hard to imagine a more public body than the police force

Harelkin v University of Regina (SCC 1979)

1. Harelkin was a student in social work program
2. They kicked him out for either his grades or his neurotic tendencies
3. The University Council dismisses his appeal without a hearing
   * No doubt this is a breach
4. He went to the trial court: no judicial review
5. He went to the Court of Appeal and ended up at SCC
6. He doesn't want to go to the Senate
   * Was it an adequate alternative?
7. The court split 4-3
   * Not enough to show you had a prior violation of procedural fairness in order to skip a step
   * Can't assume the Senate would act the same as the levels below it
   * If we are going to derogate from the legislative intent there had better be a good reason
   * Universities are autonomous
   * Going through the senate would have been less costly, faster
8. Dickson is the dissent
   * This was a denial of natural justice

## II. THE THRESHOLD TEST: WHEN IS FAIRNESS REQUIRED?

### A. Rights, Interests and Privileges

* Duty of fairness applies to any decision that affects an individual’s rights, interests or privileges

### B. Legitimate Expectations

* This doctrine affords a party affected by the decision of a public official with an opportunity to make representations in circumstances in which there otherwise would be no such opportunity
* Public authorities must be entitled to change their minds
  + Does not therefore require that expectations of particular outcomes must be protected
* This is akin to promissory estoppels
  + But this doctrine only affords procedural protection
* You might have an expectation of being treated in a certain way, but you can't have any legitimate expectation of a substantive outcome

### C. CL Presumption

* Courts have always required clear statutory direction in order to limit or oust procedural protection
  + To abrogate rules of natural justice, express language or necessary implication must be found in the statutory instrument
  + Courts presume that the legislature intended procedural protection to apply

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| Cardinal v Kent (1985, SCC)  * As, prisoners charged with forcible seizure and attempted escape, transferred to different institution and placed under administrative dissociation to maintain order and discipline * Segregation Review Board recommended they be released into general prison population * Director of prison refused, did not inform As of reasons, nor afford them opportunity to be heard before making his decision * As sought judicial review of Director’s decision * Issue: whether relief ( habeas corpus with certiorari in aid) is available in provincial superior court to release prisoner in federal penitentiary from administrative dissociation or segregation into general population on ground that the segregation was imposed or continued in breach of requirements of procedural fairness * S 40 of *Penitentiary Service Regulations*   + If institutional head is satisfied     - For maintenance of good order and discipline     - In the best interests of inmate   + That necessary to keep inmate from associating with other inmates, he may order this   + Not considered punishment     - Shall not be deprived of privileges except associating with other prisoners * General CL duty of procedural fairness for every public authority making admin decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual * The question is not whether there has been a breach of prison rules, but if there has been a breach of duty to act fairly in all the circumstances * Because of serious effect of Director’s decision on As, procedural fairness required him to inform them of reasons for intended decision and give them opportunity to respond   + This was the minimal requirement of procedural fairness * Allow appeal |

## III. LIMITATIONS ON THE SCOPE OF THE DUTY OF FAIRNESS

### A. The Duty Applies to Decisions

* Decisions mean final dispositions of a matter
* Rarely will it apply to investigations or advisory processes that do not have any consequences, even though they may lead to more formal decision making processes that do

### B. The Duty Does Not Apply to Legislative Decisions

* Primary legislation (passed by Parliament/provincial legislatures) not subject to duty of fairness
  + Any meaningful conception of separation of powers between legislature and courts demands it
* Court has emphatically rejected notion that Canadian Bill of Rights established due process procedures in regard to passage of legislation
* If it’s purely legislative you get no duty of fairness
  + “Judges have their own thing, and it’s not that thing.”
* “General common law principle of procedural fairness lies as a duty on every public authority making an administrative decision NOT of a legislative nature AND which affects the rights, privileges or interests of an individual.” (*Cardinal v. Kent*)
* *Re Webb*: eviction from subsidized housing facility due to complaints against Webb’s children (teenage thieves)
  + Challenge on basis that she wasn’t given notice, so not given procedural fairness that she was due
    - You don’t have a right to subsidized housing
    - However, it DOESN'T HAVE TO BE A RIGHT TO NEED PROTECTION, CAN BE AN INTEREST OR PRIVILEGE
      * Threw out the old distinction between a vested right and unvested one
      * Doesn’t matter if applying for something, or having it taken away
* *Hutfield*: doctor denied hospital privileges, never given reasons
  + Argued that hospital privileges are essential, about professional license
  + Also argued liberty interest under s. 7 of Charter
  + General a right and interest to which procedural rights attach
    - Court said not really

#### 1. Are Cabinet and Ministerial Decisions Covered by the Legislative Exemption?

* Not subject to any legislative exemption per se, but it will often be easy to characterize Cabinet and ministerial decisions as legislative, and as a result they will be exempted from the duty
* In *Inuit Tapirisat* federal cabinet rejected appeal from a decision made by CRTC allowing a rate increase without allowing petitioning group to be heard
  + Estey concluded the Cabinet’s power to be legislative in nature
  + He did not want to burden the cabinet with hearing requirements

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| Canada v Inuit Tapirisat of Canada (1980, SCC)  * CRTC approved new rate structure for Bell Canada subscribers * Inuit Tapirisat of Canada (ITC) appealed decision of CRTC to Governor in Council   + Appeal disallowed * ITC sought declaration that GiC’s decision violated duty of fairness and was a nullity as a result * According to allegations made in statement of claim GiC did not communicate to Rs substance of material received from Minister and other sources and did not invite and or receive Rs comments on such material   + Alleged failure of GiC to receive actual petitions of Rs   + Alleged failure of to afford Rs opportunity to respond to case against them * S 64 of the National Transportation Act creates right of appeal on question of law or jurisdiction to FCA and unlimited or unconditional right to petition GiC to vary or rescind orders, decisions or regulations of Commission * Issue: is there a duty to observe natural justice in, or at least a lesser duty of fairness incumbent on, GiC in dealing with parties such as Rs upon their submission of a petition under s 64(1)? * GiC must keep within the law as laid down by Parliament * Executive branch cannot be deprived of right to resort to its staff, to departmental personnel concerned with subject matter, or advice of ministerial members of the Council * The GiC could still hold oral hearings if it so disposed   + But the population in the past is a fraction of what it is today   + It would be an unwise and impractical judicial principle to convert past practice into rigid, invariable administrative procedures * Discretion of GiC is complete, provided he observes the jurisdictional boundaries of s 64(1) * The issue of fairness does not arise in these proceedings on a proper construction of s 64(1)   + At this stage in the lengthy proceedings R was very familiar with application of Bell Canada and the company |

#### 2. Is Subordinate Legislation Covered by the Legislative Exemption?

* Political self-interest often ensures that consultation occurs prior to promulgation of legislation, even where there is no formal requirement for it
* There are times when it is not in the political interest
  + Argument for fairness protection in these contexts may be strong

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| Homex Realty and Development Co v Wyoming Village (1980, SCC)  * Owner of land entered agreement with Village of Wyoming for installation of municipal services   + Deemed lots not to be a registered plan of subdivision     - Village enacted municipal bylaw without notice to Homex     - Consequence: Homex could not sell any land until a new law was registered or consent of the Committee of Adjustment were obtained * Homex sought judicial review * Courts have developed general proposition that wherever a statute authorizes interference with property or other rights and is silent as to whether or not the agency in question is required to give notice, courts will supply omission of legislature and require agency in question to afford subject opportunity of being heard   + Whether or not courts today will invoke this principle of interpretation depends on nature of the action being undertaken by a body such as a municipal council * Circumstance here: statute does not expressly require notice to affected landowners * Council has acted as judge of its own actions in determining outcome of dispute * Was Homex heard by the Council?   + There was no formal or ordinary hearing   + There had been full awareness by both sides of the positions taken   + There had been detailed negotiations and exchange of correspondence * Denial of issuance of order of judicial review   + Appeal dismissed |

#### 3. Are Policy Decisions Covered by the Legislative Exemption?

* The legislative exemption includes decisions which may be described as policy
* Both policy decisions and formal legislative decisions are subject to political accountability

### C. The Duty May Be Suspended or Abridged in the Event of an Emergency

* Duties must be observed before a decision may be made
* In *Cardinal v Director of Kent Institution* court held that although duty of fairness applied to imposition of isolation, segregation in a prison context, in apparently urgent or emergency circumstances no requirement of prior notice and opportunity to be heard before decision
  + Once a recommendation to end the segregation of prisoners had been made by the review body, the duty of fairness required that the prison director inform the inmates of the intended decision to reject the recommendation, provide reasons, and afford them the opportunity to contest his intended decision
* Emergency can have effect on procedural fairness requirements
  + Can postpone procedural rights, or limit them if necessary
  + Emergency cannot completely abrogate them
* Once the immediate emergency has passed, you need to make good on them

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| Reference re Canada Assistance Plan (BC) (1991, SCC)  * Federal government made cost sharing agreements with provinces for social assistance/welfare * Federal government introduced legislation reducing amount of money to pay under agreement * BC Court of Appeal advised   + Federal government could not limit its agreed obligations   + Province had a legitimate expectation that had not been honoured * Federal government appealed * Doctrine of legitimate expectations   + No support in Canadian or English cases that this doctrine can create substantive rights   + It is part of rules of procedural fairness which can govern administrative bodies   + Can create a right to make representations or to be consulted   + Does not fetter decision following representations or consultation * A purely ministerial decision will typically afford the individual no procedural protection * Courts do not intervene during legislative process in Parliament * R concedes there is no legal impediment preventing Parliament from legislating   + Contends government is constrained by doctrine of legitimate expectations from introducing Bill to Parliament * Parliamentary government would be paralyzed if doctrine of legitimate expectations could be applied to prevent government from introducing legislation in Parliament   + Such expectations might be created during an election campaign   + Business of government would stall   + It is fundamental that government not be bound by undertakings of its predecessor * The doctrine does not apply to legislative process and does not apply here   + Existence of convention is irrelevant and need not be considered * It has not been shown that Parliament intended to bind itself or restrict the legislative powers * The Plan has no constitutional nature, and does not impose any manner and form requirement * Appeal allowed |

## IV. THE CONTENT OF THE DUTY OF FAIRNESS

* Duty of fairness may include one or more of the following
  + Right to notice of a potential decision
  + Right to disclosure of particulars
  + Right to make written submissions
  + Right to a hearing within a reasonable time
  + Right to an oral hearing
  + Right to counsel
  + Right to call and cross-examine witnesses
  + Right to written reasons for a decision
    - Not always required, but may be required in certain circumstances
    - This right may be satisfied in a variety of ways

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

* Discretionary power involved in assessing compassionate and humanitarian considerations exercised in name of Minister by immigration officer
* Baker sought judicial review of Minister’s decision, arguing among other things that Minister failed to observe requirements of the duty of fairness
* SCC held Baker was entitled to more than minimal procedural fairness, but not oral hearing
* Court also held that the reasons gave rise to a reasonable apprehension of bias

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| Baker v Minister of Citizenship and Immigration (1999, SCC)  * A was ordered deported and applied for a Minister’s exemption under s 114(2) of *Immigration Act*    + Rejected by letter, which contained no reasons for decision * Upon request, she was provided with officer’s notes * In *Pushpanathan*: certification of question of general importance is trigger by which appeal is justified * Procedural fairness:   + Threshold for duty of fairness is met     - Existence of a duty of fairness does not determine what requirements will be applicable in a given set of circumstances     - Content should be decided in specific context of each case   + How much fairness? Must consider     - Nature of decision being made and process followed in making it       * Decisions resolving disputes between parties by finding facts and applying law likely to demand more extensive procedural protections than admin decisions       * These have more in common with regulation than adjudication     - Statutory scheme and terms of statute pursuant to which body operates       * Greater procedural protections required when no appeal process provided for     - Importance of decision to individual or individuals affected       * The greater the impact on the individual, the more procedural fairness you get     - Legitimate expectations of person challenging decision       * Does not create substantive rights       * If claimant has legitimate expectation that a certain procedure will be followed, this procedure will be required by duty of fairness       * If claimant has legitimate expectation that a certain result will be reached, fairness may require more extensive procedural rights than otherwise accorded       * Legitimate expectations may expand content of the duty of fairness     - Choices of procedure made by agency       * Courts must be conscious of limits of their expertise on judicial review of fairness questions       * Onerous fairness requirements undermine institutional mission of decision maker       * Important to take into account perspective of decision maker   + Above factors not exhaustive * Legitimate expectations:   + Article of Convention and their wording do not give rise to legitimate expectation for Ms. Baker:     - That procedures above those usually required under duty of fairness would be accorded     - That a positive finding would be made     - That particular criteria would be applied * Participatory rights:   + Circumstances require full and fair consideration of issue; must have meaningful participation     - Does not require oral haring necessarily   + Lack of oral hearing in this case did not constitute violation of procedural fairness for Ms. Baker * Reasons:   + Traditional position: duty of fairness does not require reasons for admin decisions   + In certain circumstances, duty of procedural fairness will require written reasons     - These circumstances require reasons       * Fulfilled by case notes * RAB:   + Procedural fairness requires that decisions be made free from RAB   + Test from *Committee for Justice and Liberty v National Energy Board* (1978, SCC)     - Apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining required information       * What would an informed person, viewing matter realistically and practically, and having thought matter through, conclude   + About justice being done, and about justice being seen to be done   + Under this test, there was RAB * Standard of review:   + Pragmatic and functional approach recognizes standard of review for errors of law on a spectrum     - Some decisions entitled to more deference   + Standard of review analysis considers (*Pushpanathan*)     - Privative clause     - Expertise of tribunal     - Purpose of provision and Act as a whole     - Nature of decision being made (law or facts)   + Considerable deference should be accorded immigration officers given     - Fact specific nature of inquiry     - Role within statutory scheme as an exception     - Decision maker is Minister   + Factors to less deference     - Absence of privative clause     - Explicit contemplation of judicial review by Federal Court     - Individual rather than polycentric nature of decision   + Appropriate standard is reasonableness simpliciter * Violation of principles of procedural fairness (RAB), and unreasonable discretion   + Appeal allowed * Charter issues are not discussed in this case; focus on admin law principles instead * How much fairness is she entitled to? |

## V. JUDICIAL REVIEW OF THE DUTY OF FAIRNESS

* Difference between judicial review of a decision on procedural and on substantive grounds
* Until recently, court used 3 standards of review: correctness, reasonableness (simpliciter), patent unreasonableness
* No similar approach is taken for duty of fairness
  + Decision makers do not have right to be wrong where procedural questions are concerned
* A violation of duty of fairness will not result in a substantive outcome
  + Role of court is to supervise decision making process,
    - To ensure decision has been made properly, not that proper decision made
  + Nothing prevents the decision maker from reaching the same substantive decision
* Order quashing proceedings may cause great inconvenience to those involved, and to public interest
  + By requiring that proceedings be repeated has costs and delay

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| Fairness “crib notes”  * Without notice other rights cannot be exercised * Four main categories of problems with notice: form, manner of service, time, content   + Forms     - 2 main forms       * Oral       * Written         + More common   + Manner of Service     - The way that notice is delivered     - Courts will probably require personal service     - Absent statutory guidance courts probably permit some form of public notice   + Time     - Notice must be given long enough before the date of the proposed hearing to allow party time to decide whether to participate and to prepare   + Content     - Notice must give enough information about hearing to enable party to prepare response * Discovery: in some cases tribunals may have power to compel parties to reveal to the other side relevant information related to the litigation * Traditionally oral hearings were required as an element of natural justice   + Procedural fairness doctrine: presumption for oral hearing has been subsumed   + Duty of fairness may be met without oral hearing if adequate opportunity for party to be heard * Recent challenges by media have led to great openness at oral hearings * No CL absolute right to counsel; the right’s existence is fact-dependent   + No right to counsel in cases of routine information gathering * More complex the inquiry and more severe the repercussions on individuals involved, the more likely the person has a right to counsel * Section 40 of ATA allows admission of some evidence not admissible in a court of law   + Still limited by rules of natural justice or procedural fairness     - Party must have opportunity to make the case     - Omission of evidence that adds dimension of critical importance is denial of natural justice   + Rules about hearsay generally more relaxed in tribunals     - Based on necessity and reliability     - Exclusive reliance on hearsay may be grounds for reversal     - Weight placed on hearsay will also be taken into account * Right of a party to cross examine other party’s witnesses is now enshrined in some statutes   + Most effective way to test merits of case   + If there is another equivocally fair method of answering the case, it may meet the requirements of natural justice |

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| David Jones excerpt on fairness  * Inadequacy of reasons and unreasonableness are distinct grounds for judicial review * *Law Society of Upper Canada v Neinstein*   + Lawyer disbarred for sexually harassing two women   + He appealed a finding of professional misconduct     - Main argument: inadequacy of reasons   + For majority, Doherty was skeptical that complaints about adequacy of reasons are often cloaks for attacking the merits of a decision   + Despite these doubts, Doherty found that the reasons failed to adequately address why evidence of complainant was preferred over that of Neinstein     - Absence of reasons addressing credibility of one side in a “he said she said” case may impact on adequacy of reasons as a whole     - No analysis of his evidence or evidence of his witnesses     - Neinstein, on reading reasons would have no idea what hearing panel made of his evidence or his supporting witness * *Guttman v Law Society of Manitoba*   + He was a lawyer with a history of professional misconduct   + Pled guilty to further charge of professional misconduct and was disbarred   + Guttman appealed disbarment on grounds that Discipline Committee had not given sufficient reasons for not taking into account his personal problems when assessing penalty   + In referring to *Neinstein*, Manitoba court said it was incumbent on committee to explain why it did not accept evidence that obvious stresses suffered by A caused or at least significantly contributed to going astray of his moral compass   + Failure to explain why evidence was rejected, or at least why it was not persuasive is failure which goes to the heart of and affects entire decision   + Deference not owed to decision and intervention is permissible * *Walsh v Council for Licensed Practical Nurses*   + In its reasons, committee stated that Ms Walsh failed to abide by Standards of Practice and Code of Ethics   + CA in Newfoundland and Labrador held reasons given by committee inadequate; did not identify breach of relevant provision in Standards of Practice or Code of Ethics   + Court also criticized reasons as being a mere summary of evidence that did not provide parties with adequate explanation to ascertain basis of decision   + Where witnesses gave differing views on an issue, reasons must give some explanation for accepting the views of one witness over another * *Burcke v Newfoundland and Labrador Assn of Public and Private Employees*   + CA in Newfoundland and Labrador: reasons must not merely state conclusions   + Mr. Burke had made specific allegations of arbitrary behavior that supported a complaint that Union had acted in a superficial or careless manner     - Board’s reasons did not address specific allegations before it     - Rather they merely reviewed history of matter, and stated conclusions that Union had demonstrated a caring attitude and had acted fairly and properly |

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| Clifford v. OMERS (2010, Ontario Court of Appeal)  * Where admin tribunal has legal obligation to give reasons for decision, on judicial review, what standard of review should court apply in deciding whether it has done so?   + How does court assess whether reasons are adequate to meet that legal obligation? * Allow appeal * Majority of Divisional Court erred in applying standard of reasonableness   + Should apply standard of correctness     - Reasons given by tribunal were adequate to meet legal obligation * Tribunal had to decide whether Ms. Campbell and Mr. Clifford were in a CL relationship for at least 3 years prior to death   + Found that it was * *Baker* established that in certain circumstances duty of procedural fairness will include requirement that administrative tribunal provide reasons for its decision   + Nature of decision being made, and process followed in making it   + Nature of statutory scheme being administered   + Importance of decision to individual   + Legitimate expectations of person challenging decision   + Respect for choice of procedures made by admin agency itself * Unfair to person subject to a decision such as this one to not be told why result was reached   + Court cannot give deference to the choice of whether or not to give reasons     - Court must ensure that tribunal complies with its legal obligation     - Must review what tribunal has done, and decide if it has complied     - The standard must be correctness * Assessing compliance with legal obligation   + Reviewing court must use flexibility in determining what constitutes reasons sufficient to meet this obligation   + R v REM emphasizes that where reasons are legally required, their sufficiency must be assessed functionally     - Reasons must be sufficient to fulfill the purposes required of them       * Let individual know why the decision was made       * To permit effective judicial review     - Basis of the decision must be explained     - This explanation must be logically linked to decision made       * Not necessary for tribunal to describe every landmark along the way     - Must pay particular attention to circumstances of the case       * Whether reasons show tribunal grappled with substance of matter * Tribunal here was under legal obligation to give reasons for its decision   + It identified both questions, grappled with them, and provided answers to both   + Task is to determine whether what was said was sufficient, not the problems   + Tribunal found evidence to be credible and reliable; open to tribunal to find so * Decision was reasonable |

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| Green v Nova Scotia (HRC) (2011, NSCA)  * A filed complaint with NS Human Rights Commission alleging that Mount Saint Vincent University discriminated against her based on disability during two December exams * Issue: whether chambers judge erred in determining   + That there was no duty to provide reasons   + Commission’s decision to dismiss A’s complaint was reasonable * Commission has authority to dispose of complaints at a preliminary stage * She was given opportunity to rewrite exams, but she did not because she was taking courses at another university and had a summer job * At judicial review of Commission’s decision, Chambers judge had to determine   + Whether A had received procedural fairness   + Whether Commission’s decision dismissing her complaint was reasonable * A argued duty of fairness requires Commission to give reasons for decision that her complaint was without merit * Unable to accept As arguments * Commission’s decision revealed what Commission decided – dismissal of complaint – and why – having assessed evidence, did not consider it sufficient to warrant referral to board of inquiry – * As a result of her active participation, she was aware of all arguments before Commission and had means to know why Commission reached decision it did * No error or injustice resulting from Chambers judge’s decision of no duty on Commission to provide further reasons for its screening decision not to refer complaint to board of inquiry that would support appellate intervention * Dismiss this ground of appeal * Commission’s decision to dismiss complaint falls within range of acceptable outcomes which are defensible in respect of the facts and the law * Dismiss this ground of appeal |

# Chapter 6 – Independence, Impartiality, and Bias

## I. INTRODUCTION

* Tribunal independence, impartiality and bias all center on notion of fairness in administrative decision making process
* Decision maker and decision making process must not proffer undue preferential treatment or be driven by preconceived notions
* Mere perception of partiality toward particular outcome or bias is enough to have decision overturned
* Impartiality refers to ideal state of decision maker or decision making institution
  + Able to make judgments with open mind, without mind already made up
* Independence: means of achieving impartiality

## II. SOURCES OF GUARANTEE OF AN INDEPENDENT AND IMPARTIAL TRIBUNAL

* Principles of natural justice
  + Decision maker should neither judge her own cause nor have any interest in the outcome of a case before her
    - Nemo judex in sua causa debet esse
      * No one is fit to be the judge in his own cause
  + Requirement of decision maker to hear and listen to both sides of a case before making a decision
    - Audi alteram partem
      * Hear the other side
* Relevant constitutional principles:
  + Charter s 7 (life, liberty and security of person)
  + Charter s 11(d) (presumption of innocence)
  + Quebec Charter of Human Rights and Freedoms s 23 (full and equal, public and fair hearing)
  + Canadian Bill of Rights ss 1(a) and 2(e) (right to life, liberty and security of person), (right to a fair hearing)
  + Alberta Bill of Rights s 1(a) (liberty, security of person and enjoyment of property)
* Challenges:
  + Decision maker having a direct, pecuniary interest in outcome
  + Attitudinal bias
  + Consistency and efficiency

## III. WHAT IS TRIBUNAL INDEPENDENCE AND WHY IS IT IMPORTANT?

* Generally, under their enabling statutes, tribunals are required to maintain some contact with the minister, and are obliged to file annual reports to the minister
* The minister will be involved in the process of appointing and removing members of the tribunal
* This may create an appearance of inappropriate interference between government departments and tribunals
  + Particularly acute where government is frequently an opposing party before the tribunal
* Independence v impartiality
  + Independence:
  + Impartiality:
    - Inability to be swayed by anyone -- other judges, interest groups etc
    - State of mind
  + Bias:
    - Must look at external indicia, rather than trying to get into person's head
    - Obvious instances of bias
      * Family relationships
      * Personal interest in a corporation
        + Other pecuniary interests
      * Advocate for something in the past

### A. The Development of the Law of Tribunal Independence in Canada

* First wave of jurisprudence used independence of judiciary as a foundation on which to mould concept of administrative tribunal independence
* Second wave, marked by *Ocean Port Hotel*, affirmed hybrid nature of tribunals and maintained no general constitutional guarantee of independence where tribunals are concerned
* Third wave served as a retrenchment

#### 1. Laying the Groundwork: The Theory of Judicial Independence

* No outsider should interfere in fact, or attempt to inference with the way in which a judge conducts his or her case and makes his or her decision
* 3 objective conditions have been identified as necessary to guarantee independence
  + Security of tenure
    - Guaranteed by constitution for judges
    - Before removal, judges must be provided with opportunity to respond to allegations against them
  + Financial security
    - 2 goals:
      * Guarantee that although government is responsible for remuneration of judges, will not alter their pay for arbitrary reasons such as discontent with decisions rendered
      * Promise that the amount judges are paid will be sufficient to keep them from seeking alternative means of supplementing their income
  + Administrative control
    - Deals with manner in which the affairs of court are administered
      * Budgetary allocations for buildings
      * Equipment
      * Assignment of cases
    - Ensures judges not put in compromising situations where decisions may be to protect their own employment and interests, rather than for the sake of rendering decisions solely on basis of their legal judgment
* Mere appearance of inappropriate interference with decision making process is enough to engender a loss of public confidence in decision making mechanisms of state

#### 2. From Judicial Independence to Tribunal Independence

* *R v Valente* was first SCC case to suggest idea that guarantees for judicial independence could also be applied to a variety of tribunals
* Test for tribunal independence and RAB: whether a reasonable, well informed person having thought the matter through would conclude that administrative decision maker is sufficiently free of factors that could interfere with ability to make impartial judgments
* *Canadian Pacific Ltd v Matsqui Indian Band*
  + Requisite level of institutional independence depends on nature of tribunal, interests at stake, other indices of independence such as oaths of office
  + They used the 3 part test on judicial independence
    - Security of tenure
    - Financial security
    - Administrative control
  + From this case:
    - Use a flexible approach to above test
    - Don't expect every tribunal to have security of tenure as judges
* Tribunal service thought of as type of public service done for honour, not for glory or riches
* Tribunal members can be appointed for a variety of terms
  + Problem with at pleasure appointments is that they theoretically enable government to fire decision makers whose decisions are not in line with its expectations
    - Possibility of indirect interference with tribunal decision making
* 2747-3174 Quebec v Regie (in Laverne chapter)
  + Quebec licensing board
  + Even though people on licensing board were there for fixed limited terms, they had security of tenure
  + When it came to role of lawyers, the lawyer had many points of contact with tribunal
  + He was acting as legal advisor for tribunal, then prosecutor for tribunal, then helped write reasons
    - He wore too many hats

#### 3. Ocean Port Hotel and Parliamentary Supremacy

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| Ocean Port Hotel (2001, SCC)  * Members of the board had “at pleasure” appointments * SCC: when no constitutional constraints involved, administrative tribunals do not attract general constitutional guarantees of independence * Issue: degree of independence required of members sitting on administrative tribunals empowered to impose penalties * 5 allegations of non compliance   + 2 day suspension of liquor license   + Notice by letter * Huddart at Court of Apeal: appointees to Board lacked security of tenure necessary to ensure independence   + Decision to suspend license for violation of Act closely resembles judicial decision   + Must approach standards required of a court at CL   + Institutional independence consists of:     - Security of tenure       * Only this was at issue in this appeal     - Financial security     - Administrative control   + A member of the board can be removed at the will of the government * Act expressly provides for appointment of Board members at pleasure of Lieutenant GiC   + CA elevated a principle of natural justice to constitutional status     - Committed a clear error of law * Absent constitutional constraints, degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute * Like all principles of natural justice, degree of independence required of tribunal members may be ousted by express statutory language or necessary implication * Ultimately it is Parliament that determines nature of a tribunal’s relationship to executive   + Not open to the court to apply a CL rule in the face of a clear statutory direction * Administrative tribunals created precisely for purpose of implementing government policy   + May require them to make quasi-judicial decisions * Tribunals sometimes attract Charter requirements of independence; as general rule they do not * Legislature’s intention that the Board members should service at pleasure is unequivocal   + Does not permit argument that the statute is ambiguous and should be read as imposing a higher degree of independence to meet requirements of natural justice * Exercise of power here falls squarely within executive power of provincial government * The second wave * Court found fundamental distinction between tribunals and courts   + They are part of executive, not judicial branch   + Statute is not ambiguous; was designed with a particular form of independence |

* Attempted to lay to rest controversial issue of whether at pleasure appointments provide satisfactory degree of independence for decision makers sitting on tribunals that impose penalties
* Ocean Port argued that unwritten constitutional principle guaranteeing judicial independence should be interpreted to extend to administrative tribunals as well
  + SCC disagreed
* Tribunals may be required to make quasi judicial decisions
  + But their primary function as policy makers and their status as extensions of executive branch of government make degree of independence a question most appropriately determined by Parliament or provincial legislature
  + Up to Parliament or legislature to determine structure, responsibilities and degree of independence required of any particular tribunal
* Degree of independence required at CL could be ousted by express statutory language or necessary statutory implication, so long as the statute is constitutionally valid
  + Administrative tribunals do not attract Charter or quasi-constitutional requirements of independence

#### 4. Reasserting the Push for independence: Unwritten Constitutional Principles, Tribunal Independence, Rule of Law

* SCC has showed willingness to expand notion of court to allow litigants before some less judicial entities benefits of constitutional guarantees of independence
* In *McKenzie v Minister of Public Safety and Solicitor General et al*, petitioner argued that unwritten constitutional guarantees of independence should be expanded to apply to residential tenancy arbitrators
  + BCSC agreed with the petitioner’s argument
  + Senior and well respected; residential tenancies board rescinded her appointment 18 months in
  + She argued that she was higher at the adjudicative spectrum
  + She won at the BCSC
    - Everyone thought that this case would overturn Ocean Port
  + The BCCA decided this issue was moot
    - It was fully dismissed with a lecture to lower court
  + We are left with Ocean Port
* *PEI Reference:* judicial independence not only stemmed from specific provisions of Charter (ss 7 and 11d), but derived as well from unwritten constitutional principles dating back to UK Act of Settlement 1701
* In *Ell v Alberta:* unwritten constitutional principles serve to protect judicial independence of justices of peace, for whom issue of independence has been debatable for some time

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| Keen v. Canada (2009, FC)  * Applicant (Keen) was President and member of Canadian Nuclear Safety Commission * Keen dealt with reactor crisis concerning production of medical isotopes * Minister wrote a letter expressing his discontent with how she dealt with crisis   + She replied via letter explaining her narrative and actions     - The minister did not reply * On Jan 15, 2008 GIC on recommendation of Minister issued order in council terminating Keen as president of commission, without affecting her status as member * On Sept 22, 2008 Keen advised PM she would no longer serve as member of commission   + Due to having been constructively dismissed as president * In *Borowski v Canada* (1989, SCR): a case is moot if events subsequent to institution of proceeding affect relationship between parties such that a live controversy no longer exists   + Court retains discretion to hear the case in any event * *Interpretation Act* (s 23) provides that every public officer is deemed to hold office “during pleasure” unless otherwise expressed in relevant enactment, commission or instrument of appointment * In *Canada v Cosgrove* (2007. FCA): court stressed nature of judicial independence and concern that judges may deal with and decide their cases free from inappropriate scrutiny of legislative and executive branches of government   + This does not require judges to be immune from scrutiny * At pleasure appointment described by SCC in *Dunsmuir v NB* (2008. SCC)   + Certain duties of fairness owed to person with at pleasure appointment before dismissal   + If statutory provisions are silent, they have at least a right to notice of intention to be dismissed and to make representations for consideration before final decision is made     - Employee in this situation is truly subject to the will of the Crown; procedural fairness is required to ensure that public power is not exercised capriciously * Act is silent whether designation of president is “during good behavior” or “at pleasure” * Appointment of Keen as member of commission is “during good behavior”   + She was not terminated as a member * If designation of president was “at pleasure”, she was afforded sufficient procedural fairness   + She was given notice and opportunity to make submissions * If designation of president was “during good behavior” then neither Minister nor GIC have adequately set out grounds upon which it was believed she lacked good behavior * Designation of president is “at pleasure”   + Stated clearly in commission   + Circumstances of her termination sufficient to satisfy requirements of fairness and natural justice as set out in *Dunsmuir* * Application dismissed, no costs ordered * Ocean Port applies to this case, and she lost |

## IV. DISCUSSION

### A. Competing Images: Views of Independence and Impartiality from Inside and Outside

#### 1. The Appointment and Removal Process: Institutions, Ideologies and Institutional Culture

* These are some of the most controversial and contested issues

### B. Bias, Adjudicative Independence, and Policy Making (and Whose Policies Are They Anyway?)

* Houle and Sossin identify three modes of policy making by administrative tribunals:
  + Decision making
  + Informal rule making through use of soft law such as guidelines, bulletins and manuals
  + Formal rule making through delegated legislation
* There is often tension between need for tribunal members to collaborate in order to further law as an institution and need to give each decision maker space to render rightful decisions

#### 1. Reasonable Apprehension of Bias

* Impartiality deals with attitude of the decision maker and decision making institution with respect to both the issues and parties before them
* The test for bias relies on perception
  + If a reasonable person with informed understanding of how tribunal functions perceives that the decision making is biased, this is enough to have decision quashed
* Test for determining RAB was formulated in dissenting opinion of Justice DeGrandpre in *Committee for Justice and Liberty v National Energy Board*
  + What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude
* The grounds for apprehension of bias must be substantial
  + Mere suspicion of bias is insufficient
* The reasonable well informed person is not one who is overly sensitive

#### 2. Consistency and Decision Making

* Similar decisions in similar cases show the general public how a tribunal has chosen to apply its statutes in various factual situations
* Consistent policy: a form of non binding guideline that tribunal users can refer to in deciding how to manage their affairs in industry or sector being regulated by the tribunal
* In *Consolidated Bathurst,* the Ontario Labour Relations Board held a meeting of the full labour board to discuss the draft reasons of one of its three member panels
* Discussion dealt with whether a particular legal test that the board had established through its jurisprudence should be replaced by another
  + At issue was whether the full board meetings constitute a breach of the natural justice principle “he who hears must decide” by placing the decision makers in a situation where they can be influenced by others who have not heard the evidence or arguments

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| International Woodworkers of America v Consolidated-Bathurst Packaging Ltd (1990, SCC)  * Consolidated Bathurst operated a corrugated container plant in Hamilton   + Negotiated new collective agreement with R union without disclosing that it planned to close plant   + Ontario Relations Board determined A had obligation to disclose decision to R union * Methods used at full board meetings reflects need to maintain atmosphere where each attending board member retains freedom to make up his mind on any given issue and to preserve panel member’s ultimate responsibility for outcome of final decision   + Full board meetings are designed to promote discussion on important policy issues and to provide opportunity for members to share personal experiences in regulation of labour relations   + No minutes, no attendance; just discussion * Rationale for full board meetings:   + Benefiting from acquired experience of all the members   + Large number of persons participating in board decisions creates possibility that different panels will decide similar issues in a different manner     - Coherence should be fostered * Discussions with colleagues do not constitute, in and of themselves, infringements on panel members’ capacity to decide issues at stake independently * Danger that full board meetings may fetter judicial independence of panel members is not sufficiently present to give rise to a RAB or lack of independence within meaning of test * Full board meeting was an important element of a legitimate consultation process and not a participation in decision of persons who had not heard the parties * Appeal dismissed * Panel upholds the existing legal test * Sopinka in dissent rejects this process   + Party should have had a chance to respond |

* SCC acknowledged need for full board meetings
  + Allowed members of large board with heavy caseload to benefit from acquired expertise of collective
  + Structure of the Labour Board was conducive to exchanges of opinions
  + Coherence to be fostered: outcome of dispute not depend on identity of decision maker
  + Privative clause protecting board’s decisions: more incumbent on board to take measures to avoid conflicting results
* Court outlined conditions for such meetings so that natural justice would not be breached
  + Discussions be limited to law or policy and not factual issues
  + Parties be given reasonable opportunity to respond to new ground arising from meeting
* *Tremblay* was decided after *Consolidated Bathurst*
  + Court clarified that imposition of consultation meetings by a member of board who was not on panel could amount to inappropriate constraint
  + Statute expressly indicates that individual decision makers must decide matters; imposing group consultation amounts to act of compulsion against legislative intent

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| Geza v Canada (2005, FC) Campbell J:   * In 1998 IRB decided to produce a precedent (lead case) for Roma refugees from Hungary   + Claim chosen to be representative of issues that recurred when Hungarian Roma people were seeking refugee status   + Purpose of lead case initiative: enable board to have one case in which there were informed findings of fact and a relatively thorough analysis of relevant legal issues * Characteristics of IRB   + Expert tribunal   + Variable and unpredictable caseload * Lead case has 2 objectives   + Establish a baseline of up to date and expert information on country conditions which has a sudden shift in volume or type of refugee claim   + Gives focus to principal legal issues arising from those facts * Evidence presented in lead cases, and decisions reached not binding on subsequent panels * IRB determined that the applicants were not convention refugees * Present applications   + Allegation of bias against IRB in producing the lead cases     - 2 part test (*R v Lippe,* 1991, SCC), modified in *Canadian Pacific Ltd v Matsqui Indian Band* (1995, SCC)     - Will there be RAB in mind of fully informed person in substantial number of cases?       * If no, allegations of bias cannot be brought on an institutional level, but must be dealt with on a case by case basis     - Applicants have insufficient evidence to substantiate their argument       * When read in its entirety, evidence on record does not support any of applicant’s allegations       * No evidence of motive to provide precedential case to increase rejection rate of Hungarian Roma       * Evidence does not support applicant’s contention that Mr. Bubrin’s involvement in administrative capacity prior to commencement of hearings in any way raised a RAB   + Attack on uniform procedure adopted in actual hearing process for each case as a breach of due process     - Not addressed in excerpt   + Attack on the finding of state protection in each case     - Not addressed in excerpt   Evans JA:   * Tribunals’ decision is liable to be set aside for bias if a reasonable person, who was reasonably informed of the facts and had thought the matter through in a practical manner, would conclude on a BoP that the decision maker was not impartial   + Standard of impartiality expected of a particular administrative decision maker depends on context and is to be measured by reference to the factors identified by L’Heureux Dube in *Baker v Canada*   + Board is charged with a uniquely difficult mandate of administrative adjudication     - Must devise means of maintaining and enhancing consistency and quality of decisions   + Legal notion of bias connotes circumstances that give rise to a belief by a reasonable and informed observer that the decision maker has been influenced by some extraneous or improper consideration * Not a single fact points to bias * But, given high standard of impartiality to which board is held in adjudicative capacity, a reasonable person might well have concluded on basis of above that the panel hearing claim was not impartial   + 1 of 2 panel members may have been predisposed to denying A’s claim; he had played a leading role producing authoritative, non binding legal and factual precedent to reduce percentage of positive decisions from Hungarian Roma refugee claims * Allow appeals, allow applications for judicial review, remit matters back to board for redetermination * Heavy caseload, insufficient resources at IRB   + How the lead case was built     - Applicants consented to participate     - Applicant's counsel participated actively     - Minister of Citizenship invited to participate in hearing to bring up policy issues     - Operations Case Manager for Europe team selected individual cases     - Experienced panel members familiar with Hungary and Roma cases     - Hearing lasted 14 days; called 6 expert witnesses on country conditions (a lot)   + Panel finds they didn't have a well founded fear of persecution due to being Roma     - Found applicants not credible * Issue: does the use of the lead case raise RAB? * Federal court sees no RAB * SCC or federal court of appeal? Not sure * FCA found RAB based on relationship between panel and ministry   + The fact that there was a link from management on the panel   + The fact that there was a concern about too many Roma   + The e-mails: desire to reduce the number of claimants * This case really shut the door on lead cases   + There hasn't been one since |

#### 3. Adjudicative Independence and the Legislative Process

### C. Multifunctionality

* Expertise required of tribunal members and staff is not only juristic legal experience needed to interpret statute, but may also include expertise in particular technical subject area
  + Experts are drawn from other fields and general public
* Common complaint of tribunals: potential to act as both prosecutor and judge in same matter
* *Currie* dealt with question of whether disciplinary hearings used in provincial prison exhibited signs of institutional bias in a substantial number of cases
  + Those responsible for maintaining order in institution also placed on disciplinary panels
  + Caused appearance of conflict
  + The Alberta Queens Bench found a breach of s 7 of the Charter
    - Found that none of the traditional guarantees of independence existed
    - Culture of institution and these types of hearings made it impossible for a prisoner to assert his/her side of the story

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| “Administrative Law at Pleasure: Keen v Canada, Lorne Sossin, 2009  * FC’s approach to Keen’s dismissal represents fulfillment of an unsettling implication of *Dunsmuir* * It is difficult to avoid conclusion that effect of *Dunsmuir* will be diminishing of procedural protections against termination for public office holders * Court identifies situations where private law of employment contracts may not govern, or may not govern completely   + Where public employee is not protected by a contract of employment     - Judges, minister of Crown, other officials who fulfill constitutionally defined state roles   + Where a public office holder truly serves at pleasure     - Subject to summary dismissal   + Where a duty of fairness flows by necessary implication from a statutory power governing employee relationship * Court’s new approach builds on abstract legal boundaries, such as those between public office holders who have constitutionally defined state roles, and those who do not   + Those who do not appear to include regulators and administrative tribunals * *Dunsmuir* is a bold step for SCC, and articulates a unanimous preference for a contractual over a public law scheme for the protection of the rights of public employees   + Ultimately, contractual remedies may well be appropriate for many public employees     - They cannot take the place of the admin law doctrine of procedural fairness as a constraint on arbitrary or improper government action * At pleasure appointments are inherently inappropriate to adjudicative, oversight and accountability positions * Issue is not whether government has right to dismiss at pleasure, but rather appropriateness of government exercising power it has in the circumstances |

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| Dunsmuir v NB (2008, SCC) Bastarache:   * Dunsmuir was employed by DoJ for NB, and was given several employment reviews and fired * Dunsmuir commenced grievance process under s 100.1 of *Public Service Labour Relations Act* RSNB   + Adjudicator found termination letter effected termination with pay in lieu of notice     - Not disciplinary, but rather based on work performance and suitability   + Relied on *Knight v Indian Head School Division No 19* (1990, SCC) for legal principles concerning at pleasure office holders and procedural fairness     - Hel A was entitled to procedural fairness in termination; ordered A reinstated * Approach taken in judicial review of a decision of a particular adjudicative tribunal seized of a grievance filed by A after his employment was terminated   + Judicial review is the means by which the court supervise those who exercise statutory powers, to ensure they do not overstep their legal authority   + Function of judicial review: ensure legality, reasonableness and fairness of admin process and its outcomes   + Judicial review is constitutionally guaranteed in Canada   + Current approach involves 3 standards of review     - Correctness       * No deference     - Patent unreasonableness       * Most deferential     - Standard of reasonableness simpliciter       * Middle ground   + There ought to be two standards of review, correctness and reasonableness   + Prior to *CUPE*, judicial review followed preliminary question doctrine, which inquired into whether tribunal had erred in determining the scope of its jurisdiction     - By rebranding an issue jurisdictional, courts could replace a decision of tribunal with one they preferred; often at expense of legislative intention   + *Bibault* introduced concept of pragmatic and functional analysis to determine jurisdiction of tribunal     - Abandoned preliminary question theory     - Courts were to consider a number of factors       * Wording of provision conferring jurisdiction       * Purpose of enabling statute       * Reasons for existence of tribunal       * Expertise of its members       * Nature of the problem     - This doctrine later expanded to determine appropriate degree of deference in respect of various forms of admin decision making   + In *Southam*, a third standard of review was introduced     - Reasonableness simpiciter asks whether tribunal’s decision was reasonable       * If so, decision should stand, if not, must fall     - Difference between patent unreasonableness and reasonableness simpliciter is immediacy, or obviousness of defect in tribunal’s decision   + After *Southam*, courts struggled with conceptual distinction between two standards of reasonableness   + In *Ryan* the court tried to bring some clarity     - A patently unreasonable defect, once identified, can be explained simply and easily, leaving no possibility of doubting decision was defective       * So flawed, that no amount of curial deference can let it stand     - Unreasonable: defect less obvious, will require searching/testing to discover   + Court has moved to highly formalistic, artificial jurisdiction test, easily manipulated, to a highly contextual functional test that provides great flexibility but offers little actual ground guidance, and too many standards of review   + The problems *Southam* tried to remedy are best addressed with 2 standards, not 3     - 2 variants of reasonableness should be collapsed into a single form     - Deference imports respect for decision making process of adjudicative bodies with regard to both facts and law       * Respect for legislative choices to leave some matters with admin decision makers   + Standard of correctness must remain with jurisdictional some questions of law     - Reviewing court will not show deference to decision maker’s reasoning process       * It will undertake its own analysis of the question   + A consideration of following factors will lead to conclusion that the decision maker be given deference and reasonableness test applied     - Privative clause       * Statutory direction from Parliament indicating need for deference       * Interference by court should be minimized     - Discrete and special admin regime in which decision maker has special expertise     - Nature of question of law       * Of central importance to legal system and outside area of specialized expertise will always attract correctness standard       * If it does not rise to this level, it may be compatible with reasonableness   + Admin bodies must be correct in determinations of true questions of jurisdiction or vires     - Neither wish nor intend to return to jurisdiction/preliminary question doctrine that plagued the jurisprudence for many years     - Jurisdiction is intended in narrow sense of whether or not tribunal had authority to make inquiry   + Process of judicial review involves 2 steps     - Whether jurisprudence has already determined in a satisfactory manner degree of deference to be accorded with regard to a particular category of question     - Where first inquiry proves unfruitful, courts must proceed to analysis of factors making it possible to identify proper standard of review   + Whether the above is called pragmatic and functional is irrelevant     - But let’s rename the above analysis “standard of review analysis”   + The analysis must be contextual     - Presence or absence of privative clause       * Contains ouster and finality clause     - Purpose of tribunal as determined by interpretation of enabling statute     - Nature of question at issue     - Expertise of tribunal   + Application     - Considering the above 4 factors, standard is reasonableness     - The reasoning process of the adjudicator was deeply flawed       * Relied on and led to a construction of statute that fell outside the range of admissible statutory interpretations       * Arbitrator treated A, a non unionized employee, as unionized employee * Whether A, who held office at pleasure, had the right to procedural fairness in termination   + This discussion is omitted   + *Knight* decision should be reconsidered     - In specific context of dismissal from public employment, disputes should be viewed through lens of contract law rather than public law     - Dunsmuir was a contractual employee, as well as a public office holder       * Contract governed, and employer was within rights to dismiss Dunsmuir with pay in lieu of notice and without hearing       * Adjudicator erred in applying public law duty of procedural fairness * Appeal dismissed * Patent unreasonableness dropped:   + Reasonableness not a gradient; confusing to pick between the two   + Means courts must accept some unreasonable decisions * Reasonableness: deference, respecting legislative intent, give benefit of the doubt * Correctness: protecting RoL, separation of powers, jurisdiction * Post Dunsmuir, we use pragmatic and functional test, we just don't call it that anymore   + Now the work is all done under standard of review heading   Binnie (concurring):   * Agree with colleagues that A’s former employment relationship is governed by contract * Must develop a principled framework that is more coherent and workable * 3 basic legal limits on allocation of administrative discretion   + Constitution restricts legislator’s ability to allocate issues to admin bodies which s 96 of constitution has allocated to courts   + Admin action must be founded on statutory or prerogative (CL) powers     - No one can exercise a power they do not possess   + Fair procedure is said to be the handmaiden of justice * When an applicant challenges substantive outcome of admin action, the judge is invited to cross the line into second guessing matters that lie within the function of the administrator   + Judicial review proceeds on justified presumption that legislators do not intend results that depart from reasonable standards * Degree of deference depends on nature and content of question   + Nature of question plays a more important role in terms of substantive review     - Helps define range of reasonable outcomes within which administrator is authorized to choose * Reasonableness is a big tent that will have to accommodate a lot of variables that inform and limit court’s review of outcome of admin decision making * Present incarnation of standard of review analysis requires threshold debate of 4 factors   + This is all mere preparation for the argument about the actual substance of the case * There is no single correct answer   + Presumed that decision under review is reasonable, until applicant shows otherwise * Reasonableness standard: now incorporate both   + Degree of deference     - Formally reflected in distinction between patent unreasonableness and reasonableness simpliciter   + And assessment of range of options reasonably open to decision maker in circumstances * Asking the courts to have regard to more than one variable is not asking too much * Binnie agrees about the procedural fairness stuff, and agrees that the current status of standard of review needs to be reformed (3 standards now 2)   + He thinks the review doesn't go far enough; should address admin decisions other than tribunals   Deschamps (concurring):   * In adjudicative context, same deference is owed in respect of question of facts and questions of mixed fact and law on administrative review as on appeal from a court decision   + A question of law will also attract deference, provided it concerns interpretation of enabling statute and providing there is no right of review * Even if deference had been owed to adjudicator in this case, interpretation could not have stood * On issue of natural justice, agree with colleagues * On result, agree that appeal should be dismissed * Don’t start with the privative clause, rather start with nature of question   + Is it a question of law, a question of fact, or a question of mixed law and fact |

# Chapter 8 – Standard of Review: The Pragmatic and Functional Test

## I. INTRODUCTION

* When judges hear appeals, task is to ask whether lower court got answer right or wrong
* Judicial review brings up a different set of questions
  + Is there always a single correct answer?
  + Who is better situated to determine answer, first level specialist or generalist reviewing judge?
  + What criteria can assist in assessing relative expertise?
* Court called upon to review interpretation or application of a statutory provision by admin decision maker will first a pragmatic and functional test to assess who is better placed to make determination at issue
  + How much deference
  + Less deference means stricter review
    - Correctness
  + An issue attracting a lot of deference will only be set aside if it is patently unreasonable
  + Matters falling in between will be quashed is they are simply unreasonable
* No decision can be completely immunized from judicial scrutiny

## II. THE PREQUEL

* Ordinarily, judicial review is available for breaches of procedural fairness, errors law, abuse of discretion, factual findings made in the absence of evidence
* Privative clauses originally intended to prevent courts from interfering with substantive outcomes of administrative action through doctrines of error of law or lack of evidence
* Privative clauses usually include
  + Grant of exclusive jurisdiction over the subject matter
  + Declaration of finality with respect to outcome
  + Prohibition on any court proceedings to set outcome aside
* CL presumes that citizens’ retain access to ordinary courts to ensure that creatures of statute do not exceed jurisdiction granted to them
  + On the other hand, doctrine of parliamentary supremacy dictates that the legislator enacts law, and court must interpret and apply law in accordance with legislator’s intent
* Historically, judges assigned themselves task of determining whether issue fell “within jurisdiction” and therefore within ambit of privative clause
  + Or whether it was a “jurisdictional question” that determined outer boundary of decision maker’s authority
    - If latter, court was entitled to review decision
    - At this juncture, correctness was implicit and exclusive standard of review
* 2 techniques employed by court
  + Preliminary or collateral question doctrine
  + Asking the wrong question doctrine
* In *Parkhill Bedding and Furniture Ltd v International Molders Etc Union* Manitoba CA: question of whether Parkhill was a new employer was preliminary or collateral to main issue that the board had exclusive jurisdiction to address
  + Board wrongly concluded that Parkhill was a new employer, and gave itself jurisdiction it did not possess to declare the collective agreement bound Parkhill
* In *Metropolitan Life Insurance Company v International Union of Operating Engineers, Local 796* court ruled that the determination by board was not protected by privative clause
  + Board lost jurisdiction because it employed a faulty reasoning process
  + Board decided a question which was not remitted to it
  + Under this doctrine, (asking the wrong question), matters within jurisdiction of a decision maker could become jurisdictional and subject to judicial scrutiny if decision maker asked himself or herself wrong question in course of addressing issue

## III. THE BLOCKBUSTER: CUPE V NEW BRUNSWICK LIQUOR CORPORATION

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| CUPE v N.B. Liquor Corp. (SCC, 1979)  * During lawful strike, CUPE, Local 963 laid complaint with Public Service Labour Relations Board   + That NB Liquor Corporation was replacing striking workers with management personnel contrary to s 102(3)(a) of the Act   + Liquor Corporation countered with a complaint against the union, alleging picketing in violation of s 102(3)(b) of the Act * Board found employer’s complaint well founded * Section 102(3)(a) is badly drafted   + Intent of section: to ensure jobs remained open for employees after strike was over * General subject matter of dispute between parties fell within confines of act   + One cannot suggest that the board did not have jurisdiction     - A privative clause protects decision of the board made within its jurisdiction       * Clear statutory direction that public sector labour matters be promptly and finally decided by the Board         + Specialized tribunal * Board’s interpretation was not patently unreasonable * Restore order and decision of Public Service Labour Relations Board |

* SCC allowed union’s appeal
  + Dickson J canvassed reasons for existence of privative clauses, emphasizing:
    - Legislative choice to confer certain tasks on administrative actors
    - Specialized expertise and accumulated experience of administrative bodies
    - Virtues of judicial restraint
  + A court should only interfere if an interpretation of a provision is so patently unreasonable that its construction cannot be rationally supported by relevant legislation
* 3 sources of SCC doctrinal changes
  + Court situates case in broader reappraisal of respective roles assigned by legislature to courts and to administrative bodies in implementation of regulatory regimes
    - Describes board as specialized tribunal possessing a legislative mandate to apply its distinctive expertise and experience to elaborating and implementing the constitutive statute
      * Spirit of curial deference
  + Judgment admits that the provision in dispute bristles with ambiguities
    - No one interpretation could lay claim to being right
  + Acknowledges failure of prior judicial efforts to construct a coherent, principled means of distinguishing reviewable questions from those insulated by a privative clause
    - Preliminary or collateral question method is not helpful because with a little effort, one can characterize anything as preliminary or collateral
* Short of a patently unreasonable interpretation of a statutory provision, courts should not interfere with result reached by administrative decision maker
* Dickson J's analysis
  + Jurisdiction
    - If not actually a question of jurisdiction, don't make it a question of jurisdiction
    - For true questions of jurisdiction we defer (alarm bells?)
  + Privative clause
    - Clear statutory direction that the question should be decided by the board
  + Patent unreasonable
    - Was board decision so patently unreasonable that they lost jurisdiction?
      * No! Because there is a train wreck of a statute
* Definition of patent unreasonableness from this case
  + If evidence, reasonably viewed, is incapable of supporting findings
  + If decision can't be rationally supported by relevant legislation
  + If words are given an interpretation that they can't reasonably bear

## IV. THE SEQUALS

* In *l’Acadie*, decided after CUPE, SCC resiled from idea that jurisdiction ought to be determined at outset
  + Ruled that a jurisdictional question attracting correctness standard could arise anytime
    - Could apply to interpretation, finding of facts, applications of law to facts, or fashioning of a remedy
* In *Bibeault* Betz elaborates test for determining what constitutes jurisdictional question (subject to correctness) and which questions are within tribunal’s jurisdiction (subject to patent unreasonableness)
  + Central question: did legislator intend question to be within jurisdiction conferred on tribunal?
  + Involves examination of wording of enabling enactment conferring jurisdiction, and purpose of statute creating tribunal, reasons for its existence, area of expertise of its members, nature of problem before tribunal

### A. Is Judicial Review Constitutionally Protected?

* In theory a legislator could revise and refine a privative clause to better effect ouster of courts
* In *Crevier v AG Quebec:* constitutionality of private clause in Quebec statute challenged on basis that confiding final and unreviewable decision making authority to admin tribunal violates s 96 of CA Act 1867
  + Laskin upheld privative clause, but only on understanding that it did not preclude correctness review on challenges based on division of powers, and by implication, a patent unreasonableness review for matters within jurisdiction
  + This case constitutionalized judicial review for jurisdictional questions, thereby placing the matter beyond reach of legislative amendment
* *Pasienchyk*: As a matter of constitutional law a legislature may not, however clearly it expresses itself, protect an administrative body from review on matters of jurisdiction
  + It also cannot be left to decide freely which matters are jurisdictional and which come within Board’s exclusive jurisdiction
* *Pezim v BC* (economic tribunal)*:* even where no privative clause with statutory right of appeal, concept of specialization of duties requires deference be shown to decisions of specialized tribunals on matters which fall within tribunal’s expertise
  + Following features of statutory framework point to greater deference
    - Subject area (more complex = more deference)
    - Public interest
    - Powers to administer statute
    - Statutory definitions
    - Policy development role and adjudicative functions
    - Interpretation of statutory provision goes to heart of regulatory expertise and mandate of body
* *Canada v Southam* (economic tribunal): added an intermediate standard of review between patent unreasonableness and correctness (reasonableness simpliciter)
  + Hinted at in *Pezim*
  + The middle ground is reasonableness simpliciter
* Addition of reasonableness simpliciter did little to add predictability or determinacy to this area of admin law

## V. THE STORY SO FAR: PUSHPANATHAN V CANADA

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| Pushpanathan v Canada (1998, SCC)  * Concerned interpretation of a provision of *Immigration Act* * Issue: whether acts contrary to purposes and principles of UN included a criminal conviction for drug trafficking in country of asylum * A claimed refugee status under UN Convention Relating to Status of Refugees   + Claim never adjudicated; was granted permanent residence under an admin program   + He was later arrested and charged with conspiracy to traffic in a narcotic * A renewed his claim for Convention refugee status   + Board decided that A was not a refugee by virtue of Art 1F(c)     - Provision does not apply to person guilty of acts contrary to purposes and principles of UN * This appeal raises 2 important questions   + Proper standard of judicial review over decisions of IRB     - Certification of question of general importance is trigger to justify appeal       * Reviewing court must ask: was question which provision raises one that was intended by legislators to be left to exclusive decision of board?     - Traditionally, correctness standard and patent unreasonableness standard were only two approaches available to reviewing court       * In *Southam*, court introduced reasonableness simpliciter     - Factors to be considered       * Privative clauses         + Absence does not imply high standard of scrutiny         + Presence of a full private clause is compelling evidence that court should show deference to tribunal’s decision       * Expertise         + Understand as relative, not absolute       * Purpose of the act as a whole, and provision in particular         + While judicial procedure is premised on a bipolar opposition of parties, interests and factual discovery, some factors require consideration of numerous interests simultaneously   Where an administrative structure resembles this model, court should exercise restraint   * + - * Nature of the problem: question of law or fact         + Even pure questions of law may be granted wide degree of deference where other factors of pragmatic and functional analysis suggest deference is legislative intention     - Standard should be correctness       * This case involves a determination which could disqualify numerous future refugee applicants as a matter of law       * Board enjoys no relative expertise in the matter of law which is the object of judicial review here       * The board is not responsible for policy evolution       * Absence of strong privative clause   + Meaning of exclusion from refugee status of those guilty of acts contrary to purposes of UN     - Excluded from excerpt * A’s conspiring to traffic in a narcotic is not a violation of Article 1F(c) * Allow appeal and return matter to Convention Refugee Determination Division * This case is really concerned with legislative intent v expertise * Privative clause has 2 things: finality and ouster   + Privative clause in this case does not have ouster   + "Refugee division has sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction"     - Nothing in here to limit right of appeal * Bastarache:   + What matters is legislative intent in creating tribunal     - Was it legislative intent to leave this question exclusively to board? * Pushpanathan set up 4 part test for determining standard of review (not rejected by Dunsmuir)   + Presence of a privative clause   + Expertise: the most important factor   + Purpose of act, particular provision   + Nature of the problem * This test above shows up again in Dunsmuir, but doesn't actually cite Pushpanathan * Expertise analysis   + 3 part test:     - What is expertise of tribunal     - What is expertise of courts     - Compare expertise, and decide who has more   + Who has more expertise? * If things are polycentric, or broad implications on policy, then we will defer |

### A. Privative Clauses

* Statutory language that conveys a message of judicial restraint includes
  + Provision that action of agency shall not be questioned, reviewed, appealed or otherwise set aside by any court
  + A grant of exclusive jurisdiction over all matters
  + Declaration that the outcome of agency is final and binding on all parties
* Where statute is silent about judicial review, CL bases of substantive review (error of law, finding of fact in the absence of evidence, abuse of discretion) will apply
* Alternatively, grounds for judicial review may be set out in general statute applicable to agency
* Under pragmatic and functional test, presence of privative clause weighs in favour of deference
* A finality clause inclines towards curial deference, but not as strongly as a privative clause

### B. Expertise

* Relative expertise is most important factor in determining the standard of review
  + Court must characterize the expertise of the tribunal in question
  + It must consider its own expertise relative to that of the tribunal
  + Must identify nature of specific issue before admin decision maker relative to expertise
* Bodies that deal with economic, financial or technical matters seem to sit at apex of expertise
* Labour boards, often protected by privative clauses, are in some ways paradigmatic example of expert administrative tribunals
  + Yet labour boards tend not to benefit as consistently from curial deference as some other bodies
* In *Law Society of NB v Ryan* the Court defended superior expertise of Law Society’s professional discipline committee
* In *Chamberlain v Surrey School District No 36*, writing for dissent Gonthier: although board’s decision had human rights aspect, courts should not assume they possess greater expertise than administrative decision makers with respect to all questions having a human rights component, especially in context of local democracy
* Although SCC prioritizes expertise in formulating standard of review, its inquiry is limited to statutory role of administrative actor, not to particular individual occupying it
* What determines expertise?
  + Structure
  + Policy making role
  + Full time staff
  + Professional qualifications
  + Composition of lawyers/non-lawyers
  + Elected?

### C. Purpose of the Statute as a Whole and the Provision in Particular

* Pushpanathan: where a statute and/or provision can be described as polycentric
  + Engages balancing of multiple interests, constituencies and factors, contains a significant policy element, and articulates legal standards in vague or open textured language
    - More judicial restraint is warranted
* Disputes more closely resembling bipolar model of opposition between parties and interests justify less curial deference
  + Rationale: judges have less relative expertise in former, more relative expertise in latter

### D. The Nature of the Problem: Law or Fact?

* Questions o f law, questions of mixed law and fact and questions of fact are conveniently mapped onto spectrum of deference as less deference, neutral and more deference in accordance with court’s declining relative expertise

## VI. COMING ATTRACTIONS

### A. Disaggregation

* In the *Retired Judges* case Binnie states that the court’s task on judicial review is not to isolate issues and subject each of them to differing standards of review

### B. Is Three a Crowd?

* Ever since *Southam* ushered in reasonableness simpliciter, commentators, practitioners and even lower court judges have complained about indeterminacy, impracticability, unpredictability and sheer confusion generated by three standards of review
* *Council of Canadians with Disabilities:* majority blended reasonableness simpliciter and patent unreasonableness into a single standard of demonstrably unreasonable

### C. Converging Tests?

* At present, test for content of procedural fairness lists five factors relevant in determining what procedures are required by duty of fairness in particular case
* *Baker* instructs that the duty of fairness should also take into account and respect choices of procedure made by agency itself, particularly when the statute leaves decision maker ability to choose its own procedures, or when agency has expertise in determining what procedures are appropriate in circumstances
  + *Baker* adds “importance of decision to individual affected” to pragmatic and functional test

### D. The Last Word on Legislative Intent

* In 2004, BC enacted *Administrative Tribunals Act*
  + If tribunal’s enabling statute has privative clause
    - Standard of review is patent unreasonableness for questions of law, fact, or exercise of discretion for all matters over which tribunal has exclusive jurisdiction
  + Where enabling statute has no privative clause
    - Finding of fact reviewable on basis of no evidence or unreasonableness
    - Questions of law reviewable on correctness
    - Exercise of discretion subject to standard of patent unreasonableness
    - Procedural fairness is decided having regard to whether, in all circumstances, tribunal acted fairly

## VII. REVIEW OF STANDARD OF REVIEW

* When judges believe tribunal got it wrong, they will arrive at a standard of correctness (and conclude that the tribunal erred)
* When they believe the tribunal got it right, they will reach a standard of patently unreasonable, and find the decision was not patently unreasonable
* Or they will impose a standard of reasonableness and do whatever they want

## VIII. POSTSCRIPT: DUNSMUIR V NB

* In *Dunsmuir v NB* court unanimously reverted to two standards of review (correctness and reasonableness)
  + Tried to offer clearer guidance on appropriate standard of review
* Bastarach and Lebel, writing for majority, conceded that the law currently provides great flexibility but little on the ground guidance, and offers too many standards of review
  + They insist that a return to two standards is not merely a return to pre-*Southam*
  + Pragmatic and functional approach is revised as standard of review analysis with emphasis on 3 bases for deference
    - The presence of a privative clause
    - A discrete and specialized regime
    - Question of law that is not of central importance to the legal system or beyond the specialized expertise of the tribunal
* 3 steps since Dunsmuir
  + Check for appropriate precedent
    - Even if you think there is a fantastic precedent, you must continue
  + If no appropriate precedent, determine standard of review based on Dunsmuir test
    - Reasonableness or correctness
  + Did the decision meet standard?
    - Was the decision at issue, reasonable? Or was it correct?
* Still alive: the pragmatic and functional approach (but not the name)
  + Pragmatic
    - Practical, reason based
    - Contextual
    - Pluralistic, open minded
  + Functional
    - Considers structural relations among institutions
    - Outcomes: reasonable
    - Purposive: does this achieve the ends sought?

# Chapter 9 – Modern Standards of Review in Theory and Practice

## I. INTRODUCTION

* Contemporary Canadian admin law:
  + 3 standards of review that represent 3 distinct judicial postures
    - Correctness: low or no deference
    - Reasonableness: some, but not great, deference
    - Patent unreasonableness: highest deference
* *CUPE* expresses gradual reconciliation of judiciary and administrative state under banner of a common culture of justification
  + Radical shift away from traditional judicial tendencies to regard administrative state as a lawless zone
  + Court indicates that it will take seriously formal indicia of legislature’s entrusting certain admin actors with exclusive powers of decision, and the practical or functional justifications for granting those decision makers presumptive authority
  + Prescribes purposive reading of enabling statutes
* *Southam:* insertion of standard of reasonableness simpliciter
  + Recognition of administrative legitimacy implicit in extension of deference on a reasonableness standard, and in expectation of reasonableness under that standard

## II. BACKGROUND: STATUTORY INTERPRETATION AND SUBSTANTIVE REVIEW

* Positivist approach to statutory interpretation flows from presumption that statutory language contains singular and unified meaning that is stable over time
  + Objective is to find a determinate legislative intent
  + Smuggles into legal judgment contestable value-driven choices
    - Those choices should be explicitly submitted for public justification
  + May work against a meaningful conception of deference
* Normative approach to statutory interpretation
  + Assumption that contested matters of statutory interpretation cannot be resolved by exclusive reference to text, or even by situating the text in its social context
    - Also require judgments about competing values or social priorities informing alternative statutory constructions
  + Adherence may entail attitude of strict non-deference where administrative decision is understood to place in issue important public values
    - Other judges may view same interpretative problems as supportive of deference on review
      * Decision makers may be uniquely positioned to work out how basic commitments of social, political and legal order inform or interact with sector specific values and policy objectives of administrative regimes

## III. THEORY AND PRACTICE: THE MODERN STANDARDS OF REVIEW

* How are we to understand review for correctness after *CUPE,* given that the decision calls into question a positivist approach to statutory interpretation
* Has notion of review for patent unreasonableness (*CUPE*)offered meaningful guidance about how best to discern limits of legality under this deferential standard?
* How does review for unreasonableness stand in relation to the other 2 standards

### A. A Contested Correctness

#### 1. The Correctness Standard in Theory

* Both patent unreasonableness and reasonableness review are said not to be about adjudging the right answer, and then gauging relative accuracy of tribunal’s answer in light of that
* Iacobucci’s description of correctness:
  + Court has, through pragmatic and functional analysis, deemed itself best placed to resolve matter under review, court is free to revisit decision originally put to admin decision maker as it sees fit
* While case-specific pragmatic and functional analysis is always required to determine whether correctness review is warranted, this standard typically applies
  + In determining whether non-adjudicative decisions of municipal decision makers are ultra vires
  + In reviewing decision makers’ conclusions on constitutional or Charter limits of their statutory powers
  + Correctness is generally engaged in cases concerning relative jurisdictional scope of different tribunals
  + Closely correlated with characterization of question in review as pure law, general law, or law of great precedential value

#### 2. Correctness Review in Practice

* Until mid-1990s, pre Southam, application of patent unreasonableness was contingent on a privative clause
* In *Bibeault*, Beetz J concludes the issue is jurisdictional, meaning no deference is due
  + He favoured conceptual coherence as between statute and civil law over context-inflected sympathies of tribunal
* *Mossop* (SCC, 1993) adopted a correctness standard
  + Mossop applied to for bereavement leave to go to same sex partner's dad's funeral
    - Bereavement leave only applied to immediate family (not same sex partner)
    - He complained about discrimination and was given a day of special leave in lieu
  + He didn't bring a Charter challenge; rather a CL challenge
  + Lamer: absent Charter challenge of constitutionality, when Parliamentary intent is clear, courts and admin tribunals not empowered to do anything else but apply the law
    - If ambiguity, courts should seek out purpose of legislation, and that which is more in conformity with Charter should prevail
  + In concurring judgment, La Forest J is fixed on statutory meaning of family/family status
  + L’Heureux Dube is alone is arguing that patent unreasonableness standard should apply
    - Even if Parliament had in mind a specific idea of the scope of family statute, in absence of a definition in the Act which embodies this scope, concepts and equality and liberty which appear in human rights documents are not bounded by precise understanding of those who drafted them
      * Essential to orient interpretive judgment with reference to human rights principles
    - This judgment reflects a commitment to a normative model of statutory interpretation
      * Under this model, statutes are understood not as closed systems, but as requiring interpretation in light of the animating principles and values of the wider social and legal tradition
    - Her disposition of the matter Is endorsed in the separate dissenting reasons of McLachlin and Cory JJ, who determine that a correctness standard is in order
      * Indicate support for the idea that the statutory text must be read in light of social context and with particular sensitivity to the ways that human rights principles inflect and are inflected by that text and context
  + 6 judges said that the standard was correctness
  + Of the judges who said correctness, they split on application
    - 2 said decision was correct, and 2 said not was correct
  + 1 judge said patent unreasonableness
    - L’Heureux Dube found with 2 others decision not correct/patently unreasonable
  + Notice that no one is at reasonableness simpliciter
* Since *Mossop*, and introduction of standard for reasonableness, Court has indicated willingness to accept that some deference to human rights tribunals on matters involving interpretation and application of human rights statutes may, in some cases, be warranted
* *Trinity Western* (SCC 2001)
  + Very similar split in this case, as case above
  + Notice that no one here is at reasonablness simpliciter either
  + These kinds of cases led people to say that judicial review was disaster in need of reform
* *Pushpanathan:* majority focuses on intention of drafters of incorporating international convention
  + Bastarache in dissent:
    - For purposes of judicial review, statutory interpretation has ceased to be a necessarily exact science and this court has again confirmed curial deference
      * This approach erodes idea that courts need not give weight or respect to efforts of tribunals, even on matters for correctness review
* Standard of correctness: trying to determine singular right answer
  + Courts are treating tribunals like lower courts
    - Deciding what the right answer if for them with last word
  + Questions of law, constitutional issues, jurisdictional issues all decided on correctness
* Can we be confident that there is only right answer in all these situations?
  + If we have an ambiguous statute (CUPE) clearly there is not one answer
* Maybe correctness means that there is only one right answer, it is clear, and you have to get it
* Maybe it just means you are in court territory, and the court gets to decide

### B. In Search of Patent Unreasonableness

#### 1. The Patent Unreasonableness Standard in Theory

* Post *CUPE*, statutory language may accommodate more than one reasonable interpretation, and courts should defer to expert tribunals where interpretations fall within ambit of reasonableness
* With reasonableness simpliciter, courts had to further refine patent unreasonableness
* Patent unreasonableness:
  + Whether discretionary decision may be said to be unreasonable on its face, unsupported by evidence, or vitiated by failure to consider proper factors or apply appropriate procedures

#### 2. Patent Unreasonableness Review in Practice

* Reviewing judge must not measure decision against his/her sense of correct decision
* A second principle goes to allowable level of engagement with decision maker’s reasoning, and with evidence and argument on the record
* *Ryan:* on applying a reasonableness standard, a court should not at any point ask itself what the correct decision would have been
  + In conducting a review for reasonableness simpliciter:
    - Not every element of reasoning given must independently pass test for reasonableness
      * Question is whether reasons, taken as a whole, are tenable as support for the decision
  + This is not a spectrum, they are buckets
  + Reasonableness is a fundamentally different process than correctness review
* *Retired Judges* case
  + Binnie relies on principle that while patent unreasonableness standard does not admit reweighing of factors taken into account by a statutory decision maker, court is entitled to have regard to importance of factors excluded from consideration
* 2 imperatives with this standard:
  + Prohibition on seeking right answer
  + Prohibition on undue probing

### C. The Third Way: Reasonableness Simpliciter

#### 1. The Reasonableness Standard in Theory

* Standard more deferential than correctness but less deferential than not patently unreasonable
  + Middle ground
* *Ryan*: judges must stay close to reasons for administrative decision, while searching for line of analysis within given reasons to reasonably lead tribunal from evidence to conclusion
* judges must take care not to displace attention from a context sensitive assessment

#### 2. Reasonableness Review in Practice

* *Southam*:
  + Tribunal’s decision need only be reasonable, and not necessarily correct
  + Iacobucci less than convinced by tribunal’s conclusion, but this did not justify overturning decision on a reasonableness standard
    - There was some evidence for conclusions, and inferences were not illogical
* *Baker:*
  + The comments of L’Heureux-Dube leave some uncertainty
    - She wrote that the officer failed to give consideration to a relevant factor (consideration of the children)
      * Then she wrote that this failure was an unreasonable use of discretion
      * Then she wrote that a discretionary decision maker may be accorded deference in connection with the factors he/she deems relevant to a given decision, and not merely in connection with the weight given to mandatory relevant factors
* *Suresh:*
  + Responds to some of the uncertainties in *Baker*
    - Some factors may be deemed by the courts to demand prioritization

## IV. CRITIQUES OF THE THREE STANDARD MODEL

* In *Toronto (City) v CUPE, Local 79* LeBel raises critique of modern jurisprudence on standards of review
  + Thesis: modern jurisprudence on standards of review exhibits conceptual confusion and inspires deep methodological uncertainty
  + He suggests correctness review is engaged by constitutional questions, by ultra vires concerns in connection with non-adjudicative powers, and by cases where question at issue is question of law of central importance to legal system as a whole and outside adjudicator’s specialized area of expertise
    - Correctness review must be appropriately confined to matters clearly outside authority and competence of admin decision makers
  + Centerpiece: critique of patent unreasonableness
    - Idea of defects of a greater magnitude than simple irrationality is incoherent
    - Idea of greater or lesser probing on review is vague and unworkable
    - Idea of letting unreasonable or irrational decisions stand, because they are not irrational enough, or because they require some work to discover, is in conflict with Parliamentary supremacy and with principal that power is not to be exercised arbitrarily or capriciously

## V. POSTSCRIPT: DUNSMUIR V NEW BRUNSWICK

* The standards of review are reduced to 2: reasonableness and correctness
* In an exam we should use Dunsmuir analysis, but where relevant, refer to Pushpanathan factors

# Chapter 7 - The Charter and Administrative Law

## I. INTRODUCTION

* Preamble: “Canada is founded upon principles that recognize supremacy of God and rule of law”
* Section 1: Charter of Rights and Freedoms guarantees rights and freedoms set out, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
* Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
* Courts rely on CL doctrine of procedural fairness to interpret principles of fundamental justice set out in s 7 of Charter
* When courts review substance rather than procedure of a decision engaging Charter rights, they use *Oakes* framework for testing validity of legislation
* SCC: agencies with authority to decide questions of law may have jurisdiction to apply Charter

## II. PROCEDURAL FAIRNESS AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

* Individual must receive notice of proceedings and have full and fair opportunity to respond to facts and contentions on which decision maker may rely
  + Duty to disclose such facts and contentions
* Individual may have right to legal council
  + Participatory rights
* May be owed reasons for decision if decision affects important interest such as employment or continued residency in Canada
* Section 7 is only rights conferring provision in Charter that refers to principles of fundamental justice
* To access procedural safeguards in context of s 7, complainants must first cross threshold of establishing that life, liberty or security interests are impaired by relevant decision
  + If a s 7 interest is engaged, procedural fairness comes into play by means of principles of fundamental justice; legislation must conform to them in order to be lawful

### A. Oral Hearings and the Scope of Section 7

* *Singh v Canada:* principles of fundamental justice include procedural fairness
  + Statutory scheme precluded IAB from granting oral hearing to claimants who failed to set out reasonable grounds
  + Wilson J held that s 7 applied to Singh
    - Had constitutional right to have claim determined in accordance with principles of fundamental justice
  + This case is fundamental for:
    - How review under Charter can overcome clear legislation, usually an insurmountable obstacle to relief at CL
    - Recognition that s 7 applies to non-citizens
    - Impact on Canada’s statutory and institutional framework regarding refugee claimants
  + He was a convention refugee claimant, along with 7 other people
  + He got an oral hearing under oath (counsel present)
    - Transcript sent to claimant and minister
    - Minister sends that claim to refugee status advisory council (as it was then -- now IRB)
    - RSAC denied claim and minister agreed
    - Claimant can apply for redetermination (internal appeal)
  + Admin problem:
    - Minister has chance to be heard by IAB, but not person seeking refugee status
    - Both are heard at full hearing
      * But if Minister is whispering in ear of IRB then claimant will never make it to a full hearing
  + Are refugee claimants entitled to s 7 protection?
    - Yes!
  + Does the Immigration Act deny s 7 right?
    - Life, liberty and security of person: yes
    - Was there a deprivation: yes
    - Did they get fundamental justice: no
  + Saved by s 1: no
  + When credibility is at issue: entitled to oral hearing
  + At IAB stage claimant didn't have opportunity to hear case against him and respond
  + Since this case it has been held that s 7 does not always require an oral hearing
    - But it does for credibility issues
* Charter can take a complainant across normally insuperable threshold of clear statutory bar to certain procedures, but once threshold is crossed, it is still CL that determines content that procedure must have to pass constitutional muster

### B. Incorporation of the CL Framework under Section 7

* *Suresh:* barring extraordinary circumstances, deportation to torture will generally violate principles of fundamental justice protected by s 7 of Charter
  + Case was decided in Suresh’s favour: Minister breached s 7 principles of fundamental justice by failing to provide Suresh with adequate procedural safeguards and reasons for decision

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| Suresh v Canada (Minister of Citizenship and Immigration) (SCC, 2002)  * Convention refugee from Sri Lanka, applied for landed immigrant status * Canadian government commenced deportation proceedings against him on security grounds, alleging membership in Liberation Tigers of Tamil Eelam * First step in procedure was certificate under s 40.1 of Immigration Act   + Referred to Federal Court for determination on reasonableness   + Deportation hearing followed   + Minister notified Suresh that she was considering issuing an opinion declaring him to be a danger to security of Canada * Suresh exhausted remedies available under Immigration Act and sought judicial review   + Alleged that Minister’s decision was unreasonable, that the procedures under the Act, which did not require oral hearing and independent decision maker were unfair, and that the act violated ss 7 and 2 of the Charter * Principles of fundamental justice require, at a minimum, compliance with CL requirements of procedural fairness   + Must look at Baker factors     - Nature of decision made and procedures followed       * This decision bears some resemblance to judicial proceedings     - Role of particular decision in statutory scheme       * Need for strong procedural safeguards     - Importance of decision to individual affected       * Interest is highly significant: risk of torture in Sri Lanka     - Legitimate expectations of person challenging decision       * Given Canada’s commitment to CAT, right to procedural safeguards     - Choice of procedure made by agency       * Minister is free to choose procedure         + Need for deference must be reconciled with elevated level of procedural protections mandated by serious situation of refugees like Suresh * Procedural protections required by s 7 in this case do not extend to the level of requiring Minister to conduct full oral hearing or a complete judicial process   + But they do require more than the procedure required by the Act     - Ie more than he got * Suresh was entitled to:   + Person facing deportation under s 53(1)(b) must be informed of case to be met   + Opportunity to respond to case     - Suresh and his counsel had no knowledge of which factors to address, nor any chance to correct factual inaccuracies or mischaracterizations   + Must be given opportunity to challenge information of Minister   + Minister must provide written reasons     - Must articulate: no substantial grounds to believe that individual who raised s 53(1)(b) arguments will be subjected to torture or other treatment     - Must also disclose why Minister feels that individual to be a danger to Canada     - Must emanate from person making decision, rather than memo in form of advice * Above procedural protections need not be invoked in every case   + Individual must make out prima facie case of risk of torture upon deportation * Lack of basic procedural protections provided to Suresh not justified by s 1 * They left open door that we can deport someone who will return to be tortured |

### C. The Duty to Disclose and the Right to Reply

* Court concluded that Suresh did not have a right to an oral hearing
  + But he did have right to disclosure of materials on which Minister based decision, including memo from immigration officer who initially reviewed case under 53(1)(b)
  + He also had a right to reply to the claims set out in the memo
* In principle, an ordinary statute can oust privilege because privilege is CL doctrine
* In *Pritchard:* meeting requirements of procedural fairness does not require disclosure of privileged legal opinion
  + To pierce privilege, a complainant would have to distinguish procedural fairness at CL from procedural fairness under s 7

### D. The Duty to Give Reasons

* *Baker:* decision makers have duty to give reasons if important interests at stake
* In *Suresh:* Minister herself (not delegated officer) must provide reasons that demonstrate
  + Individual is a danger to Canada
  + No substantial grounds to believe he would be subject to torture
* Because duty to give reasons is part of duty of procedural fairness, courts usually review it on standard of correctness

### E. The Right to State Funded Legal Counsel

* SCC has held that neither procedural fairness nor RoL in admin law requires state to fund legal representation
* Where a decision impairs a s 7 interest, in certain circumstances state must provide individual with legal counsel in order to satisfy requirements of principles of fundamental justice
* S 7 infringements not easily saved under s 1 because s 7 rights protected are very significant
  + Rarely will a violation of principles of fundamental justice, such as right to fair hearing, be upheld as reasonable limit demonstrably justified in free and democratic society
* Enfolding procedural fairness into s 7 principles of fundamental justice has elevated duty of fairness to new heights

### F. Undue Delay

* Further element of procedural fairness: timeliness
* *Blencoe:*
  + Bastarache J found the threshold of causing Blencoe to suffer abuse of process had not been crossed
    - He did express concern with commission’s lack of efficiency and assessed costs against it
  + Lebel thought case could be settled on admin law principles rather than Charter grounds

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| Blencoe v BC (SCC, 2000) Bastarache J   * Blencoe, a minister in BC was accused of sexual harassment   + Dismissed from Cabinet and ejected from party’s caucus * Blencoe sought to have complaints against him stayed on the basis that Commission had lost jurisdiction as a result of unreasonable delay   + Abuse of process and denial of natural justice * R’s rights to liberty and security of person (s 7 of Charter) not implicated in circumstances of this case   + No denial of natural justice or abuse of process * Does Charter apply to actions of BC Human Rights Commission?   + Being autonomous or independent from government is not a conclusive basis upon which to hold that the Charter does not apply     - Bodies exercising statutory authority are bound by Charter even though they may be independent of government   + Commission is carrying out legislative scheme of Human Rights Code     - Putting in place a government program or a specific statutory scheme established by government to implement government policy     - Commission must act within limits of its enabling statute       * Governmental quality   + Once complaint brought before Commission, subsequent administrative proceedings must comply with Charter * Have R’s section 7 rights to liberty and security of person been violated by state-caused delay?   + Liberty interest protected by s 7 no longer restricted to freedom from physical restraint     - Can be engaged where state compulsions affect important and fundamental life choices       * State has not prevented R from making fundamental life choices   + 2 requirements must be met for serious state imposed psychological stress     - Psychological harm must be state imposed     - Psychological prejudice must be serious   + Delay in human rights process was not direct cause of R’s prejudice     - State did not directly intrude into a private and intimate sphere of R’s life   + Right to dignity rests on     - Previous statements by this court on importance and value of dignity     - Recognition in prior cases that state induced psychological stress can infringe s 7     - Notion of stigma in 11(b) of the Charter in the criminal law context   + Stress, stigma and anxiety of R did not deprive him of right to liberty or security of person   + Delay, in circumstances of this case, did not violate principles of fundamental justice * Was R entitled to a remedy under admin law?   + Delay without more will not warrant a stay of proceedings as an abuse of process at CL     - This would be tantamount to creating a judicially created limitation period   + Unacceptable delay may amount to an abuse of process in some circumstances where the hearing has not been compromised     - But not in this case     - Must be a delay that would bring the human rights system into disrepute   + Delay must have been unreasonable or inordinate     - Must be so oppressive so as to taint the proceedings * Does the Charter apply to BC Human Rights Commission?   + Yes! * Was he entitled to a remedy?   + No!   + An abuse of process case will be very rare   + Here the delay didn't offend the community's sense of justice and fairness * Not necessary to answer whether stay is appropriate remedy because there no basis for action   Lebel J   * Agrees that a stay of proceedings is not warranted in this case * Admin law abuse of process doctrine is about protecting people from unfair treatment by admin agencies * Unreasonable delay not limited to situations that bring human rights system into disrepute either by prejudicing the fairness of a hearing or by rising above a threshold of shocking abuse * A remedy other than a stay may be appropriate in other cases where ongoing delay is abusive * We must keep in mind 2 principles   + Not all delay is the same   + Not all admin bodies are the same * 3 main factors to be balanced in assessing reasonableness of admin delay   + Time taken compared to inherent time requirements of matter     - Considers legal and factual complexities   + Causes of delay beyond inherent time requirements     - Whether affected individual contributed to or waived parts of the delay     - Whether resources were used efficiently   + Impact of delay on lives of real people * Unreasonable delay in admin proceedings is illegal under admin law * The inefficiency in the handling of this matter has led to an abuse of process   + Should be addressed with appropriate remedy     - Order for expedited hearing     - Order for costs * Blencoe is entitled to costs * Starts with admin law instead of the Charter   + Q: has an admin agency treated people inordinately badly?   + Not all delay is the same; engage in a balancing act   + This delay was abusive, but Lebel is not prepared to order a stay |

### G. Ex Parte, In Camera Hearings

* Since Sept 11, 2001, many liberal democracies enacted legislation to give police and security services added powers to investigate and prosecute terrorism
* IRPA detainees not charged criminally, do not benefit from presumption of innocence and other due process guarantees
* Review being conducted behind closed doors gave rise to *Charkaoui v Canada*
* In these cases, the judge may receive and rely on evidence withheld from named person that would be inadmissible in a court of law
  + No opportunity to appeal for further judicial review
* McLachlin: these proceedings doubly engaged s 7 because persons subject to security certificates face detention pending deportation (liberty interest) and because person’s removal may be to a place where his or her life or freedom would be threatened (security interest)
  + Judge may decide on reasonableness of Crown’s case without benefit of having evidence adequately tested (adversarial system)
  + Named person may never know the case against them
* To remedy shortcomings of *Charkaoui*, court suggested that an *amicus curiae* could be appointed to represent the named person during in camera proceedings
* In *Charkaoui,* violation of s 7 not saved under s 1 because infringement did not minimally impair right at stake

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| Charkaoui v Canada (Citizenship and Immigration) (SCC, 2007)  * In a constitutional democracy, governments must act accountably and in conformity with constitution and rights and liberties it guarantees * IRPA unjustifiably violates s 7 of Charter   + By allowing issuance of certificate of inadmissibility based on secret material   + Without providing for independent agent at stage of judicial review to protect named person’s interests * IRPA permits deportation on basis of confidential information not disclosed to person named in certificate or anyone acting on the person’s behalf   + Requires ministers to sign a certificate declaring foreign national or permanent resident inadmissible to enter or remain in Canada on grounds of security   + A judge of FCA then reviews certification to determine if reasonable     - Can be conducted in camera and ex parte       * Named person and his lawyer has no right to see undisclosed material       * But ministers and reviewing judge rely on it     - If reasonable, no appeal and no judicial review s 80(3) * While detention of permanent resident must be reviewed within 48 hours, a foreign national must apply for review 120 days after a judge determines certificate reasonable * To engage s 7 of Charter, claimant must prove 2 matters   + That there has been or could be a deprivation of life, liberty or security of person   + Deprivation was or would not be in accordance with principles of fundamental justice * If claimant succeeds, government must justify deprivation under s 1 * In *Suresh*: barring extraordinary circumstances, deportation to torture will generally violate principles of fundamental justice protected by s 7 * Procedures to meet demands of fundamental justice depend on context * S 7 is concerned with whether the process is fundamentally unfair to the affected person   + If yes, then inquiry shifts to s 1 for government to justify infringement * Overarching principle of fundamental justice: no person shall lose liberty without due process   + IRPA includes a hearing with 2 phases: executive and judicial     - Judge must be independent and impartial     - Judge make judicial decision based on facts and law     - Named person be afforded opportunity to meet case against him       * Being informed   + IRPA fails to satisfy second and third requirements * 3 related concerns with independence and impartiality   + IRPA may be perceived to deprive judge of independent judicial role and co-opt judge as agent of executive branch of government     - Non deferential role of judge helps independence   + Designated judge functions as investigative officer rather than judge     - This fact alone does not deprive judge of independence   + Judge, who must compensate for the fact that the named person does not have access to material, will become associated with this person’s case     - Judge is required to conduct review in an independent and judicial fashion * IRPA process is designed to preserve independence and impartiality of judge, as required by s 7 * The normal standards used to ensure reliability of evidence in court do not apply here   + Named person is shown little or none of the material   + To their credit, judges have adopted a pseudo-inquisitorial role to test information     - Judges cannot rely on parties to present missing evidence * The named person cannot meet the case against them   + Where limited disclosure or ex parte hearings have been found to satisfy the principles of fundamental justice, intrusion on liberty and security has typically been less serious than that effected by IRPA   + To satisfy s 7, person must be given necessary information or substitute must be found     - Neither is the case here   + How can one meet a case one does not know? * IRPA’s procedure for determining whether a certificate is reasonable does not conform to principles of fundamental justice under s 7 * Section 1 analysis (Oakes test) requires   + Pressing and substantial objective     - Proportional means       * Rationally connected to objective       * Minimal impairment of rights       * Proportionality between effects of infringement and importance of objective   + SIRC (an independent review body to monitory (CSIS) established a formal adversarial process with a court like hearing room and procedures that mirrored judicial proceedings     - Independent panel of lawyers to act as counsel to SIRC       * Effective substitute for informed participation       * Can help bolster actual informed information by affected person   + Air India trial Crown and defense counsel came to agreement under which defense counsel obtained consents from their clients to conduct preliminary review of withheld material on written undertaking to not disclose material to anyone, including client   + UK’s special advocate model resembles Canadian SIRC model   + IRPA’s procedures for determining whether certificate is reasonable cannot be justified as minimal impairments of individual’s right to a judicial determination on facts and law, and right to know and meet case |

## III. REVIEW OF ADMINISTRATIVE DECISIONS UNDER THE CHARTER

* Legislature can trump requirements of CL by amending legislation with clear and express language
  + With no Charter issues, it can do so without resort to s 33 of Charter (override)
* Charter review alone appears to have the potential to place judges above legislators in determining which laws and decisions apply to us
  + Stress on idea that law making and public administration belongs exclusively to the people’s elected representatives and delegates
* Analytical framework developed under the Charter to review legislation requires a 2 step inquiry
  + Whether impugned provision infringes a Charter right
  + Whether infringement can be saved under s 1 as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society
* Frameworks for review:
  + Orthodox approach
    - 2 step Charter framework
  + Mixed approach
    - Judges first review legality of a decision using principles of admin law
      * Including inquiry into whether decision is ultra vires discretion or based on an unreasonable interpretation of a statutory provision
    - If decision lawful under admin law, then tested under 2 step Charter framework
  + Administrative law approach
    - Limits scrutiny exclusively to what is available as a matter of admin law

### A. The Orthodox and Mixed Approaches

* *Slaight Communications v Davidson:*
  + Slaight forbidden from making negative comments about Davidson’s work performance to possible future employers, and was required to write a letter of reference
    - He argued this infringed his freedom of expression
  + Dickson found both positive and negative orders infringed s 2(b), but saved under s 1
    - They were rationally connected to purpose
    - They were proportionate
    - The orders were reasonable in admin law sense
  + Lamer (dissent) found on admin law grounds that adjudicator had made patently unreasonable decision and had exceeded his jurisdiction by issuing negative order
    - Cited Prof Hogg for idea that because Parliament cannot pass law inconsistent with Charter, neither can it authorize admin action that violates Charter
      * However, Parliament can pass laws that infringe Charter rights if justified under s 1
  + Where majority parted ways with Lamer was their insistence that admin law should yield to Charter review whenever Charter rights were in play and contending values had to be weighed against one another
* Lamer’s blueprint to Charter review of discretion is now well established as framework of orthodox position
  + SCC, under orthodox approach, will engage in substantive admin law review when contending values are at stake only if complainant fails to establish prima facie infringement of a discrete Charter right, in which case s 1 never enters picture
* Cuddy Chicks approach
  + Legacy: specialized tribunals with expertise and authority to decide questions of law are in best position to hear and decide constitutional questions related to their statutory mandates.
  + Douglas College: Does labour arbitrator have jurisdiction to look at constitutionality of CA?
    - YES, arbitrators are bound by same Constitution as courts (LaForest, J.)
    - Under IR Act arbitrator has authority to provide final and conclusive settlement of dispute
  + Cuddy Chicks: Same issue as Douglas
    - Overarching consideration: admin bodies have specialized expertise
  + Tetreault-Gadoury: UI Act expressly conferred jurisdiction to consider questions of law on umpires, not Board of Referees
    - Under legislative scheme, umpires, not Referees, authorized to resolve constitutional issues
* In *Multani v Commission scolaire Marguerite-Bourgeoys*:

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| Multani v Commission scolaire Marguerite-Bourgeoys (2006, SCC) Charron J   * Majority followed blueprint to review in *Slaight Communications* * Deschamps and Abella concurred in result, but rejected idea that administrative decisions should be reviewed under Charter framework   + Exclusively on basis of admin law principles * Issue: whether decision of school board’s council of commissioners prohibiting a student to wear a kirpan infringes freedom of religion   + Is this a reasonable limit? * Absolute prohibition cannot be justified under s 1 of Charter * School gave a reasonable accommodation to wear kirpan under strict conditions * CA’s analysis on standard of review was inadequate and leads to erroneous conclusion * Admin law standard of review is not applicable to constitutional component of judicial review * Complaint is based entirely on constitutional freedom   + Reasonableness standard should not have been applied   + Admin law standard of review was not relevant * Steps of Charter review   + Freedom of religion depends on sincerity of belief; infringement must be non-trivial   + Section 1     - Safety is a pressing and substantial objective     - The prohibition is connected to the objective     - Other accommodations are reasonable, so minimal impairment not met   + Prohibition is null * Majority goes with Orthodox approach   + Go with Charter first; question of infringement of constitutional right, not jurisdiction thing     - Value added by using Charter: get very structured analysis (s. 2(b), then s. 1, etc.)     - Can incorporate social values into analysis; can’t under admin law * Where actions of admin body infringes a Charter right, you carve out Charter issues and deal with them separately through an ordinary Charter analysis   + All other questions (jurisdiction, discretion, facts, etc.) are dealt with through the administrative analysis * THIS IS THE APPROACH FOR THE EXAM * Carve out the Charter issue, and deal with the rest with Admin   Deschamps and Abella   * Case is more appropriately decided by recourse to admin law than con law review   + Purpose of constitutional justification is to assess a norm of general application, such as a statute or regulation   + Basing analysis on principles of admin law averts problems that result from blurring distinction between principles of constitutional justification and principles of admin law     - Prevents impairment of analytical tools for each field * Admin body’s decisions can and must be judicially reviewed on principles of admin law   + Preferable to adhere to admin law analysis where resorting to constitutional justification is neither necessary nor appropriate * That a party chooses to characterize issue as requiring s 1 analysis does not make it so * While admin bodies do have power and duty to take values protected by Charter into account, it does not follow that their decisions must be subjected to justification process under s 1 of the Charter * An admin decision maker should not have to justify its decision under Oakes test   + Oakes test was developed to assess legislative policies, not admin decisions * Dissent says admin law works, and is just as demanding as Charter |

* + Charron, speaking for majority, held council’s decision infringed Multani’s freedom of religion (s 2(a))
    - Infringement could not be saved by s 1
  + She recognized that cases involving Charter rights could have admin law component
    - But held that review on administrative grounds in the present case was inappropriate because a Charter right was clearly at stake
      * Compliance with Charter was a central issue

### B. The Administrative Law and Mixed Approaches

* SCC has declined to use the Charter where it was at least possible to do so
* *Baker:* 
  + L’Heureux Dube said that application of Charter unnecessary because case could be resolved on basis of administrative law
    - This is consistent with mixed approach, but stands in some tension with orthodox view if s 7 argument is compelling
* *Trinity Western:*
  + Iacobucci and Bastarache declined to follow the orthodox approach
    - They did not review the decision under ss 2(a) and 1 of the Charter
* *Chamberlain:*
  + Decision should be reviewed on a standard of reasonableness simpliciter
* It is possible that issues of standing led majorities in *Chamberlain* and *Trinity Western* to opt for review under admin law rather than the Charter
  + These cases may be read as supporting a mixed approach that permits review on admin law grounds when constitutional rights are at stake
    - But may not foreclose the possibility of review under Charter if decision survives preliminary scrutiny at CL
    - Neither decision survived admin review, so turning to Charter was unnecessary

### C. Reconciliation?

* Idea of a shared constitution undermined if French version of s 1 permitted only admin law approach to review, while English text supported just the orthodox approach
  + A unifying approach is required

## IV. AGENCY JURISDICTION OVER THE CHARTER

* Sometimes, unambiguous statutory provisions may appear to infringe Charter rights under any reasonable interpretation
  + Tribunal’s application of interpretive principle tantamount to refusal to obey the law the legislature has entrusted it to implement

### A. The Old Trilogy and “Jurisdiction over the Whole Matter”

* Although admin agencies cannot declare infringing statutory provisions to be invalid, s 52(1) authorizes them to apply Charter to their enabling legislation and to refuse to give effect to inconsistent provisions
* *Cooper:* La Forest, for majority: legislation did not confer on commission explicit power to consider questions of law
  + No such power was implicit to statutory scheme because commission’s role within it was to screen complaints rather than adjudicate them
  + Commission had to apply s 15(c) of Act to As
    - Neither commission nor tribunal could review constitutional validity of impugned provision
  + McLachlin dissented, insisting that all law and law makers must conform to Charter, and commission had power to consider questions of law

### B. Vindication of the Dissent in Cooper?

* New series of unanimous decisions has emerged to confirm dissenters’ understanding of tribunal authority to consider questions of law
* *Martin:* Appeals Tribunal held it had jurisdiction to hear Charter argument
  + Concluded that the statutory exclusion violated Charter as complainants alleged
  + Gonthier J found that admin tribunals which have jurisdiction to decide questions of law under legislative provision are presumed to have jurisdiction to decide constitutional validity of provision
  + If legislation does not expressly grant jurisdiction to consider questions of law, jurisdiction may still be present implicitly and inferred from a series of factors
    - Statutory mandate of tribunal in issue
      * Whether deciding questions of law is necessary to fulfilling this mandate effectively
    - Interaction of tribunal in question with other elements of admin system
    - Whether tribunal is adjudicative in nature
    - Practical considerations
  + Presence of legislative intent establishes a rebuttable presumption that agency has jurisdiction to apply Charter
    - Presumption can be rebutted by pointing to explicit or implied statutory withdrawal of authority to determine constitutional questions
    - Courts always review on standard of correctness when called to scrutinize a tribunal’s decision that a legislative provision is inconsistent with Charter
* If a tribunal does not have jurisdiction to hear a Charter challenge, separate judicial review proceedings must be launched
  + These constitutional issues are likely to come before the courts in any event
    - Addressing them in tribunal adds considerable cost and time to final resolution of the matter
    - But “the Charter belongs to the people” (*Cooper)*
      * People should not be deprived of opportunity to assert constitutional rights in tribunals and agencies; usually more accessible than courts

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| R v Conway (2010, SCC)  * Issue: remedial jurisdiction of Ontario Review Board under s 24(1) of Charter   + Provide for anyone whose Charter rights have been infringed may apply to court of competent jurisdiction to obtain appropriate remedy * Conway detained in mental health facilities across Ontario   + Diagnosed with unspecified psychotic disorder, mixed personality disorder * He sent a Notice of Constitutional Question to the Board claiming his constitutional rights had been violated was entitled to an absolute discharge under s 24(1)   + Bad living conditions   + Environmental and noise pollution   + General hostility from staff * After an 8 day hearing, found to be an egocentric impulsive bully unable to control behavior   + Threat to public safety, unsuitable candidate for absolute discharge * Is Ontario Review Board a court of competent jurisdiction to grant Charter remedies?   + Yes! But Conway is not entitled to the remedies he seeks * Appeal dismissed * In *Mills*: relief is available under s 24(1) if “court” from which relief is sought has jurisdiction over parties, subject matter and remedy sought   + *Weber* expanded this inquiry to cover administrative tribunals * Observations of *Mills*   + *Mills* test applies to courts as well as admin tribunals   + Although *Mills* sets out a 3 pronged definition of court of competent jurisdiction, the first 2 steps have almost never been relied on     - Jurisdiction over parties, and jurisdiction over subject matter remain undefined     - Inquiry almost always turns on whether court or tribunal had jurisdiction to award particular remedy sought * Since *Slaight* court has increasingly expanded application of Charter in admin sphere   + *Blencoe*  explained that *Slaight* guaranteed that statutory bodies are bound by Charter even if they are independent of government and/or exercising adjudicatory functions   + In *Multani,* relying on *Slaight*, court explained that legislature cannot pass a statute that infringes Charter, and cannot, through enabling legislation, infringe Charter by delegating power to an admin decision maker * In *Martin* in 2003, Gonthier J determined that the following determines whether it is within an admin tribunal’s jurisdiction to subject a legislative provision to Charter scrutiny   + Under enabling statute, does admin tribunal have jurisdiction to decide questions of law     - If so, tribunal is presumed to have jurisdiction to determine constitutional validity of that provision under the Charter   + Does tribunal’s enabling statute clearly demonstrate that legislature intended to exclude Charter from tribunal’s jurisdiction     - Is so, the presumption in favour of Charter jurisdiction is rebutted * Summary of jurisprudence   + Whether tribunal can grant Charter remedies generally     - Whether admin tribunal has jurisdiction to decide questions of law     - If legislature did not intent to exclude Charter from its jurisdiction, tribunal is court of competent jurisdiction and can apply Charter and Charter remedies   + Once above question is met, must ask whether tribunal can grant particular remedy sought, given relevant statutory scheme * Application to this case   + Board is a quasi-juridical body with significant authority over a vulnerable population   + Board has a broad discretion to consider a large range of evidence   + Granting board jurisdiction to unconditionally release dangerous patient without requisite treatment would frustrate Board’s mandate to supervise special needs of those found to need treatment/assessment regime   + Allowing Board to prescribe or impose treatment is expressly prohibited by Criminal Code and inconsistent with constitutional division of powers * Dismiss appeals |

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| Judicial Review Procedures Act  * Doesn’t expand judicial review, nothing new created   + Just simplifies procedure * s. 3: error of law   + Extends power of certiorari to errors of law not on the face of the record * s. 5: can tell tribunal to reconsider with specific directions   + Can’t fetter decision making power, but can give instructions * s. 6: tribunal can’t ignore instructions * s. 7: court can set aside a decision if it would otherwise have given a declaration   + Courts can’t substitute opinion for decision maker at CL   + However, if you would have given them a declaration, can set aside instead * s. 10: court can make interim orders * s. 11: no time limit for applications   + (However, there is one under the *ATA*) * s. 15: tribunal gets notice and gets to be a party at hearing * s. 1   + “statutory power”     - Regulation making, etc., policy stuff, includes statutory power of decision   + “statutory power of decision”     - Judicative power to make decision of legal rights of other people       * Difference in s. 5: can only force a tribunal to reconsider something on a statutory power of decision |

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| Administrative Tribunal’s Act  * 5 main foci of legislation   + Independence, accountability, appointments   + Institutional design and statutory powers   + Dispute resolution   + Charter & Human Rights Code Jurisdiction   + Standards of review * s. 1 Definitions   + **"dispute resolution process":** confidential and without prejudice process established by tribunal to facilitate settlement issues in dispute;     - If dispute resolution doesn’t work, what you say in process won’t affect rest of outcome   + **"privative clause":** provisions in tribunal's enabling Act     - Give tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions     - And provide that a decision of tribunal in respect of matters within its jurisdiction is final and binding and not open to review in any court;       * Only really refers to full/strong privity clause (finality and ouster)       * So, doesn’t apply if enabling statute only has finality or ouster clause   + **"tribunal":** tribunal to which some or all of provisions of this Act are made applicable under tribunal's enabling Act;     - Not all tribunals (self-governing professions especially) consider Act     - Enabling Statute must say that the ATA applies * s. 8: appointing authority may terminate appointment of chair, vice chair or member for cause * s. 2&3: appointment must be on merit based process * ss. 11-13   + Can make their own rules in terms of procedure and practice directives     - One of the *Baker* criteria!   + s. 12: tribunal MUST issue directives around this issue   + s. 13: may issue directives around issues   + NOT ALL OF THE SECTIONS APPLY TO TRIBUNALS TO WHICH THE ATA APPLIES     - USE THE DAMN CHART * ss. 43 – 46.3   + Real meat of statute (along with ss. 57-59)   + s. 43 grants full power to determine questions of law and constitution     - Only 2 boards have this section apply   + s. 44: no jurisdiction of constitutional questions     - Applies basically across the board   + s. 45: tribunal has no jurisdiction over CHARTER questions     - Middle ground: only 3 tribunals   + s. 46.1: can decline to apply human rights code if more appropriate forum available * s. 57: time limit to apply to judicial review (60 days) * s. 58: standard of review if there is privative clause   + Privative clause: experts over areas in which they have exclusive jurisdiction   + (2) In a judicial review proceeding relating to expert tribunals under subsection (1)     - (a)  finding of fact or law or exercise of discretion by tribunal for matter over which it has exclusive jurisdiction under privative clause must not be interfered with unless patently unreasonable,     - (b) questions about application of CL rules of natural justice and procedural fairness must be decided considering whether, in circumstances, tribunal acted fairly, and     - (c) for all matters other than those identified in paragraphs (a) and (b), standard of review to be applied to the tribunal's decision is correctness   + (3) For purpose of subsection (2) (a), discretionary decision is patently unreasonable if     - (a) discretion is exercised arbitrarily or in bad faith,     - (b) discretion is exercised for an improper purpose,     - (c) discretion is based entirely or predominantly on irrelevant factors, or     - (d) discretion fails to take statutory requirements into account * s. 59: if no/weak privative clause   + (1)  standard of review is correctness for all questions     - Except those respecting exercise of discretion, findings of fact and application of CL rules of natural justice and procedural fairness   + (2) A court must not set aside a finding of fact by tribunal unless no evidence to support it or if, in light of all evidence, finding is unreasonable   + (3) A court must not set aside discretionary decision of tribunal unless patently unreasonable   + (4) For purposes of subsection (3), a discretionary decision is patently unreasonable if     - (a) discretion is exercised arbitrarily or in bad faith     - (b) discretion is exercised for an improper purpose,     - (c) discretion is based entirely or predominantly on irrelevant factors, or     - (d) discretion fails to take statutory requirements into account. * (5) Questions about application of CL rules of natural justice and procedural fairness must be decided having regard to whether, in all circumstances, tribunal acted fairly |

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| Minister of Citizenship and Immigration v Khosa (2009, SCC) Binnie (majority)   * Khosa immigrated to Canada from India in 1996 at the age of 14 * In 2002, found guilty of criminal negligence causing death and received a conditional sentence * A valid removal order was issued to return him to India * K appealed and IAD (Immigration Appeal Division) denied special relief under 67(1)(c) * Minister sought leave to argue that 18.1 of FCA establishes a legislated standard of review that displaces CL   + 18.1 deals with grounds of review, not standards of review     - But does provide legislative guidance on degree of deference owed to IAD’s findings of fact * FCA applied reasonableness simpliciter standard and set aside IAC decision * Majority decision of IAD was within a range of reasonable outcomes and majority of FCA erred in intervening to quash it   + Decision of IAD is restored * Does not share Rothstein’s view that absent statutory direction, no deference is owed to admin decision makers * *Dunsmuir*: with or without a privative clause, measure of deference is appropriate for particular decisions allocated to admin decision makers relating to special role, function and expertise   + Where legislative language permits, the courts     - Will not interpret grounds of review as standards of review     - Will apply *Dunsmuir* principles to determine appropriate approach to judicial review     - Will presume existence of a discretion to grant or withhold relief based in part on *Dunsmuir* * First step in *Dunsmuir* is looking at existing jurisprudence to determine standard of review * *Dunsmuir* established relevant factors in second step of standard of review inquiry pointing to reasonableness standard   + Presence of privative clause   + Purpose of IAD from enabling legislation   + Nature of question at issue before IAD   + Expertise of IAD dealing with immigration policy * Reasonableness is proper standard * Rejects Rothstein’s effort to roll back *Dunsmuir* clock where some courts asserted a level of skill and knowledge in admin matters that they did not possess * 18.1 sets out threshold grounds which permit but do not require court to grant relief   + Whether or not court should exercise discretion in favour of application will depend on court’s appreciation of respective roles of courts and administration, as well as circumstances of each case * English version of 18.1(4) is permissive   + Court is given discretion     - French version does not confer discretion * The above should be interpreted to preserve discretion, considering the principles in *Dunsmuir* * Procedural issues, and errors of law generally governed by correctness standard * Inference that legislatures left content of review to be supplied by CL * No proper basis for FCA to interfere with IAD decision to refuse special relief * Majority standard of review analysis   + 2 step analysis     - Look at precedent     - See 4 factors from Pushpanathan   + Reasonableness is not a spectrum * Majority: with or without privative clause, administrative tribunals should get some deference   Rothstein (concurring in result)   * With respect to s 18.1(4) of FCA, language of para (d) makes clear that findings of fact to be reviewed on a highly deferential standard   + Courts must give effect to legislature’s words and cannot superimpose on them a duplicative CL analysis * When Parliament intended a deferential standard of review in 18.1(4) it used clear and unambiguous language   + Where Parliament did not provide for a deferential review, it intended reviewing court to apply correctness standard as in regular appellate context * *Dunsmuir* standard of review should be confined to cases with strong private clause   + Absent a privative clause, courts have always retained a supervisory judicial review role * Focus of analysis should be on nature of question under review, not type of admin decision maker   + Where a legal question can be extricated from a factual or policy inquiry, it is inappropriate to presume deference where Parliament has not indicated this using a privative clause * Recognizing expertise as a free standing basis for deference on questions that reviewing courts are normally considered to be experts on (law, jurisdiction, fraud, natural justice etc), departs from the search for legislative intent that governs this area * IRPA’s privative clause does not seek to restrict or preclude judicial review * Agree with Binnie’s bilingual analysis and conclusion * Discretion in 18.1(4): withhold relief in appropriate circumstances   + Does not engage question of standard of review * IAD’s decision not to grant relief in this case should be upheld   + The application of *Ribic* factors is fact based     - The factual findings of IAD were not perverse or capricious * His view is entirely different of the history of standard of review   + Different view of the role of the courts and administrative tribunals   + Standard of review must be kept within the bounds of why it originally existed   + Courts should not be in the game of determining expertise of tribunals then deciding whether or not to defer   + If privative clause, this is intent of legislature, and courts should stay out     - If there is no privative clause, Parliament did not intend deference     - If there is no privative clause, treat it like a lower court   Deschamps (concurring in result)   * Agrees with Rothstein that since 18.1(4) of FCA sets legislated standards of review, those standards oust CL * Allow the appeal   Fish (dissenting)   * Standard of review applicable is reasonableness * IAD’s decision is not reasonable * IAD’s conclusion that there was insufficient evidence upon which a determination could be made that K does not represent a risk to the public is not only incorrect, but unreasonable   + IAD is entitled to deference   + Deference ends where unreasonableness begins * Dismiss appeal * Return this matter to IAD for reconsideration before a differently constituted panel * Standard of review in this case is reasonableness (post Dunsmuir) * 7/8 judges felt the standard fell within reasonableness * Only Fish would have quashed it for not being reasonable |

# Chapter 13 – Regulations and Rule Making: The Dilemma of Delegation

## I. THE SPREAD OF REGULATIONS, RULES, AND SOFT LAW

* Regulations:
  + Form of law developed by executive branch of government
    - Typically do not set general government policy as statutes do, but explain how statutes actually work
  + Binding on all those who are subject to them
  + Power to make them must be expressly granted under a statute
* Rules/guidelines can be broken into 2 categories
  + Regulations and rules
  + Soft law
    - Not legally binding
    - Power to make soft law does not have to be expressly provided in a statute
    - Plays important role in procedure and substance of decision making
* Rule making v adjudication
  + Rule making is prospective, not retrospective
* Delegation v discretion
  + Delegated authority (authority to make regulations)
    - The authority is given to the administrative agency
    - This is about a rule making function
  + Discretion is adjudicative
* Hard law v soft law
  + Hard law: things that are enforceable
    - Binding rules in statutes or regulation
  + Soft law: policies, speeches
    - No binding enforceable effect, but carry some weight in the world
* Regulation: subordinate legislation that is delegated authority
  + They are something that a particular ministry will carry forward
    - Pre-publication in Canada Gazette, then published in Canada Gazette as binding regulation
  + Created by Ministry, applying generally to area that statute applies to
* Rules: a few independent arms length agencies have ability to pass themselves
  + Example: securities commission, competition tribunal
  + Agency itself drafts rules
    - They don't have to talk to the Minister or go through the legislature
  + Rules drafted internally, subject to a notice and comment phase
    - Sort of equivalent to Canada Gazette
* Rules and regulations have the same enforceability in law

## II. WHY DELEGATE?

* Primary reason for delegation is expertise
  + Even if they had the expertise, legislators lack time and information to make decisions necessary for functioning of current regulatory and welfare state
  + Legislation is necessarily and unavoidably incomplete
    - Power to make requirements may be delegated in order to increase flexibility
  + A legislator may not know what a good rule is
    - Legislators are generalists, and may not have all the information
* Although soft law guidelines not legally binding, in *Baker*, SCC took them into account
* Legislative instruments can assist members of the public
  + To predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly
  + Enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case by case basis
* Soft law instruments may be preferable to formal rules requiring external approval
* Why delegate?
  + Time based problem
    - Any statute drafted today must work with unforeseeable events
      * Well drafted laws must be flexible in the future
    - Future decision making can be delegated to people faced with future decisions
  + Costs
    - Cheaper ways to build flexibility into system than constantly revising legislation
  + Trust
    - Which administrative tribunals get trust and which don't?
      * A study out of the US showed that people administering welfare get no trust, whereas securities regulators get much more trust from legislators to make decisions

## III. THE RISKS OF DELEGATION

* Party making rules or soft law may not follow wishes of the legislature
* Legislature may not be respecting wishes of public
* Legislators delegate power because they lack expertise, time, and information
  + They may have difficulty monitoring how this power is exercised

## IV. CONTROLLING THE RISKS

* Four main approaches to controlling delegated legislation
  + Structuring the discretion
  + Legislative oversight
  + Substantive judicial review
  + Process requirements

### A. Structural Approaches

* A legislature will be more likely to delegate broad powers to make rules the more it trusts agent making rules to follow legislature’s policy preferences
* Legislatures may also attempt to indirectly control the exercise of discretion through choice of body that will exercise discretion or resources provided to that body

### B. Legislative Review

* Legislature itself, or more likely a committee, could examine rules or soft law and decide whether to approve, disapprove or amend them
* As a committee, it may have some time to examine regulations that are made, but, absent a significant allocation of resources, still less time than the agency or ministry
  + Exacerbates problem by creating a system where regulations go back and forth between legislators and agency or rule making authority
* This does not solve problems of expertise and information, which is often a main reason for delegation in the first place
  + Legislators are either likely to defer, or take a hard look and substitute their own views
    - Neither are great outcomes

### C. Judicial Review of Substance

* Court monitoring may keep agent within bounds of power delegated to it and control agent where it makes mistakes, substitutes its own views or acts in its own self-interest
* Third party oversight by independent branch of government which isn't political, and cares a lot about upholding RoL
  + Will bring a justice lens, rather than bureaucratic efficiency lens
  + Purely legislative decisions not subject to judicial review for procedural fairness
* *Thorne’s Hardware Ltd v The Queen*
  + Federal government made an order in council under *National Harbours Board Act* extending boundaries of Port of Saint John, NB
  + SC held that while it is possible to strike down an order in council on jurisdictional or other compelling grounds, it would take an egregious case to warrant such action
    - This is not such a case
  + Court took a strong position against examining actions of Cabinet in making orders in council

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| Thorne’s Hardware Ltd v Canada (1983, SCC)  * Issue: whether As are obliged to pay harbor dues imposed by National Harbours Board on entering or using port of Saint John, NB * Governor in Council passed Order in Council extending limits of port   + Water lot A’s was brought within limits of port * That a power is vested with GiC does not make it beyond judicial review * Decisions made by GiC in matters of public convenience and general policy are final and not reviewable in legal proceedings   + Possibility of striking down an order in council on jurisdictional or other compelling grounds remains open     - It would take an egregious case to warrant such action       * This is not such a case * A says that the expansion of harbor limits was bad faith   + Not the place of the courts to investigate motives of federal Cabinet * As acknowledge that s 7 of the Act does give federal cabinet jurisdiction to expand harbor limits * A’s submission must fail |

* *Enbridge and Union Gas v Ontario Energy Board* 
  + Ontario CA found the standard of review should be correctness

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| Enbridge Gas Distribution Inc v Ontario (Energy Board) (2005, Ontario Court of Appeal)  * Enbridge challenged rule made by OEB   + Court rejected argument using correctness standard * Appeal dismissed * Whether one uses the ultra vires analysis or pragmatic and functional analysis, result is the same * Board’s ruling is not protected by a privative clause, but is subject to statutory right of appeal   + The interpretation of the provision at issue (44(1)) is a question of law     - Board can claim no greater expertise than the courts     - Nothing in the language of the provision to suggest that the court should give deference to Board’s view of extent of jurisdiction granted to it * Central issue in appeal: whether 44(1) gives Board jurisdiction to make rules at issue   + Nothing in language of 44(1) or its statutory context to deprive board of rule making jurisdiction     - Such a narrow reading would be inconsistent with the broad purpose of the act   + The words of 44(1) read in their grammatical and ordinary sense confer ample jurisdiction on the board to make the billing provisions of GDAR     - Such a reading is harmonious with the scheme and object of the act and intention of legislature * Board properly followed the procedures outlined by the statute |

* Courts will review substance of rules (including regulations) for whether regulation is within the grant of power (*Enbridge)*
  + They will also review rules for other reasons, including whether regulation violates Charter
    - In many cases they have been reluctant to do this, because discretion is often granted in such broad terms that review is difficult
    - Courts have been even more reluctant to review soft law
* Fettering occurs where a guideline or policy, due to its language or practical effect, is in effect mandatory or binding on decision maker, taking away discretion granted to him/her
* Even if appropriate challenges come before courts, often courts do not have expertise to review rules
  + Even if they have expertise, this discussion assumes that courts attempt to determine best possible interpretation of legislation power and appropriateness of challenged rule
    - But judges also have their own policy preferences
      * Concern that judges’ discretion over policy outcomes (content of rules) creates a further principal-agent problem as judges implement their own views
* Given lack of clarity in how courts interpret their “expertise” relative to that of admin decision makers, legislators can never be sure that their choice of delegate will prevail

### Process requirements

* Something other than judicial review or legislative review which accomplishes the same goal
* Primarily around consultation
  + If you get enough people talking about an issue, you will get a broad enough range of opinions that you get better information than from a few experts in a back room
* Clear downsides:
  + Costly, slow, worry about interest group domination of public forum, behavioural cascades
  + Will the regulatory body take seriously what the public says?
  + Time
* There is no overarching rule which requires consultation

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| Public Mobile v Canada (AG) (2011, FC)  * Public Mobile has standing to bring this application * Decision of GiC is quashed * Issue: control in fact test concerning Canadian ownership * S 16(3)(c) of Telecommunications Act, expressed a double negative:   + Not controlled by persons who are not Canadians     - AG argued that this wording left open situation where a broadly held multi-national entity may have control * Standing for judicial review   + Courts should tend to be inclusive rather than exclusory     - Public Mobile has sufficient interest in the matters to be a person entitled to seek judicial review in these proceedings * Canadian ownership and control   + The legal control requirements of 16(3)(a) and (b) have been met by Globalive     - CRTC and GiC decisions differ regarding control in fact provision of 16(3)(c) * Once it is determined that a finding is one of mixed fact and law, court must consider whether alleged error is purely one of law subject to review on correctness standard   + GiC did not make any findings of fact different than those found by CRTC   + Findings of GiC based on legal determination are to be judicially reviewed on standard of correctness (*Dunsmuir*)     - GiC stepped out of the provisions by inserting a previously unknown policy objective into s 7       * Of ensuring access to foreign capital, technology and experience     - GiC erred by limiting its decision to Globalive only     - GiC misdirected itself, particular in whereas clauses       * “Act should be interpreted in a way that ensure access to foreign capital, technology and experienced is encouraged”         + The act does not refer anywhere to foreign investment or foreign capital, technology and experience       * “Based on the facts of this particular case and has a significant direct impact only on Globalive” * Public Mobile has standing   + Decision of GiC dated Dec 10, 2009 is based on errors of law and must be quashed |

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| Globalive and AG v Public Mobile and Telus (2011, FCA)  * Telecommunications Act requires that a company be Canadian owned and controlled in order to be eligible to operate in Canada as a telecommunications common carrier   + CRTC held that it is controlled by a non-Canadian   + GiC held that Globalive satisfies this requirement   + Federal Court quashed Order in Council * Appeals allowed and Order in Council restored * Facts:   + Globalive successfully bid at a license auction     - Minority voting shares owned by Orascom (Egypt)     - Majority non-voting shares owned by Orascom (Egypt) * Canadian ownership has 3 requirements   + At least 80% of corporations board members must be individual Canadian     - 16(a) satisfied   + Individual Canadian must beneficially own at least 80% of voting shares     - 16(b) satisfied   + Corporation must not otherwise be controlled by persons who are not Canadians     - 16(c) control in fact test       * Not satisfied * GiC has power to substitute its views as to the public interest for that of the Commission * A CRTC decision may be appealed in one of two ways   + Appealed directly to court under s 64     - Both factual and legal issues will be reviewed on a reasonableness standard   + Reviewed by GiC pursuant to s 12     - GiC reviews CRTC’s decision de novo     - This court is reviewing order in council       * All aspects of the order are subject to judicial review * According to *Dunsmuir*, no admin decision making is completely immunized from judicial review   + Though some is reviewable on a reasonable standard * Gic’s application of control in fact test and its references to telecommunications policy objectives were decisions of mixed fact, policy and law; reasonableness standard applies   + Need for deference underscored by nature of s 12 review process   + Decision of GiC fell within range of possible, acceptable outcomes * It was open to GiC to refer to policy considerations in varying CRTC decision * Public Mobile is entitled to public interest standing   + Such an applicant must satisfy the court that     - A serious issue has been raised     - It has a genuine or direct interest in the outcome of the litigation     - There is no other reasonable or effective way to bring the issue before the court   + Basic purpose of public interest standing: ensure legislation is not immunized from challenge * Appeals allowed, Order in Council restored |

* CRTC found that Globallive was controlled by a non-Canadian in fact
* In Dec 2009, the Governor in Council reviewed the CRTC decision and overruled the CRTC
  + Found Globallive was not controlled by a non-Canadian
* Public Mobile was unhappy and sought judicial review from the Cabinet decision
* Privative clause (52(1) of Telecommunications Act
  + Determination on a question of fact is binding and conclusive
    - There is a finality clause, but no ouster
    - Decisions appealable (64(1))
* Governor in Council decision
  + Canadian ownership and control requirements should be applied in support of policy objectives set out in Telecommunications Act (s 7)
    - Reliable and affordable service
    - To enhance efficiency and competitiveness of Canadian telecommunications
    - Promote ownership and control of Canadian carriers by Canadians
* Federal Court: nothing in Act says one policy objective is subordinate to another
  + Why didn't the GIC use section 8?
    - Didn’t want process of publication, consultation, potential opposition
  + Only has a direct effect on Globallive
    - If it only has a direct effect on one carrier, they can use section 12
      * A policy change must be done under section 8

# Guest Lecture

1. Authority is delegated within the Employment Standards Branch
2. In addition to basic purpose of ensuring minimum standards, there are several related purposes to Employment Standards Branch
   * Encourage open communications between employees and employers
   * Provide fair procedures for resolving issues
   * Productive workforce
3. Self help kit
   * Need not be used if
     + Language barrier
     + Imminent insolvency
     + Time and futility of the matter will make it inappropriate
4. Branch also mediates complaints
5. Adjudication hearing
   * Effort to move things more quickly
6. There was requirement to post standards in all employment sites, but this was amended by Liberals
7. The Director exercises reasonable discretion regarding
   * Issuing licenses to employment agencies etc
   * Issuing variances for ESA requirements
   * Issuing permits for young children's employment
   * Deciding whether or not to proceed with investigation of complaint if proceedings are ongoing
   * Deciding whether or not to investigate or adjudicate
8. Procedural fairness
   * Statutory requirement in s 77 about what Director must do to ensure delivery of procedural fairness
     + Requirement of reasonable efforts to give opportunity to respond to investigation
     + Formal procedural fairness at adjudication hearings and issuance of adequate reasons
9. Jurisdiction of Employment Standards Tribunal (EST) is limited and precludes de novo consideration of evidence
10. EST conducts almost all appeals and reconsideration request hearings by written submissions, on the record

*Taiga Works Wilderness Equipment Ltd v BC* (2010, BCCA) 97

* + DES delegate failed to disclose documents or consider employer's last submissions
  + EST considered overlooked submissions and gave employer opportunity to comment to EST
  + Members on documents, then dismissed appeal and reconsideration
  + JR dismissed because tribunal acted fairly
  + Appeal granted
    - While tribunal may cure breach of natural justice without de novo appeal, no curative fairness here
  + One thing that was deeply disturbing that the Director encountered: at CA there was issue (level of fairness) that Director was not given an opportunity to make submissions
    - Breach of natural justice repeated by Court of Appeal
  + Judge at the Court of Appeal misunderstood its jurisdiction

*Actton Transport Ltd v BC* (2010, BCCA)

1. Intra-provincial garbage disposal firm alleged federal labour standards applied because parent company operated inter-provincially
2. Employer raised all conceivable arguments at ESB and EST regarding breaches of natural justice
3. Court on JR accepted parties' agreement to hold de novo consideration of jurisdiction question rather than spend 15 days of hearing
4. BCCA admonished bench not to repeat process