Admin Law CAN – 2011 Christie Ford

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# Framing Concepts

## Criteria to Evaluate the Administrative State

### Five Bureaucratic criteria

1. Effectiveness at meeting objectives
2. Efficiency = cost/benefit analysis
3. Equity
4. Manageability
5. Legitimacy/political feasibility

### Three Legal/judicial criteria

1. Rule of law
2. Procedure
3. Precedent
* Following it
* Creating it

## Rule of Law

The law applies equally to everyone.
The Rule of Law requires decisions to be grounded in law, prevents arbitrary decisions.

Rule of law is unwritten principle which constrains both legislative and court action (Manitoba Language Rights, Secession Reference, Imperial Tobacco, Christie)

**Three Main features of the Rule of Law** **(Albert Dicey 1885)**

1. Absence of arbitrariness
2. Formal legal equality
3. Constitutional Law

Mechanism: Common Law + Parliament + (unwritten) constitution = institutional control

**Rule of Law (Lon Fuller 1964)**

Law must be:

* General,
* Public, clear, consistent through time
* Non-contradictory, congruent as applied
* Prospective, capable of being applied

**Rule of Law (Joseph Raz 1979+)**

Certainty Generality Equality

**Arbitrariness:**

* Making decisions without guidelines
* Making decisions without a basis (unsupported by evidence or by reason or logic)
* Not following the procedures in place

**Procedural Arbitrariness:**

* The process is not designed to get you to a reasonable decision
* Unconstrained discretion

**Substantive Arbitrariness:**

* Bias
* Stereotyping
* Structural bias
* Irrationality
* Frivolous behaviour
* What your doing offends society’s moral standards

**Roncarelli v Duplessis** - A classic statement of rule of law (pre- Charter)

* Legislation sets scope of admin power
* Admin agency acts within jurisdiction, justifies decisions affecting people
* Courts check for arbitrariness but show deference
* Majority: in public regulation of this sort there is no such thing as absolute and untrammelled discretion, that is that action can be taken on any ground or for any reason… no legislative Act, without express language, can be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute

# Remedies

## What Remedies are available at the tribunal?

1. **Statutory authority**

**Rule:** No tribal has general/inherent jurisdiction to impose any remedy, the power must be in enabling statute

* Could include an **express list** of remedies or **broad power -** “any remedy necessary”
1. **Novel Administrative Remedies**
* A Novel Remedy may be granted if it is necessary to give meaning to other granted powers
* If there is an express list in the statute as well this argument will likely fail
* **Can NEVER imply authority to award money damages!**
* No equitable jurisdiction unless explicitly authorized in statute

**Factors:**

* Ongoing seizin
	+ Tribunal may remain seized of the matter longer than courts - if the remedy is not being carried out in good faith the tribunal can re-craft the order/conditions but must be aimed at achieving the same remedy
* Broad mandate
* Different expertise
* Crossing of public/private divide

## Enforcing Tribunal’s Order

1. **Tribunal enforces its own order - Must be expressly granted in enabling statute**.
	* Some(not many) tribunals given authority to enforce: monetary obligations, imposing liens, making garnishment orders, seizing assets, suspending driving privileges, civil contempt.
2. **Conversion into a court order**
	* Party to admin action can bring action in crt against another party to enforce the order.
		1. Private applicant must convince crt it should intervene notwithstanding potential absence of a statutory provision empowering it to do so.
	* If successful, order can be enforced in same manner as crt judgement.
3. **Criminal prosecution**: only if no other punishment is expressly provided by law.
	* If converted into court order, must comply
	* If fail to comply:
		1. Penalties, fines, imprisonment.
		2. i.e. BC Securities Act: liable to fine and not more than $3 mill or to imprisonment for not more than three yrs or both.
		3. Can be subject to criminal code. (s.127 Criminal Code which says it’s a offence to disobey a federal or provincial tribunal order)
	* If a court is going to cite someone for civil or criminal Contempt for not following a tribunal order, the order must be clear and unambiguous.

## Challenging the Tribunal’s Order

Choose to challenge action based on:

* + **Tribunals jurisdiction**
	+ **Procedure**
	+ **Impartiality**
	+ **Exercise of discretion**
	+ **Substance of its final decision**
1. **Internal tribunal mechanisms**
	1. **Slip Rule** - states tribunals can change small slips (ie. clerical errors) w/o express statutory authority to do so
	2. **Reconsiderations & rehearings** - Statute can give power to re-hear based on mis-analysed or new evidence. If not in the statute, tribunal is *functus officio* -> have to go to internal appeal or JR
	3. **Internal Appeals/ reviews** - if the tribunal is part of a multi-tiered administrative agency, the tribunal’s enabling statute may provide for appeals internal to the administrative agency, e.g. IRB Immigration Division.
2. **External non-court mechanisms** (eg. Ombudsperson, public inquiry)
3. **Courts**
	1. **Statutory Appeals**

**Note:** courts expect applicants to work through the statutory appeal process first before seeking JR, so always consult enabling statute to see if a statutory appeal route is provided and exhaust this first.

* + - **Is an appeal to the courts available?**
			* Does the enabling statute provide a right of appeal?
				+ courts have no inherent appellate jurisdiction over administrative tribunals
				+ a right to appeal must be in the tribunal’s enabling statute, otherwise JR
				+ the enabling statute will also set out the court to which tribunal orders may be appealed
				+ must be an appeal of final decision on the merits, not interlocutory rulings.
			* **What is the scope of the appeal?** (like right of appeal) determined entirely by the enabling statute
				+ varies greatly by tribunal, from a complete *de novo* review of a tribunal to being limited to issues of law based on the original record
				+ arguable that the scope of appeal is determined by how closely the tribunal’s subject matter and expertise mirror that of the courts
				+ right to appeal to crts more likely where tribunal/board can affect an individual’s common law rights (human rights, tribunals, labour relations)
			* **Is an appeal available as of right, or is leave required? If leave is required, who may grant it?**
			* **Is a stay of proceedings automatic, or must one apply?**
				+ varies between jurisdictions and between tribunals
				+ Ontario, an appeal operates as a stay of a tribunal’s proceedings (as a default)
				+ BC, the commencement of an appeal does not operate as a stay or suspend the decision being applied, unless the tribunal orders otherwise
				+ specific statutes can employer tribunals or appellate bodies (internal or court) to stay the tribunal order pending appeal
				+ need to balance due process and efficiency, tribunal expertise and judicial oversight
				+ dependent on legislature’s decision where to allocate the power
	1. **Judicial Review**

Limited jurisdiction – on procedural fairness, the matter just goes back to the tribunal to decide again. There is no guarantee of a different substantive outcome.

You need to apply for leave to get a stay for JR

**Threshold questions to determine if JR is available**

1. Is the tribunal a public body? –only public bodies subject to JR.
	* 1. if a decision maker fulfills a public function, or if the decision maker has public law consequences, a duty of fairness applies and the decision is subject to JR (*McDonald v Anishnabeck Police Services*)
			+ - Does not include private contracts with municipality because they are not acting as a public body.
				- Being governed by a statute is not enough
				- Law society is a public body because doing a gov’t function of regulating
		2. **FACTORS for determining if a decision maker is serving a public function or the decision has public consequences:**
			+ Source of the body’s powers
			+ Functions and duties of the body
			+ The extent of the govt’s direct OR indirect control over the body (implied devolution of power)
			+ The body’s power over the public at large
			+ The nature of the body’s members and how they are appointed
			+ How the body is funded
			+ Nature of body’s decisions
			+ Do the constituting documents or procedures indicate that the body owes a duty of fairness?
			+ What is the body’s relationship to other statutory schemes / parts of govt? is it “woven into the network of govt”?
2. **If the admin body is public, next ask whether the party seeking to challenge has standing?**

Either: 1) individual standing or 2) public interest standing

**Basic rule:** parties have more limited access to public interest standing on JR than in civil proceedings

1. **Which court should the party apply to for judicial review?**

Generally speaking (there are exceptions):

* + - 1. Is the administrative body provincial? If yes, go to provincial superior court (BCSC)
			2. Is the administrative body federal? If yes ,go to Federal Court
			3. Exceptions: some provinces (e.g.: Ontario) stipulate the particular provincial court to bring JR to
1. **Is the application timely?**
	* + The deadlines are generally very short, ex: 30 or 60 days. Why? Because JR is exceptional and an extreme remedy.
		+ Federal Courts Act: JR application from a federal tribunal to the Federal Court must be made within 30 days
		+ BC: general time limit is 60 days (Administrative Tribunals Acts, s. 57(1)
		+ However: the courts may extend the deadlines with good reasons.
2. **Has the applicant exhausted all other means of recourse?**
	* + Depending on tribunals enabling statute, this may include all previously mentioned remedies.
		+ Applicants must exhaust all alternative avenues of appeal before going to JR as last resort (*Harelkin)*

**Remedies on Judicial Review**

* **the court CANNOT substitute its views on the substance of the matter for the tribunal’s views.**
* **Generally cannot get monetary damages or costs**
* Based on prerogative writs

**\*Certiorari**: power of court to **quash** admin decision, but no new decision (i.*e. cannot substitute own*)

**Prohibition**: prevents a lower court from exceeding its jurisdiction \*obtain relief pre-emptively\*

**\*Mandamus**: compels action by the underlying tribunal (i.e. to reconsider fairly or w/ other direction)

**Declaration**: declaration of what ppl’s legal rights are (i.e. of their legal position)

**Habeas corpus**: usually used in physical imprisonment situations. Right not to be detained arbitrarily.

**Quo warranto**: inquire into the authority that justified action (quashed in many prov.)

* Statutory reforms
	+ Discretionary: Court has discretion through JR to refuse to grant remedy even where a duty is clearly warranted by the facts. There can be several bases for refusing to grant a remedy: (p.11)
		- Adequate alternative remedies available.
		- Premature (must exhaust all internal appeals)
		- Delay and acquiescence
		- Issues are moot
		- Party doesn’t come w clean hands

Domtar: *inconsistency between tribunal decisions is NOT in itself a basis for JR. It is discretionary.*

1. **Private Law remedies?-->**outside of the scope of administrative action AND judicial review
	* parties may prefer monetary relief (damages or restitution) rather than likely judicial review remedies
	* the Crown and its parties can be liable to private parties for monetary relief, though some statutes limit individual tribunal members’ liability
	* to seek monetary relief, an aggrieved party must initiate a separate civil action for restitution or damages along with, or instead of, a judicial review application (parties have had little success replacing judicial review altogether, sidestepping it in favour of only civil action)
	* torts of negligence or abuse of public office
	* e.g. Odhavji case: tort of abuse of (“malfeasance in”) public office
		+ - Action against police in Toronto for damages by the estate of an individual shot by police
			- police did not cooperate with an ensuing investigation and chief did not compel them to do so
			- \*courts must be careful with “abuse of public office” cases, because otherwise they risk unnecessarily entering the realm of political decision making

# Procedural Fairness

ALWAYS REVIEWED ON STANDARD OF CORRECTNESS (*Clifford*) 🡪 pretty obvious why

* Generally duty includes (i) right to be heard and (ii) right to independent and impartial hearing
	+ (but these CL principles could be overridden by legislation)

## Is the individual entitled to any fairness at all?

**General common law principle of procedural fairness lies as a duty on every public authority making an administrative (1) decision (2) NOT of a legislative nature AND which affects the (3) rights, privileges or interests of an individual (*Cardinal* SCC 1985).**

**Sources of Procedural Rights** (Where to look to figure out what procedural fairness is owed): Enabling statute, statutes (BC ATA), common law, tribunal’s internal rules & guidelines, regulations, Charter (in limited situations), principles of natural justice, Bill of rights

### Was it a final decision?

* **General Rule:** If a decision is not final or “de facto” final (ie its interlocutory or preliminary) 🡪 no procedural fairness
	+ **Qual:** **Preliminary decisions** *may* (rarely) be subject to JR if they have:
		- *De facto* finality, or
		- *Have serious impacts*
		- Affect reputation
	+ **De Facto Finality:** Duty of fairness applies to interim decisions where they are patient’s only hope of release (*Re: Abel* Div Ct 1979)
		- **Ex.** NCRMD hearings which are subject to final discretion of Ltnt Governor were “decisions,” cuz despite final discretion, review board proximity to final decision is so tight that PF engaged (*Re: Abel* Div Ct 1979).
		- **Factors:** Relies on
			* Degree of proximity b/w decision making stage in question and final decision
			* Exposure to harm from the decision
	+ **Reputation:** Damage to rep may require PF, but need to show more than *Irvine.*
		- **Ex.** No PF was due from a hearing officer who writes report on unlawful trading to Commission which decides if full inquiry is nec. (*Irvine* SCC 1987)
			* First stage in lengthy process (low prox), and Director has discretion not to publish report 🡪 low risk of damage to reputation. Considered difficulty of proving anti-trust crimes
		- **New Factor?:** May need to consider diffic PF imposes on investgtn.

### Was the decision legislative in nature?

**Gen Rule:** All legislative decisions are NOT subject to ProcFairness 🡪 NO FAIRNESS DUE. STOP ANALYSIS HERE.

Legislation within Parliament’s competence is unassailable (*Authorson v Canada* SCC)

* Ex. Even legislative decision to cut funding to BC, ON, AB in clear breach of previous federal assistance plan (contract) is not subject to any PF (*Ref re: Canada Assistance Plan* SCC 1991)
* **Cabinet/Ministerial/(Policy?) Decisions:** Depends if they are acting in a legislative capacity (*Inuit Tapirisat*) No Pf for purely ministerial or policy decisions
	+ **Key:** GiC/Cabinet is not automatically sheltered from JR
		- But after *Inuit Tapirisat,* it would take a lot to require procfair from cabinet (May be changed by *Public Mobile*)
	+ Ex. Broad GiC discretion + polycentric decision + historically legislative decision = legislative enough = No JR (*Inuit Tapirisat*)
		- Telecom price regulation issue where Inuit appealed to GiC (instead of Fed Ct) with broad discretion on what to do 🡪 GiC decision was basically a legislative (policy) issue in that case
		- Parl authorized cabinet to overturn CRTC decisions, and it does so as legislative function considering lots of parties as it pleases
	+ **Factors toward legislative:**
		- Broad discretion
		- Historically legislative acts
		- Polycentric decisions
	+ This was intensely critiqued
		- Biggest oddity was that decision was based on a bunch of written arguments, except from Inuit, and cabinet is not politically actable like parliament
* **Subordinate Legislation:** If a bylaw is quasi-judicial, then it attracts PF (*Homex* SCC 1980)
	+ Cannot couch one’s actions in a form designed to oust the application of duty of fairness (instrumentalize legislative acts)
		- **Ex.** Legislation that was effectively made as part of an inter-partes dispute *without any notice* (zoning laws that stop a quarrelling developer from building) requires PF. What they did was not in substance legislative even though in form, by-law it was.
	+ **Qual:** Municipalities can pass bylaws that are adverse to interests, but if doing so, they must give notice and opportunity to be heard (*Homex*)
	+ **Factors:** Must look to the underlying motives of the subordinate body
		- Is there an immediate and specific target?

### Does the decision affect a right, privilege or interest (r/p/i)?

* There is a general CL duty of PF on every public authority making non-legislative admin decisions that affect r/p/i (*Cardinal* SCC 1985).
* **Test:** Is the r/p/i “directly and substantially” affected? (*Hutfield* Alta QB 1986)
	+ **Ex.** Repeated denial of hospital privileges to work as a doctor in a hospital without reasons or opportunity to respond directly and substantially affected his interests (**reputation/financial ability**)
	+ **Ex** (pre-direct/substantial)**.** Decision to let a woman and family into public housing is not enough of an interest (*Re: Webb* Ont CA 1978), but once admitted, PF is due on whether to kick out
		- No statutory or CL right to public housing
		- Was a vested **interest** **in staying where she lived** w/o nec property interest
* **Qual:** Vested vs. unvested is irrelevant now (*Hutfield*)
* **Employment Ks Qual:** After *Dunsmuir*, CL duty of fairness can be overcome by the nature of the K. PF generally has no application in dismissal cases – All K Law

### Was there an emergency at the time?

* **Gen Rule:** PF rights can be suspended/abrogated during an emergency (*Cardinal*).
	+ **Qual:** Rights are not eliminated. They return to force at end of emergency.
	+ **Qual:** If abrogated, must demonstrate that rights were abrogated *no more than necessary for the emergency*

### Legitimate expectations

* **Gen Rule:** Legitimate expectations do not create substantive rights but can give right to procedure or increase the level of PF
	+ There cannot be legitimate expectations of an outcome.
	+ Also CANNOT CONSTRAIN ESSENTIAL DEMOCRATIC FEATURES (*re: Canada Assistance Plan* SCC 1991)
		- Legit Expec cannot bind a new govt to promises of old one
			* **Qual:** Maybe Constitutional/quasi-Constitutional statutes bind future governments.
		- Ex. Even creation of a law that breaches a previous agreement b/w feds and provinces cannot req notice or any PF rights (*re: Canada Assistance Plan*)
			* Provs cannot rely on old agreement to create proc rights.
	+ **Qual:** Legitimate expectations can require certain procedural protections be provided (once PF is required as a whole – See *Baker* section)
		- **Basis:** Expectations of how the State treats individuals

## If yes, how much fairness are they entitled to?

**Normally, Baker5-Part test determines which/how much fairness the applicant is entitled to**

* + It is non-exhaustive!

### Nature of the decision being made and the process followed in making it

* More a decision appears judicial = more PF. More legislative = less PF
	+ See **Threshold discussion** for factors 🡪 even if it isn’t sufficiently legislative to attract no PF, it could suggest less fairness owed.
		- Consider: *Inuit Tapirisat, Re: Canada Assistance Plan, Homex*
	+ Ex. Passing of legislation that is effectively meant to be judicial (against one party) = quasi-judicial = right to be heard, notice (*Homex*)

### Nature of the statutory scheme and the “terms of the statute pursuant to which the body operates”

* More final decision/no appeal procedure or no further requests = more PF
	+ Consider: *Re: Abel*, *Irvine*

### Importance of the decision to the individual or individuals affected

* \*\*Often the most important factor\*\*
* The greater the impact on the individual = more PF required
	+ Ex. Higher standards if party’s profession/employment is at stake
	+ Ex. potential loss of house of 25 years (*Ganitano*) = very important
	+ Ex. Risks of increased psychiatric problems + separation from children (*Baker*) = very serious
	+ Ex. Significant legal rights (pension benefits) (*Clifford*) = very important
	+ *Webb, Hutfield,* and *Cardinal* all factor into this area, but not as cleanly as the first two. Also consider cases applying *Baker*.
		- But does not matter if it is right, priv or interest

### Legitimate expectations of the person challenging the decision

* **Rule:** If a person has *legitimate* expectations of a procedure, then that procedure is required
	+ **Qual:** Cannot entitle a party to a certain *result*
	+ Ex. Baker did not have a legitimate expectation that her kids would be involved in the admin process (*Baker* SCC 1999) because Canada ratified the UN Convention on the Rights of the Child.
* Can still create higher PF for one individual vs. another in similar scenarios.

### Deference to the administrative body

* Does the admin body have some kind of **expertise** about its procedure?
	+ Ex. Specialized expertise of immigration review board (*Baker*)
* Courts must respect **discretionary decisions** to some extent
	+ **Qual:** But still subject to duty of fairness. Must be exercised w/in the law (statute, RoL, Charter, admin)

**Cumulative Situational Examples**

* *Baker:* Quite judicial decision + final decision + serious impact (mental risks/separation from children) – Deference (C+H is discretionary, Expert trib in immigration)
	+ = more than minimal PF (written submissions and reasons), but not oral hearing
* *Clifford:* Significant legal rights at stake (beneficiary of pension) + court-like process + final step
	+ = reasons
* *Ganitano:* adjudicative situation (tenancy board hearing resembled judicial process – inter parties w/decision maker) + no internal appeal +very important interest (apartment of 25 yrs and where kids grew up) + no mention of deference in agency’s own procedure
	+ = high degree of fairness required

**Pre-Baker Cases**

* *Nicholson:*CL PF in dismissal case without any express protections + somewhat serious impact (loss of job 3 months before he gets protections)
	+ = reason for discharge and opportunity to respond
* *Knight v Indian Head:* Education director of school board had decision imposed on him to have year by year K. He refused, got fired. Final decision + relatively legal decision + strong impact (loss of job)
	+ *=*owed at least reasons and opp to be heard
* *Cardinal:* VERY Serious impact (Decision to keep prisoner in solitary confinement) + final decision (Prison director’s choice) – majorly discretionary (whether to keep in solitary)
	+ = should have been informed of reasons, given opportunity to make representations, and ability to challenge decision and information.
* *Hutfield:* Denial of a hospital license to practice medicine casting a slur on reputation and financial ability (serious impact) + repeated final decisions
	+ *=* right to be heard
* *Homex:* quasi-judicial passing of legislation – municipality pursuing public interest
	+ *=* right to be heard, notice

## Is the Charter or Bill of Rights Engaged?

* PF is part of “principles of fundamental justice” (*Singh*)
	+ Thus, legislation must conform to PF in order to be lawful
	+ Charter crosses the threshold, but CL determines the content

|  |  |
| --- | --- |
| **BILL OF RIGHTS** | **CHARTER** |
| * Federal only \**NOT ALL AGENCIES COVERED*\*
* Applies to “persons”, “indivs”
* Property right
* Same reach as judicial review
* Overrides legislation *absent express intention*
* Quasi-constitutional document
 | * Fed/prov/territories
* Applies to “everyone”
* No property rights
* Applies to “gov’t” (different from JR) \**grey zone re: which gov’t agencies are subject*\*
* Overrides legislation *always*
* Entrenched in the Constitution
 |

### Step 1: Does the Charter apply?

* Must be government. Prob will not be an issue with most admin tribunals
* Applies to any body exercising statutory authority (*Blencoe*)

### Step 2: Is the party “everyone”?

* Includes “every human being physically present in Canada” (*Singh*)
	+ Ex. Refugee Claimants are entitled to PF (*Singh* 1985 SCC)

### Step 3: Is the party’s (i) life (ii) liberty, or (iii) security of the person deprived?

* **This is the threshold Q, if you don’t meet it you can fall back on admin law**
* Ex. Risk of return to dangerous country engages security of the person (*Singh*, *Charkaoui*)
* Ex. Forced separation of mother and children would have serious effect on parent’s psychological integrity and stigmatize her 🡪 engages security of the person (*New Brunswick v G(J)* 1999 SCC)
* Ex, Undue delay in resolution of HR complaint (resulting in stigmatization and impairment of psych integrity) could infringe security interest under s 7 (*Blencoe* 2000 SCC)
* Ex. Imprisonment/detention pending deportation engages liberty interest (*Charkaoui* 2001 SCC)
* **Key:** Will almost never be saved by section 1 cuz rights are very significant 🡪 not easily overcome as reasonable limit.

### Step 4: Once Charter is engaged, CL defines the content of PF

* USE BAKER STEPS TO DETERMINE LEVEL OF PF
	+ **Ex.** Suresh was no able to see or respond to the immigration officer’s recommendation to call him a danger to Canada and therefore deportable (*Suresh* SCC 2002).
		- Memo was used to justify deportation order 🡪 denial of s7 procedural rights (deportation to torture is VERY important to the party)
* **Qual:** Resort to the Charter should be reserved for cases in which ordinary statutory interpretation cannot provide a remedy
* **Oral Hearings:** Generally s 7 interests are so important that an oral hearing will be required when engaged (*Singh*)
	+ Where **credibility** is an issue, it will almost **always** be required
		- These cases will also require **discovery**
	+ **Ex.** In *Singh*, statute clearly barred an oral hearing without IAB conc that there were reas grounds to believe claimant could make successful claim in hearing 🡪 Charter trumps statute 🡪 oral hearing required to determine credibility under s7 even if IAB didn’t think they could make the case.
	+ **CounterEx.** *Suresh* also had s7 engaged but was not entitled to oral hearing (*Suresh* SCC 2002)
		- But did have right to disclosure (subject to privilege or other reasons for reduced disclosure) of materials on which Minister based decision (basically **discovery**) and right to reply to the claims
* **Reasons:** Impact on individual may be so strong that reasons must be responsive
	+ Seriousness of impact up = quality/justificatory ability of reasons must go up
	+ Ex. Demonstrate both that *Suresh* is a danger to Canada *and* that there were no substantial grounds to believe he would be tortured.
* **Right to Counsel:** Seriousness of interest (separation from fam) + complexity of proceedings (custody hearing) + limited capacity of individual (indigent) (see below for full discussion) = s 7 requires fair hearing which requires counsel (*New Brunswick v G(J)* 1999 SCC)
* **Undue Delay**: Could violate PF protected by s 7 (*Blencoe* SCC 2000)
	+ (i) if there were prejudice to the hearing caused by the delay (ie. lost witnesses) *or*
	+ (ii)if the delay caused significant psych harm or attached stigma to person’s reputation to an extent that *brought the human rights system into disrepute*.
		- **Ex.** BG govt minister accused of sexual harassment. 3 year delay of hearings. Killed political career. Depressed. Moved twice to avoid ppl was NOT sufficient to engage security interest. Was not sufficient to bring system into disrepute.
* **Ex Parte, in Camera Hearings:** Denies a fair hearing (violation of principles of fundamental justice PF)
	+ - Fair Hearing = (i) right to a hearing – yes, (ii) before independent, impartial individual – yes, (iii) based on the facts and law – no, (iv) with right to know the case and to have opportunity to respond – no (*Charkaoui*)
	+ **Def:** Closed door hearings in which neither person named or their lawyer can be presen**t**
	+ Could also inhibit party’s ability to (iv) know the case against them.
		- If case is based on undisclosed info (as it could have been in *Charkaoui*), then party doesn’t know all of case against them.
	+ **Ex.** Closed door JR of security certificates for terrorist ties w/o letting in their lawyer or them is not a fair hearing in an adversarial system cuz judge can’t test evidence.
		- Need representative of other side to challenge others 🡪 or NOT (iii) based on the tested facts and law

## Did the person get the fairness they deserve?

**Content of the Duty of Fairness**

* **General** (*Baker*)**:**
	+ (1) Did the circumstances provide a full and fair consideration of the issues?
	+ (2) Did the claimant/other with important interests have a meaningful opportunity to present the various types of evidence relevant to their case and have them fully considered?
* Generally duty includes (i) right to be heard and (ii) right to independent and impartial hearing

(but these CL principles could be overridden by legislation)

* **Key:** The **content** of the duty is **Flexible and Context Specific.** It *can include*:
* Right to notice of a potential decision
* Right to disclosure of particulars
* Right to make written submissions
* Right to a hearing w/in reasonable time
* Right to an oral hearing
* Right to counsel
* Right to call witnesses and cross-examine
* Right to written reasons for a decision
* Right to have evidence considered

\*Most rights are well-established, but *parameters/specifics* are open to argument\*

### Right to be Heard (General Hearing)

* **Def:** Opportunity for those affected to (i) put forward their views and evidence fully and (ii) have them considered by the decision-maker (*Baker*)
	+ **Key:** This will require some form of notice
		- Could require (dep on context) any combo of evidence admission, discovery, oral hearing etc.
* **Ex.** Sum of accidental lateness (phone couldn’t get through after she called early and was told to call back) + officer starting tenancy proceeding w/o claimant + no record of hearing (therefore no indication that critical evidence was reviewed) = BREACH of right to be heard (*Ganitano*) 🡪 failure to meet “high degree of fairness” required
	+ **Key:** Can consider several procedural breaches (no reasons, incomplete oral hearing, consider evidence fairly) to determine a broader breach of right to hearing.
* Opportunity to respond can be very informal in some cases
	+ **Ex.** Webb talking to her case worker saying she couldn’t keep control of her kids was sufficient (*Re: Webb*)

### Oral Hearing

* **Core:** Whether there is a credibility question in the issue (*Khan v UOttawa*) and adequate opportunity to be heard (Masters)
	+ Generally, if yes, then oral hearing will be necessary to det credibility
		- Ex. Law student trying to appeal her grade relied on her credibility (*Khan*)
	+ **Key:** If s7 CHARTER RIGHT is involved + serious issue of credibility
		- **=** fundamental justice requires oral hearing (*Singh v Canada* 1985 SCC affirmed in *Suresh v Canada* 2002 SCC)
* Ex. There was no such issue of credibility in *Baker* 🡪 no oral hearing did not violate PF
* Ex. *Nicholson:* Oral hearing was left to discretion of police board 🡪 could have been oral or written hearing
* Ex. *Masters* 1994 Ont Div Ct: Oral hearing not necessary when high-level bureaucrat was reassigned after found out he sexually assaulted 7 women.
	+ Party knew material allegations against his and had opportunity to be heard🡪that was sufficient

### Open Hearings

* Traditionally left to discretion of tribunals, but rules in BC ATA s 41(2)
	+ Rule: Oral hearings **must** be open to public unless:
		- Desirability of avoiding disclosure outweighs desirability of princ that hearings are open to public or
		- Not practicable for hearing to be open to public

### Reasons

* **For:** Necessary to ensure better decision making, reinforce public confidence, give opportunity for appeal (*Baker*)
* **Against:** Cost, delay imposed on system
	+ These negatives make req for reasons *flexible*
* **Factors:**
	+ More important to give reasons as issue becomes more important for individual
		- Ie. employment or continued residence in Canada
		- If **Charter s 7** is involved, then need for reasons very high
	+ Also more important if there is statutory right to appeal
		- (sum of importance + appeal should = reasons required)
			* They did in *Baker*
		- Significant legal rights at stake (beneficiary of pension) + court-like process + final step = reasons required (*Clifford*)
* **Sufficiency:** “must provide an adequate explanation of the basis of the decision.” Must (*Clifford* 2009 ONCA):
	+ (i) identify the issues in the case, and
	+ (ii) grapple with them to provide answers
	+ Reasons need to show why the decision was made and permit effective JR
		- **Qual:** Do NOT need to:
			* Reflect perfect legal language (cuz often non-lawyers) or
			* Refer to every piece of evidence
				+ As long as there is enough to base a conclusion on
	+ **Ex.** Officer Lorenz’s notes with caps lock and non-PC terms were sufficient reasons (*Baker*).
	+ **Ex.** OMERS reasons that did not address every piece of evidence were sufficient. But they explained why trib came to its answers and allowed effective JR (*Clifford*).
	+ **Ex.** Letter stating that HR complaint was dismissed b/c w/o merit was sufficient reasons (Green)
	+ **Ex.** Reasons are insufficient if they don’t address the primary issue of credibility (LSCU v Neinstein)
	+ **Ex.** If a tribunal is going to reject evidence, some rational basis must exist and to some extent must be articulated (Guttman) – lawyer disbarred – tribunal disregarded personal problems and reference letters.
	+ **Ex.** Disciplinary hearing reasons were insufficient b/c didn’t reference any provision she breached and didn’t address credibility.
	+ **Ex.** when a specific complaint is made, the reasons must engage with the argument presented.
	+ **Charter:** If reasons required, Charter s 7 may also require the justificatory ability of reasons must also become stronger with increase in importance of interest.

### Notice

* Without notice, other hearing rights cannot be exercised
* Check enabling statute/omnibus statutes!
	+ BC ATA s 11(2)(g) allows tribs to make rules on form, time and manner of service (for applicable tribs)
* **Honour of the Crown:** May require more than simple notice
	+ Ie. Fiduciary duty with aboriginals duty to consult (*Taku River* *Tlingit First Nations* SCC 2004; Haida Nation SCC 2004)
* **Form of notice:** Written notice will be required in MOST cases
	+ BC ATA s 19 seems to assume written is required (method that allows proof of receipt)
	+ May require oral notice in some cases with less PF necessary
* **Manner of Service:** Will probably require personal service direct to party.
	+ BC ATA s.19(1), 20 address the forms – can be mail, electronic transmission or “another method that allows proof of receipt.
	+ **Qual:** Pubic notice is prob sufficient for admin decisions affecting large # of ppl
		- Test in BC: When there are so many parties to an application that other forms of service are “impracticable” (BC ATA s 21)
* **Time:** Notice must be given sufficiently ahead of hearing
	+ **Test:** Notice must be given long enough before the date of the hearing to allow the party time to **decide whether or not to participate and prepare**
	+ BC ATA s 19(1) gives dates when notice is presumed be received
* **Content:** Must give enough info on hearing to enable party to prepare a response.
	+ **Penalties:** Notice w/o sufficient info on possible penalties may be insufficient (*R v Ontario Racing Commission* SCC 1970)
		- Ex. Notice stated trainer’s presence was required to explain horse’s drug test, but didn’t say he could be suspended at hearing (*Ontario Racing Commission*)
	+ **Reason for Hearing:** Misleading info on the reason of hearing may be insufficient notice.
		- **Ex.** Prisoner notice of movement to restricted unit implied one misconduct was being considered, but several actually were (*R v Chester* Ont HC 1984).
* **Notice During Hearings:** May be an issue combining the previous areas
	+ **Ex.** *Canada (AG) v Canada (Krever Commission)* SCC 1997- gave notice to several parties that they would be named for misconduct in inquiry final report. Challenged on jurisdiction and late delivery.
		- Giving notice mid-inquiry was w/in jurisdiction
		- Late service was fine cuz applicant’s still had adequate time to call evidence and make submissions

### Discovery

* Some tribs may have power to compel parties to reveal info to other side
	+ **Qual:** Must be FIRMLY ROOTED IN ENABLING STATUTE. If not courts will not presume this power for tribs.
* Check BC ATA s 11(2) for tribs that can make rules on pre-hearing receipt and disclosure of evidence
* Ex. Human Rights tribunals in Ont are compelled to disclose statements made by witnesses that do not testify (*Ontario (HRC) v Ontario (Board of Inquiry into Northwestern General Hospital* Ont Div Ct 1993)
	+ HRC counsel was compelled to disclose complainant’s initial statements on basis of:
		- Statute: Ontario Statutory Powers Procedure Act (SPPA) s 8 – where conduct or competence of a party is an issue, party is entitled to be furnished w/reasonable info to any allegations pre-hearing
		- Statutes: SPPA s 12 – Trib can require any person to give evidence at a hearing or to produce relevant evidence
			* Like BC ATA s 39
* CounterEx. Mainly economic regulatory bodies w/o HR may have more discretion to decline disclosure (*CIBA-Geigy Ltd v Canada (Patented Medicine Prices Review Board)* 1994 FCA ( stinchcome doesn’t apply to economic regulation)
	+ Price Review Board refused company request to disclose a staff report to det if a drug was being sold at an excessive price
* **Ex. Discovery Statute Provision:** Ontario SPPA s 5.4(1) – if a trib’s rules deal with disclosure, the trib can make orders for exchange of documents at any stage before hearing is complete
	+ Like BC ATA s 24.3(1)(b)

### Right to Counsel

* No absolute CL right to counsel. Right is fact-dependant
* **Gen Rule:** The more complex the inquiry + the more severe the repercussions on individuals involved = more likely the right to counsel (*Re: Parrish* FC 1993)
	+ **Ex.** Parent was entitled to counsel in custody hearing cuz of unacceptable risk lack of counsel poses to determining child’s best interest and thereby violating mother’s and child’s right to security of the person (s.7)( *New Brunswick v G(J)* 1999 SCC)
* **Counsel In Prison:** Consider (*R v Secretary of State for the Home Dept ex p Tarrant* 1984 UK):
	+ Seriousness of charge and potential penalty
	+ Points of law likely to arise
	+ Capacity of prisoner to make own case
	+ Need for speed and fairness b/w prisoners
* **S 7:** Engagement of s 7 can suggest increased need for counsel (as sign of more severe repercussions) (ie. *New Brunswick v G(J)* 1999 SCC)
	+ - **Ex.** custody decision over indigent woman’s three young children
	+ Does NOT entitle right to counsel for **routine information gathering (***Delghani v Canada* 1993 SCC)
		- Ex. During an examination at a port of entry

### Admissibility of Evidence

* BC ATA s 40 allows admission of some evidence not admissible in court.
* **Rule:** Party must have the **opportunity to make the case** (*UQTR v Larocque* SCC 1993)
	+ **Ex.** Arbitration award quashed cuz arbitror wrongfully refused to admit evidence relevant and crucial to the defence (*ibid*)
* **Rule:** Cannot omit evidence that adds a **dimension of critical importance** (*Timpauer v Air Canada* FCA 1986)
	+ **Ex.** LRB refused to hear medical experts testify on effects of tobacco smoke on complainant’s health. This was denial of natural justice *despite strong privative clause*
* **Hearsay:** Generally more admissible (more relaxed rules)
	+ Ex. In criminal case, hearsay about sexual assault of an infant by a doctor was admitted, and admission was also sustained in ensuing professional disciplinary hearing (*Khan v College of Physicians and Surgeons of Ontario* 1992 ONCA)
	+ **Qual:** Exclusive reliance on hearsay may be grounds for reversal (*Bond v New Brunswick* 1992 NBCA)
	+ **Qual:**Weight planed on hearsay matters
		- **Ex.**Hearsay admitted but given little weight in trib dec to deny renewal of a real estate license (*Re: Clarke and Superintendent of Brokers Insurance and Real Estate* 1985 BCCA).
		- **Ex.**Evidence before the US Securities Exchange Commission was allowed in BC Securities Commission Hearing (*Re: OEX Electromagnetic INC and BC Securities Commission* 1990 BCCA)

### Cross-Examination

* Right to cross enshrined in some statutes, subject to some limitations
	+ **Ex.** Refusal to allow a newspaper company to cross a union applying to become a bargaining agent was **denial of basic justice** cuz cross was most effective way to test the merits of the union’s application (*Re: Toronto Newspaper Guild and Globe Printing* 1951 Ont HC)
		- **Qual:** If there is another **equivocally fair method** of answering the case, it may meet the requirements of natural justice (*Re: County of Strathcona* 1971 Alta SCAD)
			* **Ex.** Opportunity to correct or contradict statements prejudicial to their view through written responses was sufficient in a decision to rezone land (*ibid*)
* BC ATA s 38(2) – Trib may limit cross when satisfied it has been sufficient to disclose all issues
* **Cases that rely almost entirely on hearsay**: Denial of right to cross alleged victim was denial of natural justice (*Re: B and Catholic Children’s Aid Society of Metro Toronto* 1987 Ont Div Ct)

## Independence, Impartiality & Bias

**For a fair decision, decision maker should give no undue preferential treatment or be driven by preconceived notions**

* Bias = partiality towards a particular outcome
* Impartiality = the ideal state of mind, free from influence
* Independence = the means to achieving impartiality, refers to structural factors and relationships
	+ **Factors**: how the agency is put together, are there overlapping roles of decision makers, pressure from boss, etc.
	+ **Full Judicial Independence:** Consists of three parts:
		- Security of tenure
			* Judge for life till 75
		- Financial security
			* Judges that are paid well can be less easily bribed
		- Administrative control
	+ Objective factors should be relied on for a finding of bias
* **Sources of guarantee:**
	+ Common law principles of natural justice:
		- *Nemo judex in sua causa debet esse* (no one is fit to be the judge in his own case)
			* If you have an interest in the outcome, you can’t be judge
				+ Ie. Personal financial interest, bribery, organized crime
		- *Audi alteram partem* (hear the other side)
			* Participatory rights in the decision 🡪 can’t go into case with mind made up.
			* Adversarial context of proceedings
	+ Constitutional Law (*Charter*)
	+ Unwritten constitutional principles
	+ Quasi-constitutional statutes (*Bill of Rights*)

Reasonable apprehension of Bias (RAB) Test **(*Committee for Justice and Liberty SCC 1978*)**

* + **Test Part 1**: RAB must be:
		- Reasonable,
			* Objectively reasonable
		- held by a reasonable and right-minded person,
		- applying themselves to the question and obtaining thereon the required information
	+ **Test Part 2:** What would an informed person
		- viewing the matter realistically and practically, and
		- having thought the matter through, conclude?
	+ **Qual:** Based on perception, but a real likelihood is required (not speculation) so you must look to the objective factors that can be assessed
	+ **Q:** Are you “sufficiently free” of factors that could interfere with your ability to make impartial decisions?
* **Bias is a part of procedural fairness (not substantive review) but don’t use *Baker* factors**

### Was there an individual bias?

* **Overall: there is no free-standing guarantee of tribunal independence because of the fundamental difference between tribunals and courts** (*Ocean Port Hotel*)
	+ The admin tribunals are not fundamentally distinct from the executive
* **Degree of independence required is determined by the legislature/enabling statute, if it’s silent, CL can fill void** (*Ocean Port Hotel*)
	+ *Ex. Here the statute specifically set out the part-time fixed term appointment structure. Board members could be removed at pleasure. The only full time employee was the Chair who decided who sat in which dispute. This was OK because statute was valid and trumps common law.*
* General public will lose faith if it is perceived that decisions were based on bias/pressure rather than the facts, so mere perception of bias is sufficient to have a decision quashed if it meets the RAB test in *Committee for Justice and Liberty*
* **Factors:** Tribunals are not courts, so the approach to RAB must be contextual because of the wide variety of organizations and mandates (*Valente*, *Ocean Port Hotel*)
	+ Look at: nature of tribunal, the interests at stake, and other indices of independence such as oaths of office (*Matsqui*)
	+ Three components to independence in the judicial model apply to assessing tribunals but in a more flexible way (*Matsqui Indian Band*):
		- Security of tenure
		- Financial security/remuneration
		- Administrative control (allocation of workload to not put in compromising situations)
* **Look at how the tribunal operates in practice, not theory** (*Matsqui*)
* **Tenure:** Independence does not mean tribunal members have to be appointed for life, but adjudicators can’t be fired at any time by executive (*Régie*)
	+ *Ex. Fixed term appointments acceptable because they allowed dismissal only for specific things and dismissal could be challenged in court.*
	+ **Qual:** common law can’t overrule an explicit valid statutory structure of appointment even if it provides at-pleasure appointments (*Ocean Port Hotel*)
		- Pyramid of power issue
	+ Maybe: When a decision is at the “high end of the adjudicative spectrum” then at-pleasure appointment structures may be struck down (*McKenzie*)
		- *Ex. Residential tenancy arbitration at high end because of court-like powers and procedures which could require a higher degree of independence. At pleasure removal was against rule of law, need cause for dismissal to guarantee independence.*
		- Note this was a BCSC decision and seemed to overrule *Ocean Port*, issue was moot at appeal and not dealt with, so questionable as good law
* All that may be required under procedural fairness to terminate people with at-pleasure appointments is notice and an opportunity to respond (*Keen*)
* **Common Independence, Impartiality & Bias Situations:**
	+ The decision maker is your uncle, the minister’s cousin, appointed by a political party, politically active, internally disagrees with government’s current policy direction, supports an advocacy group, has prior involvement in the case, has prior relevant experience, is involved at several stages, has well-known informal views contrary to one party, has made public stmts contrary to one party
	+ The majority of agency personnel: are appointed by a political party in power, are dismissed by a new political party in power

### Was there an institutional bias?

1. **Looking at institutional factors, could there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases (*Geza*, using test developed in *Lippé*)**
2. **Even if there is not a substantial number of cases, you may still argue on an individual case bases if institutional bias not found (*Geza*)**
* Contextual analysis looking at structural independence and agency procedures
	+ Look at relationships between tribunal/board and bureaucracy (*Geza*)
	+ Policy vs. adjudicative function (*Geza*)
		- Policy goals may interfere with adjudicative independence of the tribunal, but tribunals are created by government with specific policy agendas (tension here)
		- Are there safeguards in place to prevent potential policy bias in adjudicative function?
	+ Ability of the tribunal to impose sanctions
	+ What stage of the hearing are you at?
	+ How must contextual knowledge do the decision-makers have?
	+ Is the tribunal acting in a policy manner or a truly adjudicative manner?
* Methods used to promote consistency have given rise to allegations of bias: full board meetings (*Consolidated Bathhurst, Tremblay*) and development of “lead” cases (*Geza*)
	+ Institutional constraints recognized for tribunals – need to adopt policies for efficiency and consistency (*Consolidated Bathhurst*)
	+ Coherence a goal to be fostered (*Consolidated Bathhurst*)
	+ Full board meetings need two safeguards (*Consolidated Bathhurst*):
		- Can’t discuss facts, only policy
		- Disclose any new grounds raised in meeting to parties so they can respond
		- Consultation must be voluntary (*Tremblay*)
	+ Watch for pressure from boss in decision – did one person require the consultation or did the Board as for it? (*Tremblay*)
		- Pressure to decide against conscience and opinions is the relevant issue
* Full Board meetings should not be aimed at reaching consensus, the ultimate decision must rest with the decision-maker alone and not with participation from others (*Tremblay*, *Consolidated Bathhurst*)
* Delegatus non potest delegare - the delegated cannot delegate further.
* He who hears must decide

# Standard of Review

**This looks at the substance of the decision to determine amount of deference court should be giving to decision maker**

**Two steps:**

* 1. **Determine SOR: what SOR are they entitled to?**
	2. **Apply SOR: did the tribunal come to proper answer?**

### Determine Standard of Review (*Dunsmuir* + *Pushpanathan*)

**1. Has SOR already been determined through existing jurisprudence? There is a respect for judicial review precedent (*Dunsmuir*)**

* If yes, determine category below. If no, go to step 2: pragmatic/functional approach.
	+ **Reasonableness (some deference)**
* Questions of fact, discretion, or policy will *usually* automatically allow for deference (*Mossop*)
	+ Same will usually apply for mixed fact and legal issues (*Dunsmuir*)
* Privative clause gives strong indication for deference (not determinative)
	+ Presence/absence of PC, and an evaluation of its strength, enable court to uncover direct evidence of Parliament’s legislative intent
* Interpretation of own statute or statutes closely connected to function usually suggests deference (*CBC*)
* Particular expertise in application of common law or civil rule may also warrant deference (*Toronto v. CUPE*)/regulatory function
	+ - Ex: labour law adjudicators
	+ **Correctness (no deference)**
		- Issues of general law
			* **Test:**: Is it a question of law that is:
				+ (i) of central importance to the legal system and
				+ (ii) outside the specialized area of expertise” will always attract correctness as SOR
				+ **Qual:** Issues below this standard may attract reasonableness standard
			* **Purp:** such questions require uniform and consistent answers (basis=RoL)
				+ Ex: *Toronto v. CUPE* – issues of res judicata and abuse of process
		- Legal issues covered by this SoR include:
			* Background common law, civil law concepts
				+ Ex: “alienation” in *Bibeault*
			* Constitutional issues re: separation of powers are always correctness
				+ Why: role of s. 96 courts in interpreting our constitution
			* Charter issues are always correctness
			* True questions of jurisdiction must always be correctness
				+ Jurisdiction Def: Whether or not the tribunal had authority to make the inquiry
				+ Where tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter 🡪 must be correctness or the determination is ultra vires
				+ Ex: *United Taxi Drivers Fellowship of Southern Alberta* – admin had to determine if municipality could enact bylaw limiting # of taxi licences
			* Questions regarding jurisdictional lines between two or more competing specialized tribunals
				+ Two tribunals with potentially same subject matter, ex: human rights and residential tenancies
			* Human rights-related questions attract a correctness standard
				+ Ex: “family status” in *Mossop*

**2. Use Standard of Review analysis (Dunsmuir), Pushpanathan factors will still be helpful**

* Privative clause – gives rise to a strong indication that reasonableness should apply
* Mixed fact and law – where law can’t be determined separately = reasonableness
* What law are they considering – if enabling statute or its within expertise = reasonableness; jurisdictional question = correctness
* Anything else that requires special expertise = reasonableness
* Question of law – central importance/outside the expertise = correctness (otherwise could be reasonableness)
* Constitutional Questions (division of powers) = correctness

**(*Pushpanathan)*:**

#### 1. Presence of a privative clause

* *Enables court to uncover direct evidence of Parliament’s intended roles for both court and tribunal*. The privative clause is a statutory provision intended to restrict or preclude interference by Court in the decision making of an administrative tribunal. PC is made up of a finality clause and ouster clause.
	+ Three types of PC:
		- 1. Full (this equals a curial defence)
		- 2. Partial (ex: finality only, or ouster only)
		- 3. Statutory right of appeal (suggests very little deference, because it explicitly provides for judicial intervention)
* Pointing towards **reasonableness**:
	+ Strong PC: indication of legislature’s intent that administrative decision maker be given deference.
* Pointing towards **correctness**:
	+ Weak PC: clause permitting appeals suggests more searching for standard of review – less deferential to decision making body
* Silence 🡪 neutral (*Pushpanathan*)
* Privative clauses: in application (fairly far down the pecking order)
	+ Reasons why PC’s never play a determinative role
		- Even with a PC, you can never have a total ban on judicial review (*Crevier*)
		- Necessarily subordinated to other steps
			* Macklin: Have to understand expertise of tribunal before figuring out where PC fits
				+ Can’t apply a privative clause if tribunal isn’t expert in area

#### 2. Expertise

* *Informs the courts perception of the relative strengths of the tribunal and the court to deal with the matter*.
	+ Note: This is the most important factor in the *Pushpanathan* approach (*Southam*); but was specifically noted to no longer be the most important factor in *Dunsmuir*. What is law now?? (not sure)
		- Why: expertise is case specific; legislature can’t say what role expertise will play in each individual case
		- Remember: courts are the ones who define “expertise”
* Subject matter of expertise in question can be predictive:
	+ More deference: economic, financial, technical tribunals
		- Why: requires expertise in fact, not law
		- Law societies are deferred to (*Ryan*)
			* Lay person involvement makes them different from other law-related boards
			* Lawyers on law society boards are thought to be “in tune” with practice of law
	+ “Splitting” and “lumping” as deference: ex: labour boards, human rights commissions
		- Lumping is a powerful tool: gives impression of coherence, legitimacy
		- Splitting is a powerful tool for: collateral questions, nature of expertise, questions about SOR, questions of law vs. fact
			* This is a holistic, middle way approach, ex: defer to labour board on question of fact, but not on law.
	+ Less deference: questions of general law
	+ No deference: questions related to the Charter
		- Standard: correctness
* Assessing the relative strengths of court vs. tribunal: 3-step process
	+ 1. Expertise of tribunal
		- What type of expertise does the tribunal have?
		- Does the tribunal have specialized knowledge that the court does not?
			* Is the board in a policy-making role or does it administer a regime? (*Pezim*)
			* Look at board composition (statute, not individual members)
				+ Qualifications (*Southam*, re: economists)
				+ Security of tenure vs. at-pleasure appointments
				+ Who appoints members? (*Baker*, *Pasienchyk*)
				+ Other factors

Tripartite structure (where at least 1/3 of board chosen in accordance w/ democratic election procedures)

Professional staff

Elected officials (ex: Baker. Minister or delegate?)

* + - Are there any procedural aspects to consider?
			* Tribunals can interpret law, but cannot create/change it
		- What are the non-judicial means of implementing the Act?
	+ 2. Expertise of court
		- What type of court is it?
			* Some courts have specialized knowledge, ex: tax court
		- Does the court have expertise that the tribunal does not?
			* Courts have expertise in law and its application
				+ *Via Rail*: If you go far enough, you can probably find a question of general law or specific law depending on how the question is framed

Ex: in *Pushpanathan*, could frame it as an issue of international law (UN convention) or domestic criminal law (drug trafficking, etc)

* + - Are there any procedural aspects to consider?
	+ 3. Look at question in case and determine who has more expertise
		- Pointing towards **reasonableness**:
			* Tribunal has more specialized expertise than court with the issue (*Southam*)
			* Tribunal is interpreting its own statute or statutes closely connected to its function
			* Note: there is concern over tribunals developing tunnel vision
		- Pointing towards **correctness**:
			* Court has more expertise

#### 3. Purpose of the Act and the particular provision

* **More deference** to *tribunal* if purpose of act is polycentric
	+ Polycentric: balancing multiple interests; contains significant policy elements; legal standards are vague/open-textured
		- Judges have little expertise in these areas, thus the deference
* This is not always straight forward; to help, look to the extent to which the determination will have precedential value
	+ *Pushpanathan* and *Baker*: “serious question of general importance” has clear precedential value if it requires certification
* Direct Charter challenge 🡪 always correctness

**Standard of Review and Provincial Statute**

* **Note:** *ATA* still has three standards of review: reasonableness, patent unreasonableness, correctness
* **S. 58 of *ATA* legislates SOR**: ex: if you have \_\_\_ type of question, the SOR is \_\_\_.
	+ **See *ATA* section** on how to deal with *ATA* and SOR

### Apply Standard of Review

**Overarching question: Did the legislature intend the court to defer to the agency on this issue? Case law has moved towards a purposive, contextual, broad-based approach**

* **Must** use statutory interpretation when applying SOR. Use these lenses:
* 1. Modern: look to context, scheme, object, and intention of Parliament
* 2. Positivist: singular and unified meaning that is stable over time: what is legislative intent?
* 3. Normative: must address social values/judgments
* The Two Standards of Review (post-*Dunsmuir*)
* **1. Correctness – less deference to tribunal**
	+ Goal: to reach the (singular) “right” answer
		- Where applicable, the correctness standard “promotes just decisions and avoids inconsistent and unauthorized application of law” (*Dunsmuir*, para 50)
	+ Courts will:
		- Treat administrative bodies like inferior tribunals who have erred in interpretation
		- Impose/substitute their own answer – original decision is a nullity
		- Judges get the last word – use their own reasoning process
* **2. Reasonableness – more deference to tribunal and respect legislative intent**
	+ Goal: focus on whether decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law, and whether the process was justifiable, transparent, and intelligible (*Dunsmuir*); reasonableness is a “big tent” (*Khosa*)
		- ‘Reasonableness’ isn’t a really a “goal”, but a “characterization” (*Ryan*)
	+ Process courts undertake here (*Ryan & Dunsmuir*):
		1. **Process:** does the decision reflect a **justifiable, transparent and intelligible** process?
			- Courts give a somewhat probing examination of reasons; court will give respectful attention to reasons offered or could be offered
		2. **Outcome:** does the decision **fit within a range of possible acceptable outcomes** defensible by law
			- If decision was ‘reasonable’:
				* Courts will stay close to tribunal’s reasons
			- Will find decision ‘unreasonable’ if:
				* Not supported by reasons that can stand up to this “somewhat probing examination”
				* Not supported by tenable reasons
				* Not properly grounded in evidentiary record

# The Charter and Substantive Review

## Multani

Orthodox approach – If there is a prima facie infringement of a Charter right established – use Charter analysis. If not – use admin law. (USE ORTHODOX APPROACH ON EXAM)

Dissent – would have used Admin law approach. Always do admin law analysis first because it is best designed to deal with tribunal decisions. Charter values can be taken into account in the admin law analysis.

## Conway

**The new test:**

**1. Does this particular tribunal have the jurisdiction to grant Charter remedies generally? Look at whether it is “authorized to decide questions of law” and has not been excluded from Charter jurisdiction by statute.**

**2. Does the tribunal have the statutory authority to grant the particular remedy? Consider:**

* + - the scope and nature of the Board's statutory mandate and functions
		- Legislative intent
		- Q: ask does the particular remedy fall within the statutory scheme of the enabling statute

## Discretion

* **Discretion** **and SOR**
	+ Traditional abuse of discretion grounds were distinct from SOR
	+ Discretion introduced into SOR in *Baker*, and modified in *Suresh*
		1. How: weight and discretion
			- *Baker* marked the end of law/discretion dichotomy – substance of discretion can now be subject to reasonableness standard, not just pre-*Dunsmuir* P.U. standard
			- *Baker* said you can reweigh considerations after SOR was determined, but *Suresh* says you don’t reweigh
			- Reviewing court must limit itself to ensuring that only relevant considerations have been taken into account
		2. Look at how the decision was made
			- This along the lines of the old ‘patent unreasonableness’ standard, but now includes ‘reasonableness’. ‘Correctness’ is highly unlikely to be a SOR for a discretionary decision.
	+ **Test**: how much deference to give to a discretionary decision? Look to:
		1. Statutory language: couched in objective terms (“shall” or “may”) – is the discretion related to a specific purpose or granted for more general purposes?
		2. Nature of the interest affected: does our legal system normally give a high degree of protection to the interest?
		3. Character of the decision: are there effective alternative checks to prevent abuse of discretion?
		4. Character of the decision maker: expert tribunals, governor in council, minister of the Crown warrant greater deference
		5. ON AN EXAM**:**
			- 1. If discretion comes up, note that and make a case for it by looking at language; whether objective or subjective discretion; etc
			- 2. *Pushpanathan* analysis – and it’s going to be really hard to find a grant of discretion that comes with a correctness SOR attached – “discretionary decision will generally be given considerable respect” (*Baker*)
* **Two types of discretion:**
	+ “A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction” (*Dunsmuir*)
	+ 1. Power to decide individual cases (*Baker*; *Roncarelli*, *Suresh*)
		1. Gives the decision maker the ability to make a decision which is adapted to that set of facts and compatible with the legislative or regulatory scheme in which the decision maker operates
		2. Deals mostly with foreseeability/flexibility issues
	+ 2. Power to adopt general rules/norms/bylaws/regulations/orders/ etc governing a market/regulated industry (*Public Mobile*)
		1. Need for expertise that Parliament does not always have
		2. Responds to the problem of time (delegating the rule-making power increases efficiency, flexibility)
		3. Also has implicit power to adopt non-binding rules (“soft law”)
* **How to recognize discretion:**
	+ **Discretion in statutory language**
		1. Authorizes administrative action and/or decision aimed at small group
		2. Language: statute uses “may” instead of “shall”, for instance
		3. Delegation of broad powers, often through vague language
			- Ex: Council may make provisions for “good government” or “good rule”
	+ **Objective grant of power**
		1. Administrative decision maker gets some discretion, but court ultimately decides if it made right decision
		2. Governor in Council may make such regulations “as necessary”
		3. Reviewing court can determine if regulations are necessary
	+ **Subjective grant of power**
		1. Uphill battle for court to do anything but defer because of broad grant of discretion
		2. Gov in Council may make such regulations “as are deemed necessary” or “advisable” or “expedient”
		3. Tribunal may take into account what is relevant “in its opinion”
		4. Here there is a presumption of deference from reviewing court
* **Rule: “**A discretionary decision must be made through the weighing of considerations pertinent to the objective of the tribunal. No legislative act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, regardless of the nature and purpose of the statute. Thus, any clear departure from the statute’s purpose or object is an unreasonable exercise of discretion.” (*Roncarelli*)
	+ **Objects and Purpose:**
		1. **1. Determine the objects and purposes of the statute**
			- Look at the statute: if there is a provision which sets out the purpose, go there (might be in preamble)
			- If no purpose provision, go to Hansard (Lamer J. did this in *Mossop*)
			- Look at statutory construction
			- What do provisions suggest the overall purpose of the statute is?
		2. **2. Determine the relevant and irrelevant factors**
			- The purpose of the statute which gives discretion is key; factors relating to other connected statutes could be relevant
		3. **3. Determine whether the decision maker considered relevant factors and exercised their discretion within the limits of the statute**
			- Did the decision maker have a view of what the purpose of the statute was and was it a reasonable view?
			- Did the decision maker consider and weigh factors relevant to this purpose?
				* Irrelevant factors (*Roncarelli*)
				* Left out a relevant factor (*CUPE*)
* **Abuse of Discretion: Common Law Grounds for JR**
	+ Consider these alongside the objects and purposes test (pre-*Baker*)
	+ Common law grounds of JR that apply to all exercises of discretion
		1. Bad faith
		2. Wrongful delegation of powers
		3. Fettering discretion by laying down a general rule (not responding to individual situations)
		4. Acting under the dictation of another
		5. Non-compliance with Charter
* **The *ATA* and Discretion**
	+ 58(4) and 59(4) govern discretion
		1. Standard: “patent unreasonableness”
		2. “a discretionary decision is patently unreasonable if the discretion:
			- a) is exercised arbitrarily or in bad faith;
			- b) is exercised for an improper purpose;
			- c) is based entirely or predominantly on irrelevant factors;
			- d) fails to take a statutory requirement into account.”
	+ *Khosa*: it is constitutionally possible for a legislature to define SOR
		1. Legislature didn’t do this in the *Federal Courts Act*, but SCC didn’t look at ATA in that case
		2. If there is a BC tribunal, where ATA applies

# BC Administrative Tribunals Act

* 5 main Foci: **independence, accountability and appointments; institutional design & statutory powers of tribunals; dispute reolution; Charter and Human Rights Code jurisdiction; SoR**
* S.1 – ‘DRP’ means without prejudice, ‘privative clause’ only means a **strong privative clause**, ‘tribunal’ not all tribunals are subject to ATA (self-governing bodies are not) only ones whose enabling statute says it applies
* S.2 – appointment process: trying to **legitimize the process**, merit based appointment of chair and members
* S.8 – chair/member of tribunal can be dismissed **for cause**
* s.26 – chair can set up the tribunal and set up panels
* s.27 – chair can hire staff – such as lawyers etc.
* s.56 – statutory immunity for decisions made at tribunal
* s.11-13 – **power to make** rules: around **PF** (very broad powers); **practice directives** must be made (s.12), practice directives may be made (s.13)
* s.14-61 – different kind of tribunal powers, given **more power than previously** – to know which apply to specific tribunal – must look at chart

Substantive Parts:

* **s.43-46.3** – power to consider **Charter, Constitution and Human Rights Code**; not all tribunals can consider these things
	+ **s.43** – power to consider **constitutional** questions, don’t have to exercise it, can send the question to the courts (only applied to Security Comm and Labour Relations Board)
	+ s.44 – tribunal DOES NOT have jurisdiction to consider constitution
	+ s.45 – no jurisdiction for Charter but can consider federalism matters (Employment Standards, Farm Industry, and HR)
	+ s.46 – notice to AG for constitutional questions, 46.1 – power to decline jurisdiction to apply HR code, 46.2 – limited jurisdiction to decline jurisdiction to apply the HR code, 46.3 – no jurisdiction to apply HR code (about half) – could be problematic, but if HR matter is important bring it to HR tribunal
* s.57 – **time limit**
* s.58 - if **privative clause** present (strong privative clause) – for findings of fact, law or discretion within their jurisdiction SoR is **patent unreasonableness**; applying common law of natural justice and PF SoR is fairness; all other things are correctness; requirements of bad faith in exercising discretion found in subsection (3)
* s.59 – **NO privative clause**: SoR is **correctness** for everything except discretion, findings of fact and PF; must not set aside finding of fact – SoR is reasonableness; discretionary SoR is patent unreasonableness (look at previous subsection 3), common law rules of natural justice and PF based on fairness

## Khosa (Example of post Dunsmuir analysis)

(2009 SCC) – Absent clear Stat language on SoR apply *Dunsmuir*

Facts: K immigrated to Canada in 96 when he was 14, in 2002 he was found guilty of criminal negligence causing death after a street race ended badly, a valid removal order was made, he appealed the order to IAD who denied special relief under humanitarian and compassionate grounds (s.67(a)(c)), FCA reviewed based on reasonableness simpliciter and overruled the decision – found overemphasis on ‘street racing’ and didn’t explain their ‘possibility of rehabilitation’ finding which was contrary to criminal court, SCC restored IAD ruling

Majority (Binnie)

* S.18.1 sets out threshold – shouldn’t make it a procrustean bed
* **s.18.1 of the *Federal Courts Act*** deals with *grounds* for review NOT the level of review, however s.18.1(4)(d) does provide legislative guidance on the degree of deference to be given to the IAD’s **findings of fact**
* S.18.1 provides instructive language – but don’t accept that it binds them
* *Dunsmuir* requires substantive analysis of decision considering nature of the question: here the IAD is required to consider broad policy considerations to the facts, this power is given to IAD not the courts – **DEFERENCE** must be given (FCA did not give enough), decision was within the range of reasonable outcomes – IAD decision should stand
* IDA found the crime ‘extremely serious’, were especially concerned the he never acknowledged it was street racing and found chances for rehabilitation were neutral (even though criminal court found he had good chance for rehabilitation) dissent focused on mitigating factors of offence

Analysis:

* First step is to look at the **enabling statute** – see if it has privative clause or suggests a certain level of JR/deference
* Disagrees with Rothstein who stated absent a privative clause, reviewing court should apply correctness standard – *Dunsmuir* established **deference is required with or without privative clause**, deference to findings of fact, policy consideration and even how they interpret their own statute – based on the expertise of the tribunal
* S.18.1 must be interpreted flexibly (incorporating the common law/*Dunsmuir*)to allow for the vast array of circumstances in which it applies (all federal bodies/tribunals)
	+ although the French version is not permissive and the English version is the need for a permissive interpretation is clear from the scheme and context of the act (*may* grant relief)
	+ (4)(a) grants ability to review for errors of jurisdiction – *Dunsmuir* says this is based on correctness
	+ (4)(b) natural justice and PF = correctness (*Dunsmuir*)
	+ (4)(c) errors of law = correctness, unless law is from enabling statute = reasonableness (*Dunsmuir*)
	+ (d) errors of fact finding = high deference/reasonableness (*Dunsmuir*)
	+ (e) mixed = either, (f) any other error of law (new grounds) – these provisions clearly need to be interpreted through the common law/*Dunsmuir* because they are silent as the SoR

“As stated at the outset, a legislature has the power to specify a standard of review, as held in *Owen*, if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review, **(b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters** (as well as other factors such as an applicant’s delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth).”

**Standard of Review Analysis:**

* STEP ONE: look at existing jurisprudence – here both lower courts used a version of correctness standard
* STEP TWO: also supports reasonableness standard – must look at:
	+ presence of privative clause,
	+ purpose of tribunal as determined by enabling statute,
	+ nature of the question and
	+ expertise of tribunal
* Good example of post-dunsmuir approach: Step One – look at precedence (would be enough, but go on anyway), Step Two – look at a set of factors (similar to *Postpanathan* rather than obscure factors from *Dunsmuir*) – all suggest reasonableness standard
* Reasonableness standard: requires deference, must determine if decision falls within a range of reasonable outcomes – falls within principles of justification, transparency and intelligibility
	+ Remedy sought is discretionary remedy to vary a valid removal order, Fish J. probes the analysis too much
	+ Decision was justified, transparent and intelligible – they may have made too much of ‘street racing’ and focused too little on rehabilitation prospects, but that was within their power to do
* Reasonableness is a **single** standard (not a spectrum like they suggest in *Dunsmuir*) that is coloured by the **context** – can’t re-weigh the evidence

Concurring in Result (Rothstein):

* Argues that since s.18.1(4)(d) specifically requires deference all other grounds should NOT require deference
* Believes the deference required when privative clause is present is NOT required merely by creating the tribunal (and not putting a privative clause in place) – there is *no tension* between legislatures and the court
* Thinks privative clauses are really important – the ONLY way legislature can express desire for deference
* Expertise would be a good reason to create a privative clause but should not be a stand-alone ground for deference
* Points to the expertise of courts alone to decide matters of law (absent a privative clause)
* Uses *Dunsmuir* to argue the focus needs to be on legislative intent – and only privative clauses definitively show legislative intent for deference, if parliament wanted deference they would have included privative clause
* It’s the function of the legislature to determine expertise of tribunal – if expert enough they put in privative clause
* If no privative clause - treat tribunal just like a lower court, defer on questions of fact of mixed fact and law that can’t be separated (much simpler than JR)
* CUPE which created deference had a privative clause, which is why they used reasonableness standard

**Fish Dissents**

# Delegation and Rule Making

Rulemaking = Regulation - prospective, general
Adjudication/dispute resolution - retroactive, specific

## Delegation as a Tool

* **Legislation 🡪 broad policy strokes**
* **Delegation 🡪 used to fill in the details and practical operation**
	+ Legislature sets policy, delegates power in statute through wording “may make regulations” to executive (Cabinet, a minister, or an admin board) to fill in practical application through regulations/rules
* **How do delegated bodies make rules?**
	+ **“Soft” law: guidelines, policy statements**
		- Not legally binding, but informative and often used
		- Easily adaptable to changing circumstances, very flexible, no lengthy procedural steps
		- Power does not have to be provided in a statute to allow these
	+ **“Hard” law: statutes, regulations and rules**
		- Legally binding
		- Regulations: made by Governor in Council
		- Rules: made by an admin agency/board
		- Power to make these regulations must be expressly given in statute
* Reasons for delegation:
	+ Expertise (board members or ministers can have knowledge that legislature doesn’t)
	+ Time (legislature is overburdened, delegation allows for more time devoted to the issues)
	+ Information
	+ Flexibility (legislation takes too long to change, an admin board with rule-making ability can react to trends and issues much faster)
	+ Costs (regulations = cheaper than drafting new legislation)
* **Risks of Delegation**: Accountability, Supervision and Principal agent
* **Principle-Agent problem:** legislature (principal) delegates rule-making power to another (agent)
	+ **Agent may not follow principal’s views and values**
	+ **Agent may not act in the public interest**
	+ The principal delegates because it doesn’t have the expertise/time/information to create the rules, but it may also not have the expertise/time/information to monitor the agent properly
	+ There should be safeguards in place to ensure that agent is accountable
* **Four approaches to address problems:**
	+ 1. **Structural controls:** choosing a body the legislature trusts
* **Choice of body:** Cabinet, ministry, industry body, arm’s length admin agency?
* **Controlling resources:** Legislature can restrain body by limiting resources allocated to it
	+ 1. **Legislative oversight:** directly reviewing the rules or soft law
* Committee convened to review the regulations/rules/soft law
* Problems: slows down the efficient process, takes time, does the committee have any expertise?
* Purpose of delegation can be lost
	+ 1. **Judicial Review of substance:** Court can review rules and soft law as an independent 3rd party
* Upholds rule of law
* **General rule:** **for rule-making functions, JR focuses on the jurisdiction question first**
	+ Note: *Enbridge Gas* used a SOR analysis, **don’t do this!**
* Purposes:
	+ - * 1. Keep agent within boundaries
				2. Control agent when it makes mistakes
				3. Standardize the review framework
* Limits:
1. “Legislative” decisions not reviewable
	* + Ex. Moving boundaries of harbour seen to be a decision involving public convenience and general policy and not reviewable (*Thorne’s Hardware*)
		+ Jurisdictional grounds may be reason to strike down an order in council in an “egregious case” (*Thorne’s Hardware*)
2. Regulations, soft law difficult to review
	* + Courts will review the substance of rules for whether the regulation is within the grant of power and *Charter* violations, but discretion often in broad terms.
		+ Ex. Broad purpose of *Ontario Energy Board Act* allowed Ontario Energy Board to regulate gas vendors, even though Act said distributors (*Enbridge Gas*)
* Problems:
	+ JR can be random or biased in favour of groups with resources
	+ Courts do not have expertise to review the rules
	+ Judges may implement or substitute their own policy
		1. **Process requirements:** Procedures in place that govern how the rules are made
			- **Consultation:**
				* **Ensure that those making the rules have the relevant information**
				* **Identify public priorities and reduce mistakes**
				* **Promotes deliberation for a better decision**
				* Ex. Ontario Energy Board had notice and comment rule-making which requires consultation and analysis through written submissions, participation required under Act but no requirement for written reasons of the Board, court says this is OK (*Enbridge Gas*)
			- Increase openness and accountability of rule-making
			- Reduce special-interest group influence through public participation
			- Problems:
				* Uninformed public

No knowledge of technical details

Don’t understand small probabilities of catastrophic harm

“Information cascades” – public just adopts views of others

* + - * + Expensive and slow

Ex. Emissions standards in Ontario took from 1987 to 2001 to implement

Ex. US has mandated consultation for regulations, process blamed for slowness

* + - * + Another avenue for special-interest group domination

## General approach in Canada to Controlling the Risks:

* + No common law procedural fairness requirements for legislative decisions or making of rules, for regulations there are a couple
	+ No omnibus process statute (like the US has)
	+ Some specific requirements are contained in statutes
		- * Notice and comment requirements in *Securities Act* and *Ontario Energy Board Act*
	+ Regulation protocol exists at the federal level
		- * Send to legal counsel for review
			* Publish in the *Canada Gazette*
			* Consult with applicable groups (but which particular group is left up to delegated body)

###