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# Tools of Admin State

### Boards and tribunals:

* + Established by legislation to attain a public policy goal or goals
	+ Have no inherent jurisdiction – just what is provided in ES
	+ Often somewhat independent from government that established them (degree of independence depends on legislation)
	+ Members of the board or tribunal are appointed to bring particular expertise to the decision-making
	+ Purpose built entities – what they are supposed to be doing will affect how they are built

### Admin law can be divided into 3 parts:

* + **Procedural fairness** – is this an issue courts should review and if so did the tribunal use the proper procedures in reaching a decision
	+ **Substantive fairness** – regarding the decision itself, did the tribunal make an error of the kind or extent that the court is willing to get involved
	+ **Remedies** and the legitimacy of judicial review

### Tensions in Admin Law:

* Executive authority and the ROL
* Expertise and accessibility - risk that the ADM becomes too specialized and can’t be appealed because no one knows more about the topic
* Efficiency and democracy

### Evaluating Admin Agencies:

* 5 “bureaucratic” criteria
* Effectiveness at meeting objectives
* Efficiency – cost/benefit analysis
* Equity
* Manageability
* Legitimacy/political feasibility
* 3 “legal” criteria
	+ ROL
	+ Procedure
	+ Precedent

### Building Admin Agency:

1. Can’t completely preclude JR with PC (***Crevier*** – PC is instructive but not determinative)

2. Can’t create ADM that is essentially a court – if ADM is overlapping with court’s s 96 powers (***Re Residential Tenancies Act***)

## Procedural Fairness:

* The court in reviewing the tribunal’s actions isn’t interested in the actual decision – but in the procedures followed by the tribunal in making that decision

### A. Threshold Question

* Is this the kind of decision that should attract some kind of procedural right?
	+ **Asking whether or not there should be any entitlement to procedural fairness at all**
	+ Generally if through delegation by the legislature of governmental power, a decision is made that **affects an individual’s rights or interests there will be some minimum entitlement to procedural fairness**
	+ Also consider the doctrine of legitimate expectations – in what circumstances, if any, an individual should be entitled to certain procedural rights if a representation of some form has been made that such rights would be forthcoming
	+ Another component of this threshold question is the Charter

### B. The Content of Procedural Fairness

* **Five factors in determining general level of procedural fairness** – not exhaustive(***Baker***):

1. Nature of decision and 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

* Court will determine general level of procedural fairness, then decide what specific procedures are required. [often ask “to what extent should the administrative decision maker act like a court?”]
* Often the legislation will expressly lay out the kinds of procedures that applicants are entitled to
	+ Common law may expand on these but the first place to look is the statute
	+ *Administrative Tribunals Act* (BC) – umbrella act which sets out procedures for all tribunals
	+ **Where a statute specifies a kind of procedural right or specifically denies a procedural right that would otherwise have been available in common law, the statute prevails over common law**

### C. Bias and Independence

* Individual bias
* Institutional/systemic bias

Bias that is built into the statute or ADM

Everything that comes out of the machine will be flawed

* How independent is the tribunal from the government creating it

## Substantive Error:

1. Standard of Review – ***Pushpanathan*** and ***Dunsmuir***

2. Whether that standard was met

* Court looks at decision itself – not just procedures followed in reaching the decision
* Courts ask what the standard of review is – ie. how big an error must the tribunal make before the court will get involved?
	+ Standard of review – level of intensity with which the court will review a decision
* **2 possibilities:**
	+ Standard of correctness: most exacting standard, was it a correct decision, the same decision the court would have reached
	+ Standard of reasonableness: middle ground, decision can fall within a band of reasonable decisions even if not the exact decision the court would have made
* If the statute setting up the tribunal has a privative or preclusive clause – which says that the tribunal’s decision is final and not open to review by the courts
	+ This is treated as just one factor (but a significant one) in determining standard of review
* As with privative clauses – the existence of a statutory right of appeal is just one factor among many to be weighed in determining the standard of review

## Three sources of review power:

* **Original jurisdiction** – ordinary courts have jurisdiction over decisions of administrative decision-makers when they are challenged by way of direct actions by a citizen in contract or tort on ground that the state has infringed an individual’s private legal right [ie. sue gov through ordinary civil law]
* **Statutory right of appeal (“appellate jurisdiction”)** – no general common law right to appeal the substance of a decision
	+ **Right to appeal must be contained in statute** – if no appeal right in statute = no appeal
	+ JR is different from stat right of appeal – JR disregards lack of stat right to appeal
* **Courts’ inherent judicial review jurisdiction** – superior courts of each province may review decisions made by institutions and officials with responsibility for administering public programs
	+ Superior courts may hear any matter unless there is a specific statute that says otherwise or grants exclusive jurisdiction to anther court or tribunal
	+ **JR =** justice and ROL require court involvement even though courts aren’t supposed to be involved

## s 96 Courts

* Appointment of superior court judges is responsibility of fed gov
* Provinces cannot create a court and call it an administrative tribunal to get around this (***Re Residential Tenancies Act***)
* **Three part test to determine whether administrative tribunal is acting like a s 96 court:**
	+ Historical inquiry
	+ Is the impugned power a “judicial” power as opposed to an administrative or legislative power
* Judicial power – one where there is a private dispute between parties, adjudicated through application of a recognized body of rules and in a manner consistent with fairness and impartiality
	+ Has the power in its institutional setting changed its character sufficiently to negate broad conformity with superior, district or county jurisdiction

# The Rule of Law

* ROL constraints both legislative and court actions
* Characterized by three interrelated features:
	+ Jurisprudential principle of legality
	+ Activity or practice of law-making among and within an institutional arrangement of government
	+ A distinctive political morality
* **Rule of law = government action must be sourced in law and therefore bound by law in order to be considered both valid and legitimate**
* If branch of gov steps outside its constitutional role or function, the action or decision will be considered arbitrary in the sense that it is ultra vires its jurisdictional limits

Roncarelli – classic statement of ROL

No public official is above the law

Offends ROL where substance of decision is incompatible with the statute – **must have regard for nature and purpose of statute**

 Violated legal principle of “validity” – can’t be a capricious decision

#### Manitoba Language Rights

* But for the ROL there would be no constitutional structure – it is fundamental part of constitutional structure
	+ Law is supreme over gov and individuals
	+ Law and order are indispensible elements of civilized life within political community
		- ROL requires creation and maintenance of actual order of positive laws
	+ Constitution is deeply intertwined with principle of parliamentary supremacy and democracy
	+ Linked to judicial independence

#### Secession Reference

* 4 unwritten principles of Canadian constitutional order:
	+ Federalism
	+ Democracy
	+ Constitutionalism and ROL
	+ Respect for minorities
* No one principle trumps the others – they are highly interrelated
* These are organizing principles of the state, aspirational ideals
* **ROL is important but must be balanced against other considerations**

**Parliamentary supremacy and democracy are constrained by the unwritten ROL**

Unwritten ROL also constrains courts from unilaterally, arbitrarily or anti democratically substituting their views for those of Parliament

Imperial Tobacco - If the legislature validly enacts a statute – courts can’t come in and overrule it

* Unwritten principles of ROL in constitutional law doesn’t give courts power to strike down legislation otherwise validly enacted – cannot strike down legislation based on content (***Imperial Tobacco***)

Christie - ROL doesn’t include access to justice

National Corn Growers ***–*** deference as respect

* Court’s job policing ROL is limited by parliamentary supremacy and intention of the legislature

# Remedies

* Enabling statutes may limit the scope of court intervention in multiple ways
	+ - * Privative clauses
			* Provide appeal mechanisms that are internal to the tribunal itself
* **Appeal to courts only after party has exhausted all avenues of appeal** (including internal appeal mechanisms)

## Private Law Remedies:

* Tort of misfeasance in public office (***Odhavji***)
	+ Damages in tort
	+ Doesn’t apply where you could get normal admin remedies
	+ Only applies where you can’t appeal the decision
	+ **Limited application**

## Remedies at Tribunal Stage

* Tribunal doesn’t have general jurisdiction of court – therefore **power to impose a particular remedy must be provided for in tribunal’s enabling statute**
	+ - * Statutorily authorized
			* Broader in remedial scope
			* More efficacious
* Tribunal approaches to remedies reflect different composition, structure and mandates from courts

### 1. Look to tribunal’s enabling statute

* Tribunal can’t make orders outside the scope of enabling statute
	+ If it does = exceeding its jurisdiction and those orders will be void
* **Listed remedies -** Many ES set out express lists of remedies a tribunal may order
* **General remedies -** Other ES provide their tribunals broad discretionary power to make remedies they see fit
* **Implicit remedies -** Even where remedial power uncertain and no discretionary power – may argue that tribunal must have remedial power to do the things its ES requires it to do [**not very successful argument – focus on ES**]
* Orders for payment of money – generally can only be ordered by tribunals with express statutory authority – **never have implicit authority to order money damages**
* Tribunals don’t have equitable jurisdiction to order interim injunctions (may have statutory authority to seek an injunction in court)

### 2. Potentially broader remedial scope than courts – aspects that can affect ADM remdies:

* Deal with systemic problems
* Policy issues; governmental priorities
* Forward looking
* Seised over time – ADM can maintain jurisdiction (ex. ***McKinnon***)
* Have to consider multiple parties
* Affected by unique nature of ADM membership/expertise
* Span the public/private divide

#### McKinnon v Ontario [innovative ADM remedies]

* Tries to create meaningful systemic change within the organization – based on sustained engagement with the problem by the impartial third party
* Much more sweeping remedies than courts could provide
* Dealing with forward looking, polycentric, systemic problems

### 3. More efficacious – supposed to be cheaper, faster and more accessible

## Enforcing ADM orders against parties

### Tribunal:

* 1. A tribunal may enforce its own orders – RARE
	+ Must be given enforcement powers in ES
	+ Must be constitutionally valid
	+ **Otherwise have to convert to court order**
* 2. Tribunal makes an application in court to enforce an order it makes – COMMON

 Once tribunal order converted into court order = enforced in same way as court judgment

* *ATA* has sections to assist tribunals in obtaining compliance with their orders [s 18]

### Party:

* May bring action in court against another party to enforce tribunal’s order

### Criminal Prosecution:

* **Crim Code s 127 -** Offence to disobey a lawful order of a fed/prov ADM
	+ Only available if there is no other punishment provided by law (nothing in ES)

## Challenging ADM orders:

### 1. Internal ADM mechanisms

* Slip rule – CL rule to fix clerical errors
* Reconsideration – decisions not final until in writing
	+ Have to have power to reconsider in the ES
	+ If not in ES – ADM is functus after decision made
* Internal appeals/review – must exhaust internal steps before going to court

### 2. External non court mechanisms (ex. Ombudsperson)

* Only available after you exhaust internal steps

### 3. Using the courts

##### 1. Statutory Appeal (the norm)

* Scope of possible appeal confined to what is expressly provided by ES
* Easier to predict availability/outcome of appeal (versus JR)

**a)** **Is appeal available –** does ES provide for right of appeal

* Courts have no inherent appellate jurisdiction over ADMs
* If not provided in ES = no appeal to courts (have to access courts through JR)
* ADMs decision must decide merits of the matter – or otherwise be final disposition of matter
* ES usually sets out what court to appeal to
* Right to appeal is more common where ADM has power to affect individual CL rights

**b) Scope of available appeal**

* Determined by ES (court’s breadth and scope of appellate powers comes from ES)
* Scope varies by ADM – sometimes get complete de novo review; sometimes limited to issues of law
* Generally scope is broader where ADM more closely mirrors courts
* Even where appeal rights are broad – courts will show some deference to ADM findings of fact

**c) Is appeal available as of right or with leave?**

* Usually request leave from appellate court
	+ Look at ES – it will tell you who to request leave from

**d) Stay of proceedings – automatic or apply?**

* Unless statute excludes it – designated appellate court has inherent authority to grant a stay
* *ATA* [s 25] – appeal doesn’t = automatic stay (**must apply for a stay in BC**)
	+ This section only applies to a few ADMs though

##### 2. Judicial Review (the exception)

**DISCRETIONARY** – not automatic on prima facie case (shows respect for separation of powers, legislative intention that courts stay out)

* Domtar – two ADMs applying same provision differently; **mere inconsistency is not enough for court to exercise discretion to do JR**
	+ Principle of ROL must be qualified – it doesn’t trump other concerns
	+ Inconsistent decisions are not sufficient for JR
	+ Inconsistency = elusive principle
		- If this is a problem Exec should deal with it

###### Threshold Qs – is JR available?

**a) is the ADM public enough**

* Only public bodies are subject to JR (its function is to keep Exec in check)
* McDonald v Anishinabek – action authorized by code of conduct not statute; **subject matter not source determines remedy**
	+ **Consider:** ADM’s functions, duties, sources of power, funding, whether gov directly or indirectly controls, whether gov would have occupied the field if ADM not there
		- ADM’s power over public at large; nature of members; how appointed; nature of decisions
	+ **Subject to JR if “part of the machinery of gov”**
		- If ADM fulfills public function OR decision making has public law consequences THEN duty of fairness applies and decision is subject to JR

**b) Standing** – whether party has standing to challenge decision

* Parties to ADM action
* Public interest standing: more limited in JR context than normal civil proceedings

**c) Which court to apply to?**

* If prov ADM = Prov Supreme Court
* If fed ADM = Federal Court

**d) Deadlines** – very short to ensure JR is the exception

* Statutory time limits for filing an application for JR
* Fed ADM (*Federal Courts Act* **s 18.1(2)**) = 30 days
* Prov ADM (BC *ATA* **s 57(1)**) = 60 days
* Court may extend time limits

**e) Must show you have exhausted all other adequate means of recourse**

* Possible reasons you shouldn’t have to go through internal process:
	+ Inherent unfairness in structure of process
	+ ADM doesn’t have jurisdiction to hear the matter
	+ Appeal structure doesn’t have jurisdiction to do what you want
* Prefer internal review process because:
	+ It respects legislative intent
	+ Respects ADM’s decision making autonomy
	+ Convenient for both parties
* Harelkin – must show more than just prior violation of PF to bypass internal process
	+ No assumption that the appeal will be unfair
	+ **Factors to consider in deciding to exercise discretion:**
		- Appeal procedure
		- Composition of appeal board/implications of this composition
		- Efficiency, expediency, cost
		- Delay by applicant
		- Nature of error
		- Capacity of remedial body
		- Alternative remedy’s convenience and adequacy

##### 3. Remedies on JR

* NO DAMAGES – not likely to get court costs either
* **Court can’t substitute its views on the substance of the matter**
* Application for JR doesn’t automatically stay enforcement of ADM order
* **Courts can use discretion to refuse to grant a remedy**
	+ May refuse remedy where:
		- Alternative remedies available
		- If JR would be premature
		- Delay or acquiescence
		- Not attending hearing – waives right to JR
		- Where issues are moot
		- If you don’t come to court with clean hands

**a) Common Law (prerogative writs)**

* **Certiorari** – review for excess of jurisdiction
	+ Relief available after ADM decision made
	+ Leads to “quashing”
	+ Courts cannot substitute own decision
* **Prohibition** – prevents ADM from doing something going forward
	+ Pre-emptive relief – RARE
* **Mandamus** – often combines with certiorari
	+ Compels ADM to do something
	+ Can’t compel the decision ADM makes
	+ Sometimes can compel with direction (ex. counsel present, PF, etc)
* **Declaration** – judgment that determines legal position of parties or law that applies to them
	+ Not enforceable
	+ Cannot require anyone to take or refrain from action
* **Habeas corpus and quo warranto**

**b) Statutory Reform [*Judicial Review Procedure Act*** (BC)**]**

* Simplified application procedures for JR [s 12]
* Simplified remedies
* Clarifies who may be parties [s 15]
* Generally provide for right of appeal
* Expand JR to apply to interlocutory orders and interim issues [s 3]
* ADM may refer a “stated case” to courts for determination of question of law [s 43]
	+ ES must authorize stated cases
* Power to direct ADM to reconsider (mandamus) [s 5]
* Power to set aside (quashing) [s 7]

# THE DUTY OF FAIRNESS

* **Sources of procedural rights:**
	+ ES/legislation
		- See *ATA*
	+ CL procedural rights
	+ Bill of Rights
	+ Charter
	+ Agency guidelines, rules
	+ Developing Admin Law jurisprudence
* **Duty of fairness requires:**
	+ 1. the right to be heard and
	+ 2. the right to an independent and impartial hearing
* These requirements may be overridden by legislation, but courts will require specific legislative direction before finding this has occurred

## 1. Threshold: does PF apply

* Decision must affect individual rights, interests or privileges (***Cardinal v Kent***)
	+ Includes right not to be kicked out of subsidized housing (***Re Webb***)
	+ Includes decisions that affect reputation, that result in a “slur” (***Hutfield***)
	+ No automatic right to PF for property rights (***Homex Realty***)
* Must not be expressly removed by statute
	+ Can only eliminate PF with express language
	+ Courts presume that the legislature intended procedural protection to apply
* Must be final disposition on the matter (can’t be interim issue)
	+ If investigation is public, reputation adversely affected could be PF requirement (see ***Hutfield***)
	+ PF applies to interim decisions if they have de facto finality (***Re Abel***)
		- Get PF at interim level if that decision will be relied on at final disposition
		- Consider (***Re Abel***):
			* 1. Degree of proximity between interim step and final decision
			* 2. Exposure to harm – ie. importance of decision to individual
			* 3. Opportunity to know case – doesn’t always mean full disclosure
				+ ADM must at least consider disclosure – then give principled reasons why not
				+ If no consideration at all = PF breached
* PF doesn’t apply to legislative decisions (***Cardinal, Nicholson***)
	+ Preliminary legislation not subject to PF – only subject to constitutional requirements
	+ GIC and Cabinet can be subject to PF (not automatically exempt) – look at stat scheme and what they are actually doing in the particular case (***Inuit Tapirisat***)
		- **Consider:** broad discretion; polycentric decision – ie. legislative intent (did they intend Cabinet to be considered legislative)
	+ Subordinate legislation can be subject to PF (***Homex Realty***)
		- **Look at context:** statutory framework, nature of action taken by municipality, general circumstances at the time
		- Mixture of public/private elements = not legislative
			* Presence of compelling public interest doesn’t eliminate PF requirements
		- Culmination of inter partes dispute = not legislative

#### Nicholson

**Facts:** police office terminated on probationary period; employment terminated before 18 mos – no statutory right to hearing if employed less than 18 mos

* General duty of procedural fairness applies to administrative decisions – only purely legislative decisions are not subject to PF
* Shift focus from ADM to what rights are at stake
* Minimum PF required = (1) told the case to be met; and (2) given the opportunity to respond

#### Cardinal v Kent

* PF required of any ADM where decision:
	+ NOT of legislative nature and
	+ Affects rights, privileges or interests of an individual
* Denial of PF always makes decision invalid, whether or not the same decision would have resulted – if PF not given = quashed

#### Inuit Tapirisat

* Cabinet is not legislative for all purposes – ie. not automatically exempt from PF
* Look at statutory scheme and what Cabinet is doing in the particular case
* Looking for legislative intent – consider:
	+ Broad discretion
	+ “polycentric” decision
* BUT courts don’t want to interfere with Exec
	+ Need a pretty strong case before courts would suggest Cabinet needed to do something different procedurally (also see ***Thorne’s Hardware***)

## 2. Content: how much PF are you entitled to

#### Baker v Canada

* PF if flexible and depends on context
	+ Content of PF is decided in specific context of each case
	+ All circumstances must be considered to determine content (***Knight***)
	+ Always start with statutory scheme – **PF is always about context**
* Values underlying PF:
	+ Fairness, openness and accountability of the system
	+ Institutional legitimacy
	+ Notice and opportunity to respond to case

Five criteria for determining degree of PF required (***Baker v Canada***):

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

* More “judicial” = more PF required
	+ “Judicial” = where opportunity to be heard will affect decision making
		- Decision about one party – not general policy decision

**2. Nature of statutory scheme and terms of statute pursuant to which the body operates**

* If preliminary steps included in decision making process = minimal fairness required
* If one final decision to be made = greater fairness protection required
* More PF required where no appeal provided
* More PF where decision is final
	+ Consider ***Re Abel*** factors for determining finality of decision:
		- Proximity between interim and final decision, importance of decision to individual, opportunity to know case

**3. Importance of the decision to the individual – OFTEN MOST IMPORTANT FACTOR**

* More important = more PF

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

* Can only have LE of particular process – not outcome (***Canada Assistance Plan***)
* LE based on promises/regular practices of ADM
	+ Consider: established practices, clear, unambiguous and unqualified conduct or representations
	+ Expectations cannot be in conflict of a statutory duty (or won’t = LE)
	+ **There is a relatively limited scope for the operation of the concept of legitimate expectation in Canada**
	+ ***Baker*** – international conventions not adopted in domestic law don’t = LE
	+ ***Suresh*** – reasonable to expect Exec to comply with international obligations (= LE)
	+ **Where a statute specifies a kind of procedural right or specifically denies a procedural right that would otherwise have been available in common law, the statute prevails over common law**

**5. Deference to the procedural choices made by the decision maker**

* Have to consider and respect choice of procedure made by agency itself
	+ Especially where ES gives ADM option to choose own procedures
	+ Or if ADM has particular expertise in procedure
	+ Decision will be quashed and decision maker will have to make a fresh decision in accordance with correct procedure (doesn’t mean substantive outcome will change)

\*\****Baker*** factors are not exhaustive\*\*

## 3. Did you receive as much PF as entitled to

* Once content of PF determined – assess conduct of ADM and whether or not it met the PF required (based on correctness standard)
* Violation of PF = automatic quashing of decision and rehearing
	+ No guarantee that substantive outcome will change
	+ Can have rehearing with mandamus – direct ADM to follow PF requirements this time
* Basic PF = rights to notice and opportunity to be heard (this is tailored to specific context) (***Nicholson***)

##### PF may include:

###### 1. Notice

* Without notice other rights can’t be exercised
* Written notice more common and likely what will be required in most cases
	+ *ATA* **s 19** – written notice requirement (for BC ADMs)
* **Possible problems with notice:**
* Time - Notice must be given early enough to allow party time to decide whether to participate and prepare
* Content - Notice must contain info about possible penalties (***Ontario Racing Commission***)
* Content - Notice cannot be misleading about the reason for the hearing (***Chester***)

###### 2. Discovery

* ADM must have power in ES to require discovery
* ***Stinchcombe*** principles apply to Human Rights Tribunals (***Ontario (HRC)***)
* More economic based ADMs (that don’t affect human rights) – more discretion to refuse disclosure (***CIBA-Geigy***)

###### 3. Written submissions

###### 4. Right to a hearing within reasonable time

* PF remedies will apply if there was prejudice to the fairness of the hearing due to delay (***Blencoe***)
	+ In ***Blencoe*** there was no prejudice – his personal life was ruined, but the process was still fair (no PF remedies)

###### 5. Oral hearing

* An oral hearing is not always required (***Baker***)
	+ PF can be met without oral hearing if there is adequate opportunity to be heard (***Masters v Ontario, Baker***)
* Need an oral hearing when credibility is an issue (***Khan, Singh, Suresh***)
	+ Beetz (concurring) – should have full oral hearing in situation where life and liberty may depend on findings of fact and credibility (***Singh***)

###### 6. Right to counsel

* No CL absolute right to counsel – right to counsel depends on context
* *ATA* **s 32** – provides right to counsel
* More complex inquiry and more severe consequences for individual = more likely you have right to counsel (***Re Parrish***)

###### 7. Right to call/cross examine witnesses

* *ATA* **s 38** – allows for Ws and cross examination; ADM also able to limit cross when satisfied that it has been sufficient to disclose all issues
* Cross examination allowed where it will be most effective way to test the merits (***Re Toronto Newspaper Guild and Globe Printing***)
	+ If there is another method that is equally as fair (ex. written response) then cross won’t be allowed (***Re County of Strathcona***)
* Where credibility at issue or case largely dependent on hearsay – cross more likely allowed (***Re B and Catholic Children’s Aid Society of Metropolitan Toronto***)

###### 8. Right to written reasons for a decision

* Useful to ensure fair and transparent decision making, reduce arbitrary decision making, reinforce public confidence, ensure opportunity to appeal
* Required where: decision has important significance for the individual
	+ Where there is statutory right of appeal (***Baker***)
* Courts will be flexible in deciding what written doc will constitute reasons (ex. ***Baker***)

#### Clifford v OMERS - Reasons

* Parties agreed that the tribunal had legal obligation to provide reasons
* Applies Baker 5 Part Test to determine whether procedural fairness required trib to give reasons
	+ Decision determines significant legal rights of parties
	+ Process used was very court like – involved hearing evidence, arguments from counsel
	+ Decision is final step in process
* Finds that procedural fairness imposes legal obligation on trib to provide reasons

1. On JR what standard of review should apply to whether an admin tribunal has given reasons?

* If trib legally obligated to give reasons – question on JR is whether that obligation has been complied with
* Cannot defer to the tribunal’s choice whether to give reasons where they are legally obligated to give them
* Standard of review used by the court = correctness

**2. How do you tell whether the tribunal reasons are adequate?**

* Obviously if nothing provided = no reasons; failure to meet obligation
* ***Baker*** – court should be flexible in determining what are sufficient reasons; recognizes variety of admin agencies and the many ways procedural fairness can be achieved
	+ Sufficiency of reasons must be assessed in the context of the case and day to day realities of the ADM
* **Reasons must be sufficient to fulfill the purpose required of them** – to let the individual whose rights privileges or interests are affected know why the decision was made, and permit effective JR
	+ Path to decision must be clear but doesn’t have to cover every detail
	+ Basis of decision must be explained and explanation must be logically linked to the decision made
* **Fundamental Q: whether the reasons show that the trib grappled with the substance of the matter**
* **Reasons must:**
	+ 1. Identify live issues in the case
	+ 2. Show that ADM grappled with those issues
* Assessing sufficiency of reasons is from a functional perspective to see if basis for decision is intelligible

#### Ganitano v Metro Vancouver Housing – Opportunity to be Heard

* *Residential Tenancy Act* contains privative clause
* *ATA* s 58(2)(b) applies – standard of review for questions of procedural fairness = whether trib acted fairly in the circumstances
* Procedural right at issue: individual’s opportunity to be heard and to make responsive submissions to the admin agency
* **High degree of procedural fairness required because:**
	+ Hearing resembled the judicial process
	+ No internal appeal under the *RTA*
	+ The decision was very important – if upheld G would have to move
* **High degree of PF was not met because – the hearing had at least the appearance of being unfair**
	+ As a result of technical difficulties G couldn’t join the conference call hearing until 11 mins in; only participated in about 10 mins of hearing
	+ There is no record of the hearing
	+ Unclear whether there was any attempt to remedy G missing first 11 mins; and whether Officer identified herself
	+ Unclear whether critical evidence was reviewed with G
* Violation of procedural fairness allowed court to exercise its equitable jurisdiction to grant relief from forfeiture

# CHARTER AND PROCEDURAL FAIRNESS

* Courts rely on common law doctrine of procedural fairness to interpret the principles of fundamental justice set out in s 7 of the Charter – **for procedure admin law principles inform the Charter**
* **To access procedural safeguards on the context of s 7 – must first meet threshold or establishing that “life, liberty or security” interests are impaired by the relevant decision**
	+ **If can’t establish this, procedural fairness may still be due – under the common law**
	+ Can also look to the Bill of Rights (***Singh***)
		- BOR protects: rights of individual to life, liberty, security of the person, and enjoyment of property
		- But BOR can be trumped by express statutory language
* If legislation clearly dictates less stringent procedural safeguards – at common law courts more reluctant to impose them
	+ But under s 7 – procedural requirements of the principles of fundamental justice are constitutional requirements
	+ **If a s 7 interest is engaged, procedural fairness comes into play by means of the principles of fundamental justice and legislation must conform to them in order to be lawful**
* Singh – the interests protected under s 7 are of such importance that generally an oral hearing will be required when those interests are engaged
	+ Admin convenience doesn’t override fundamental justice
	+ **The Charter can allow you to overcome a clear statutory bar to certain procedures, but once the threshold is crossed, it is still the common law that determines the content that the procedure must have to pass constitutional muster**
* Suresh – without the guidance of statute, the Court turned to the ***Baker*** framework to assess the adequacy of the procedures afforded Suresh
	+ As far as procedural rights are concerned, the common law doctrine summarized in ***Baker*** properly recognizes the ingredients of fundamental justice

#### Blencoe v BC (Human Rights Commission) 2000 SCC

**Issue:** undue delay and administrative inconvenience; does delay violate PF, principles of fundamental justice or both?

* Applicability of the Charter: **if ADM is exercising statutory authority it is bound by the Charter**
	+ Statutory creature
	+ Administration of a governmental program requires Charter scrutiny
	+ These entities are subject to the Charter just as government be in like circumstances
	+ To allow otherwise would allow the legislative branch to circumvent the Charter by establishing statutory bodies that are immune to the Charter
* **To trigger Charter operation:**
	+ 1. Must first be a finding that there has been a deprivation of the right to “life, liberty and security of the person”
	+ 2. Then must find that the deprivation is contrary to the principles of fundamental justice – **this is where you apply *Baker* factors**
* In this case the state has not prevented Blencoe from making any “fundamental personal choices” – the interests sought to be protected in this case don’t fall within the “liberty” interest protected by s 7
* To trigger security of the person for psychological infringements:
	+ 1. Psychological harm must be state imposed - harm must result from actions of the state
	+ 2. Psychological prejudice must be serious
* **The principles of natural justice and PF include the right to a fair hearing and undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied**
	+ PF remedies if there was prejudice to the fairness of the hearing
	+ Could be prejudice from undue delay but here there was no prejudice

#### Suresh – incorporation of CL PF framework into Charter s 7 “fundamental justice”

* Principles of fundamental justice in s 7 are the same principles underlying the duty of fairness set out in ***Baker***
* **Principles of fundamental justices demand at a minimum – compliance with the common law requirements of procedural fairness** [implies you could get more PF under s 7 than CL]
	+ **Common law factors inform the s 7 procedural analysis**
* What is required by PF and therefore principles of fundamental justice is that – the issues be decided in the context of the statute involved and the rights affected (***Baker***)
* To determine PFJ apply ***Baker*** factors:
	+ 1. Nature of the decision being made and procedures followed in making it – ie. closeness of admin process to judicial process
	+ 2. Role of hte particular decision within the statutory regime
	+ 3. Importance of decision to individual affected – greater the effect on the life of the individual affected the greater the need for procedural protections to meet the CL duty of fairness and the requirements of fundamental justice under s 7
	+ 4. Legitimate expectations of person challenging the decision where undertakings were made which concern the procedures to be followed
	+ 5. Choice of procedure made by the agency itself
		- Minister must be allowed considerable discretion in evaluating future risk and security concerns
		- This suggests deference to the Minister’s choice of procedures as Parliament has signalled the difficulty of the decision by leaving up to the Minister the choice of how best to make the decision
		- However this need for deference must be reconciled with the elevated need for procedural protection attracted in this case
* PFJ require more than S got here; should get:
	+ Informed of case to be met
	+ Opportunity to respond
	+ Opportunity to challenge Minister’s info
	+ Written reasons
* Don’t always need an oral hearing to comply with PFJ
* s 1 justification – valid objectives alone do not justify infringements of PFJ
	+ very difficult to justify a s 7 violation under s 1

# INDEPENDENCE, IMPARTIALITY AND BIAS

## 1. Individual

* **Vital to litigants and the public’s confidence in the administration of justice**
* Reasonable perception of bias is enough to have a decision overturned
	+ **Impartiality** = ideal state of the decision maker or decision making institution
		- Makes judgments with open mind; without connections that improperly influence decision making process
	+ **Independence** = means to achieving impartiality
* Sources of independence and impartiality of ADM:
	+ common law and constitutional/quasi constitutional principles
	+ Charter s 7 – as matter of fundamental justice you are entitled to a DM who hears case on its merits
	+ Bill of Rights – whenever determination of rights you are entitled to an impartial decision maker
	+ **A Charter/Bill of Rights argument strengthens bias case**
* Common law – principles of natural justice encapsulated in two central ideas:
	+ Decision maker should not judge her own cause or have any interest in the outcome of a case before her – *nemo judex in sua causa debet esse*
	+ The decision maker must hear and listen to both sides of the case before making a decision –*audi alteram partem*

##### Judicial Model of Independence

* ***Beauregard v Canada*** – judicial independence = complete liberty of individual judges to hear and decide the cases that come before them [strict standard; no one can influence the judge]
* **Three objective conditions identified as necessary to guarantee judicial independence from government:**
	+ 1. Security of tenure
		- Judge can be removed only for cause
		- Before removal judges given opportunity to respond to allegations against them
		- At pleasure appointment of judges - invalid
	+ 2. Financial security
		- Judges are guaranteed a fixed salary under the constitution
		- Prevents judges from seeking alternative means of supplementing income
	+ 3. Administrative (or institutional) control
		- Manner which affairs of the court are dealt with
	+ Jurisprudence also recognizes independence from interference by other judges – adjudicative independence
* **REASONABLE APPREHENSION OF BIAS TEST:** whether a reasonable, well informed person having thought the matter through would conclude that an administrative decision maker is sufficiently free of factors that could interfere with his or her ability to make impartial judgments (***Committee for Justice and Liberty***)
	+ **RAB test looks at objective factors – not what is in ADM’s mind**
	+ Admin tribs don’t have to meet the same degree of independence as the courts do – doesn’t have to be 100% independent; just “sufficiently free”

#### Matsqui Indian Band

* **The 3 components of judicial independence apply to ADMs**
	+ Standard is different but the test is the same
* Courts will apply guarantee of trib independence in a flexible way to account for the functions performed by the trib under scrutiny
	+ - “test for institutional independence must be applied in light of the functions being performed by the particular trib at issue.”
		- “requisite level of institutional independence will depend on the nature of the trib, the interests at stake, and other indices of independence such as oaths of office”
	+ Reference to the operational context of the trib doesn’t only take place through an examination of the trib’s functions as declared in its enabling legislation, but also through an appreciation of the trib as it functions in practice
	+ FORD: looking at actual ADM operation may only apply in Ab self determination context

#### Régie

\*In context of the Quebec Charter

* Biggest worry for independence = adjudicators being dismissed at pleasure of Exec
	+ No requirement of appointment for life (as with judges)
	+ **But - need sanctions to prevent arbitrary dismissal**

#### Ocean Port

* ADMs lack constitutional distinction from executive which courts have
	+ ADMs are created precisely to implement government policy
	+ Seen as “spanning the constitutional divide between the Exec and judiciary branches of gov”
	+ Courts require judicial independence to protect from interference by the Exec – but ADMs are part of the Exec
* ADM independence is a CL principle of natural justice –the amount of independence required at CL could be ousted by express statutory language or necessary statutory implication as long as constitutionally valid
	+ Degree of independence of ADM is determined by ES
		- It is not open to the courts to apply the CL rule if there is clear statutory language determining degree of independence
	+ If ES is silent or ambiguous – presumption it was intended to comply with CL principles of natural justice
		- Court will look to CL to determine independence required
* **Key point: no general constitutional guarantee of independence for ADMs**
	+ ADMs only attract constitutional protections if the actions of that ADM trigger those protections
	+ ie. if you can show that Charter rights are at stake – then Charter protect can trump the legislative intent to oust CL natural justice

McKenzie (BCSC) – unwritten constitutional guarantees of independence should be expanded to apply to ADMs at the “high end of the adjudicative spectrum”

* + Highly adjudicative functions of residential tenancy arbitrators in this case
	+ The jurisdiction of residential tenancy arbitrators has been taken directly from the courts of civil jurisdiction
	+ BCSC – judicial independence should apply to residential tenancy arbitrators; the ROL would require this result

\* BCCA – found issue is now moot (legislative amendment) but BCSC was “offside” anyway \*

#### Keen v Canada

* Appointment at pleasure = PF requirements when fired
* Appointed during good behaviour = look to employment K for requirements
* Following ***Dunsmuir*** – PF generally has no application to dismissal of employees
	+ CL PF seen as unnecessary because employment K address PF concerns
	+ Crucial consideration = whether or not a public employee has a contract of employment
		- If yes – assumed that K addresses PF issues
			* Protection from wrongful dismissal governed by private law contract principles
		- Two exceptions:
			* Employees not protected by employment Ks – still protected by CL PF
			* PF may arise by necessary implication in some stat contexts

## 2. Systemic/Institutional

* ADMs are distinct from courts – they operate within a broad framework of regulatory governance aimed at managing a particular sector or industry through their expertise
* Institutional culture can affect ADMs
* Policy making is central to ADM existence
* **Three modes of policy making:**
	+ 1. Decision making
	+ 2. Informal rule making through use of soft law
	+ 3. Formal rule making through delegated legislation
* Impartiality deals with the attitude of the decision maker and decision making institution with respect to both the issues and the parties before them
* **RAB Test (individual)** from ***Committee for Justice and Liberty***:
	+ If reasonable person with an informed understanding of how the ADM functions perceives that the decision making is biased = enough to have the decision quashed
	+ Apprehension of bias must be a reasonable one held by reasonable and right minded persons
	+ Grounds for the apprehension of bias must be substantial – real likelihood or probability of bias should be demonstrated
	+ Mere suspicion of bias is insufficient to meet the test
* **RAB on an institutional level** (***Lippé***) **=** a RAB in the mind of a fully informed person in a *substantial number of cases*
	+ The nature and context of the decision making process drives the content of procedural fairness, including what will constitute impartiality

### Consistency and Decision Making

* *Delegatus non potest delegare* – you can’t delegate to someone else power that has been delegated to you
	+ Suggests that each ADM must make their own decision
* But – consistency is important for the ROL
	+ Consistency allows people who are regulated by the ADM to know how to act and structure their affairs
	+ Can help determine whether to go before ADM or settle

#### Consolidated Bathurst – consultation to encourage consistency [FBMs]

**Issue:** Do full board meetings breach natural justice (“he who hears must decide”) – by placing decision makers in situation where they can be influenced by others who haven’t heard the case?

* Natural justice is context specific – what it means for a busy ADM will be different than in court setting
* **Want to take advantage of all the wisdom of ADM members** – FBMs are necessary to allow the members of a large board with heavy case loads to benefit from the acquired expertise of the board as a collective
* **Want to foster coherence -** so that outcomes of disputes don’t depend on the identity of the decision maker
	+ Privative clause protecting OLRB’s decisions made it even more important that the board take measure to avoid conflicting results
* **Fostering coherence should not compromise any panel member’s capacity to decide on his own**
	+ Discussions with colleagues don’t constitute (on their own) infringements on the panel member’s capacity to decide the issues at stake independently
	+ Whatever discussion takes place the ultimate decision must be that of the decision maker for which he assumes full responsibility
* ***Audi alteram partem* requires conditions for holding FBMs:**
	+ Discussions must be limited to law or policy – **not factual issue*s***
	+ Parties must be given reasonable opportunity to respond to any new ground arising from the meeting
	+ SCC agreed with OLRB policy of not keeping minutes of meeting, not keeping attendance, not holding a vote at the end of the discussion

Tremblay [compulsory consultation]

* imposition of consultation meetings by a member of the board who was not on the panel could amount to inappropriate constraint
* Even if consultation process was voluntary – court should look at operational practice of the trib to see if it shows evidence that the consultation actually comprises systemic pressure
* **Factors that showed constraint and lack of decisional independence (“compulsory consultation”)**:
	+ Only the panel has the responsibility to make the decision and they should be free to chose whether or not to consult; BUT HERE:
		- Consultations were compulsory when a proposed decision was contrary to previous decisisons
		- President could refer a matter before another member for group discussion
	+ Group discussion was aimed at reaching a consensus
	+ Attendance and votes by show of hands were taken; minutes of meetings were kept – **aspects create an appearance of “systemic pressure”**

\* IMPORTANT FACTOR IN THIS CASE: consensus table process was not in the ES \*

ADM established this process on its own to foster consistency

**Internal directives can be scrutinized more closely by courts than the statutory structure** – ie. courts will look more closely at what ADMs make up

#### Geza v Canada – the “lead case” case

**Facts:** IRB decides to create lead case to increase efficiency (problem wasn’t consistency, but cases backing up); applicants lose lead case; after that Roma success rates drop; G argues that lead case and dropping success rates = RAB in production of lead case

**Issue:** does the use of the lead case raise a RAB

* **Two part test for reasonable apprehension of bias on institutional level:**
	+ 1. Having regard for a number of factors – will there be a RAB in the mind of a fully informed person in a substantial number of cases? (***Lippé*** and ***Matsqui***)
	+ 2. If not, allegations of RAB can’t be brought on an institutional level and must be dealt with on a case by case basis – if you fail on institutional level you can proceed with individual RAB claim
* **Definition of bias** = ADM’s decision will 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 (***Committee for Justice and Liberty***)
* Need for consistency doesn’t mean you can sacrifice impartiality and independence
* The legitimate interests of the admin agency in the overall quality of its decisions cannot be ignored in determining if there is a RAB
* Entire factual matrix was seen as raising a RAB – no one factor raises RAB but when considered together RAB exists

### Factors That May Give More Entitlement to Independence

1. Policy versus adjudicative function

2. What stage of the hearing are you at

3. How much contextual knowledge do people in this situation have

 If they need to have significant contextual knowledge = less independence

4. Ability to impose sanctions (ex. ***Ocean Port***)

 And how serious are the sanctions: more serious may = more independence

5. How close is the ADM to the Exec – ex. is decision made by Ministry itself or independent tribunal

# Standard of Review

* **“Private Clause”** – in ES of ADM; contains 2 parts:
	+ 1. Ouster clause: tries to eliminate JR completely
		- Ex. “no review to the courts under any circumstances ...”
	+ 2. Finality clause: restriction of access to JR
* Strong privative clause contains both parts
* **Reasons to oust JR:**
	+ ADM is meant to be final – encourage finality, speediness
	+ Efficiency
	+ Conserve judicial resources
	+ Idea that the ADM has more expertise than courts

## History of SOR

#### CUPE v NB Liquor Corp – “deference as respect”

* 1. Reject preliminary/collateral Q approach to jurisdiction
	+ Looks to subject matter – identify reason legislature made this ADM
	+ Courts shouldn’t go out of their way to find it is a jurisdictional Q (so they can review)
* **Advocated for more deference -** recognized ADMs are specialized and have legislative mandate to apply expertise and experience to matters that they may be better suited to address than the ordinary court
* 2. PC – look at nature of ADM
	+ If ADM has PC and is acting in jurisdiction they are entitled to err
	+ Here: ADM is specialized, has comprehensive ES, has own jurisprudence, expertise, can decide Qs of law and fact
* 3. Patent unreasonableness standard: ADM is entitled to err unless they are being PU
	+ **Created PU test:** Court should only interfere (by labelling as jurisdictional error) an interpretation of the provision that is “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation”
	+ Where statute is ambiguous and there are multiple possible interpretations = not PU
	+ In a range of reasonable alternatives, the ADM’s choice is as reasonable as the courts
* PU = bad faith, failing to take into account relevant factors, breaching natural justice, asking itself the wrong Q

Result of ***CUPE*** = 2 SORs

 1. Jurisdictional Qs = correctness SOR

 2. Content within jurisdiction = PU

Bibeault - proposes pragmatic and functional analysis for distinguishing between jurisdictional and non-jurisdiction conferring provisions [jurisdiction not really relevant anymore]

 **Central question – legislative intent**

 Did the legislator intend the Q to be within jurisdiction of the ADM?

 Consider: wording of ES, purpose of ES, reasons for ADM’s existence, area of expertise of ADM members and nature of problem before ADM

Crevier – eliminated possibility of completely insulating ADMs from JR

* PCs aren’t determinative
* No PC can keep the courts out all the time – because courts must uphold the ROL

Pasienchyk – there is a constitutional right to JR

***Pezim*** [move to focus on expertise] – central question in determining SOR is to determine legislative intent in conferring jurisdiction on the ADM

* Consider ADM’s role or function
* Also crucial is whether there is a privative clause
* **Even where no privative clause and there is a statutory right of appeal –expertise requires that deference be shown to decisions of specialized ADMs on matters which fall within their expertise**

Southam [move to focus on expertise] – created **reasonableness simpliciter** (middle ground SOR)

* Reasonableness simpliciter SOR where there is:
	+ expert ADM
	+ public interest mandate
	+ broad powers
	+ Q within ADM’s expertise
	+ no PC
	+ a statutory right of appeal
* **Reasonableness SOR not met where:** decision is not supported by any reasons that stand up to a somewhat probing examination
	+ May be a defect in evidentiary or logical process
* **Difference between unreasonable and PU = immediacy/obviousness of the defect**
	+ PU = defect apparent on the face of reasons
	+ PU only applies where there is a PC

## 1. Determine SOR

* Central Q in determining SOR is legislative intent of ES (***Push***)
	+ Focus on specific Q – not entire ES
	+ Was this Q something legislators wanted the ADM to have exclusive jurisdiction over

### Factors for determining SOR – *Pushpanathan*

###### 1. Privative clause

* As guardians of the ROL – courts can never be entirely ousted (***Crevier, Pasienchyk***)
* If present – favours curial deference
* Never determinative – can be outweighed by assessment of expertise
* Is it full or partial – partial favours deference, but not as strongly
* Appeal provision – weighs against curial deference; can be outweighed by expertise assessment

###### 2. Expertise – was most important factor (before *Dunsmuir*)

**a)** Characterise expertise of ADM in question

* **Consider:** statutory criteria for appointment, policy making function, Non judicial means of implementing the ES
	+ Consider ADM composition (by looking at ES):
		- Qualifications (***Southam***)
		- Tenure/at pleasure
		- Full time/part time
		- Ad hoc/permanent
		- Policy making role; administers policy (***Pezim***)
		- Who appoints members (***Baker, Pasienchyk***)
		- Tripartite structure, professional staff, elected officials
* Court will not consider the qualifications, competence, training or experience of the specific decision maker
* **SOR examines objective expertise**
* Generally deference to: financial, economic, technical ADMs (ex. ***Pezim***)
	+ Deference to law society (***Ryan***)
	+ More likely to “split” expertise for labour boards and HR tribs (ex. ***Mossop*** for HR trib)
		- They are experts on facts
		- Court expert on law – then find it is a legal issue and court can intervene

**b)** Consider courts expertise relative to ADM

* Courts usually considered more expert in human rights issues (***Chamberlain, Mossop***)
	+ Interpreting HR issues closely intertwined with specific subject can = deference (***VIA Rail***)
* General Q of law = court has expertise
* Charter Qs = court has expertise (SOR = correctness)
* Q of general law in specific subject matter = deference (***Pezim***)

**c)** Identify nature of specific issue before ADM relative to this expertise – ie. who has more expertise on this issue

###### 3. Purpose of the act as a whole and of the provision in particular

* Where statute is polycentric, contains significant policy element, contains vague legal standards = more deference
* Disputes that more closely represent the two party model courts deal with = less deference

###### 4. Nature of the problem (question of law, fact or mixed fact and law)

* Question of law = less deference
	+ “general” Qs of law:
		- If its going to affect other cases; greater precedential impact = less deference
		- Highly generalized propositions of law assumed left to courts (if no express stat language)
* Question of fact = more deference
* Question of mixed fact and law = neutral
* Direct Charter challenge gets no deference – reviewed on standard of correctness

Text argues these are only 2 factors:

 1. legislative intent

 2. expertise

* + Purpose and expertise often overlap
	+ Basis for less deference on general questions of law than questions of fact relates to relative expertise of courts versus admin agencies
* **Entire test is seen as an exercise in determining legislative intent –** did the legislator intend that the court defer to the agency with respect to the disputed issue?

#### Dunsmuir [intention to reform jurisprudence and make SOR workable]

BASTARACHE (MAJORITY):

###### Process of JR:

**1.** ascertain whether jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question;

* ***Dunsmuir*** says these things have been decided in jurisprudence:
	+ - Division of powers questions – correctness
		- Questions of jurisdiction or vires (where trib must determine whether it has authority to decide certain matter) – correctness
		- Questions of general law that is of central importance ot the legal system as a whole and outside the adjudicator’s specialized area of expertise – correctness

**2.** If not, proceed to an analysis of the ***Push*** factors to determine proper SOR

**Two standards of JR – correctness and reasonableness** [PU is gone (except if *ATA* applies)]

##### Reasonableness: deferential standard

* Reasonableness standard values:
	+ Deference
	+ Respect for legislative choices
	+ Expertise
	+ Different constitutional roles

###### Where reasonableness may apply:

* Qs of fact, discretion, policy and legal issues that can’t be easily separated from the factual issues – reasonableness usually applies automatically (***Mossop***)
* Where ADM interpreting its own ES or statutes closely connected with its function
* Where ADM has developed particular expertise in applying general CL rule in relation to specific statutory context

###### Applying reasonableness SOR:

 **1. Process:** Reasonableness concerned mostly with the existence of justification, transparency and intelligibility within the decision making process

 **2. Outcome:** Also concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of hte facts and law

##### Correctness: no deference

* Promotes just decisions and avoids inconsistent and unauthorized application of law
* Court will undertake its own analysis of the question – de novo review (***Ryan***)
* From the outset court must ask whether the ADM’s decision was correct

BINNIE (concurring):

* Legal questions where admin body doesn’t get discretion – court has final say
	+ 1. Issues which are allocated to the courts under s 96 of the Constitution
	+ 2. Admin actions that aren’t founded on statutory or prerogative powers – ie. whether admin body is acting within their power or jurisdiction
		- Provisions of home statute and closely related statutes which require expertise of admin body – reasonableness
		- Any other questions of general law - correctness
	+ 3. Procedural limits placed on admin bodies – requirements of procedural fairness
* Nature of the question before the decision maker helps to define the range of reasonable outcomes within which the admin body is authorized to choose
* Fear that labelling most deferential standard as “reasonableness” may invite reviewing courts to reweigh the input that resulted in the administrator’s decision as if it were the judge’s reasonableness that counts
* At this point – judge’s role is to identify the outer boundaries of reasonable outcomes within which the admin decision maker is free to choose
* Privative clause should presumptively preclude JR on the basis of outcome on substantive grounds unless applicant can show that the clause – permits JR or there is some legal reason why it can’t be given effect
* Starting presumption should be that standard is reasonableness – fact that legislator designated someone other than courts to decide this calls for deference to the outcome, absent a broad statutory right of appeal
	+ should also presume the decision under review is reasonable until applicant shows otherwise
	+ to get correctness standard should have to show that decision relates to legal matter not delegated to the admin body (or constitutionally could not be delegated)
* reasonableness depends on context
* Adoption of one reasonableness standard should not be seen by potential litigants as lowering the bar for JR

DESCHAMPS (DISSENT):

* Start analysis by considering whether questions of law, fact or mixed
* Focus of analysis should be on issues that the parties need to have adjudicated
* Questions of fact – always attract deference
* Questions of law – where privative clause deference usually owed
	+ Deference is not owed on questions of law where Parliament has provided for a statutory right of review on such questions
* Questions of mixed fact and law – limited to cases where determination of legal issue is intertwined with the determination of facts
	+ Show adjudicator the same deference that an appeal court would show a lower court
* Deference owed to exercises of discretion unless body exceeds this discretion
* In adjudicative context same deference is owed to questions of fact and mixed on JR as on an appeal from a lower court
	+ Decision on question of law also gets deference if it concerns the interpretation of the enabling statute and there is no right of review

## 2. Apply SOR

***Ryan*** – pick one SOR; not a spectrum, buckets; can’t be between, must be in one

### 1. Correctness

* Once you get this SOR court does a de novo analysis of case to determine “right” answer – if different than ADM decision = ADM decision quashed
	+ Send back for rehearing
	+ Can send back with mandamus – directions which can push ADM to make certain decision on rehearing
* Likely to attract “correctness” SOR (because courts seen as expert) – consider under expertise in ***Push*** factors:
	+ Q of general legal importance
	+ Pure Qs of law – ex. purely statutory interpretation
	+ Constitutional law Qs – Charter, federalism, Ab law
	+ Jurisdictional Qs – especially which ADM has jurisdiction
	+ Background CL/civil law concepts
	+ Human Rights Qs (***Mossop, Chamberlain***)

### 2. Reasonableness

* SOR is about respect – deference as respect (***CUPE***)
* Different process than correctness – no de novo review (***Ryan***)
* There is no single right answer here
* “unreasonable” = not supported by reasons that can stand up to somewhat probing examination (***Southam***)
	+ Could have defect in evidentiary foundation, logical process followed
	+ Takes some significant searching to find defect (unlike PU)
	+ “unreasonable” = no supported by reasons; not supported by tenable reasons; not properly grounded in evidentiary record (***Ryan***)
* Applying reasonableness - look at the process and outcome (***Dunsmuir***):
	+ 1. Is there justification, transparency and intelligibility within decision making process AND
	+ 2. Does decision fall within a range of possible acceptable outcomes

### 3. Patent Unreasonableness (if BC *ATA* applies)

* Most deferential standard
* If PU is SOR = no new review of case
	+ Don’t think about what the right answer is – this would encourage too much intervention by courts
* PU when defect is immediate/obvious on the face of the reasons (***Southam***)
* PU if (high standard to meet):
	+ No evidence to support findings
	+ Decision can’t be rationally supported by statute
	+ Words can’t bear that interpretation
	+ Amounts to fraud/deliberate refusal to comply
	+ Arbitrary, in bad faith, contrary to natural justice
	+ Outside jurisdiction
* Not PU if:
	+ ADM action within jurisdiction “errs” with different interpretation of statute (***CUPE***)
	+ “mere error of law” within jurisdiction (***Bibeault***)
	+ Error committed in good faith in interpreting/apply statutory provision

# DISCRETION

* **Discretion** – associated with the power of an admin agency to make a choice between various options
	+ Allows decisions of individual case based on facts of that case
	+ Allows adoption of general norms into binding rules (ie. **delegation**)
* **Recognize Discretion:**
	+ Where there is authorization of admin action or decision aimed at a small group or individual
	+ Language of “may” versus “shall”
	+ Delegates broad powers often through vague language
	+ Objective grant of discretion – ex. “as are necessary” allows courts to review if these were necessary
	+ Subjective grant of discretion – ex. “as are deemed necessary” “advisable” (**presumption of deference**)
* Because discretion required choices that could be based on political or policy considerations – subjecting discretion to substantive legal scrutiny was viewed as interfering with separation of powers
* Justification for restraint in reviewing discretionary decisions was not based on judicial deference but the necessity to keep the judiciary away from decisions that were viewed as outside the realm of the law

Roncarelli v Duplessis – established that even at the highest levels of executive action, discretion is limited by legal principles

* “Discretion” – necessarily implies good faith in discharging public duty.
* There is no such thing as absolute and untrammelled discretion
* An Act will not be interpreted to grant unlimited arbitrary power without express language
* Minority: discretion as power – unchallengeable in courts unless the statute explicitly allows for such a challenge
	+ the specific language of the statute didn’t contain any guidance as to the circumstances under which the commission could cancel a permit – therefore the commission had unfettered discretion to decide
	+ If decision maker is delegated broad discretionary power they could not be subject to control by the courts as long as they were acting within the limits explicitly set out in the statute
	+ Where no formal limits were set out and the delegating statute conferred entire discretion on the decision maker the discretion was a “law unto itself”

### Limitations on Discretion (Traditional Discretion Review):

* **Improper purpose:** Discretion must be exercised in conformity with the purposes authorized by the delegating statute
* Discretion cannot be exercised on the basis or in the light of “improper” considerations
* Discretion cannot be exercised in **bad faith** (*Roncarelli*)
* **Dictation/influence -** Where Parliament delegates discretion to a particular decision maker only they can exercise that discretion
	+ Any indication that one acted under the dictation or influence of another person suggests that the power was not exercised by the authority identified by Parliament (ex. *Roncarelli*)
* **Wrongful delegation -** discretion must be exercised by the person on who it is bestowed, not delegated to someone else
	+ Except where exercise of the power does not require any particular expertise or ability
* Legality of directives or guidelines requires that the decision maker actually exercise discretion and departs from the guidelines when cases demand it – discretion can’t be illusory (ie. decision can’t be made up in advance)
* **Unreasonableness -** Conditions required to make a case of unreasonable exercise of discretion are very demanding – this approach is rarely successful

#### Baker – for reviewing administrative discretion:

* Traditionally reviewing discretion limited to specific grounds; incorporated two central ideas
	+ Decision maker must be given an important margin of room when exercising discretion
		- The decision maker must still act within certain limits – within bounds of the jurisdiction created by the statute
	+ **No clear line between decisions that were discretionary and non discretionary**
		- Discretion is not intrinsically different from law – ended law/discretion dichotomy
	+ **Review discretion under the *Push* factors**
		- In ***Baker*** – find that SOR is reasonableness (substance of discretion can be subject to reasonableness standard)
		- Application: decision was unreasonable – inconsistent with the values underlying the grant of discretion
			* Looked at ES, international law, and Ministerial guidelines

Suresh – *Baker* doesn’t authorize courts reviewing discretionary decisions to engage in a new weighing process

* **You can’t reweigh considerations after SOR picked -** Weighing is for the decision maker alone
* Reviewing courts must therefore limit themselves to ensuring that only relevant considerations have been taken into account
	+ All you can look at is what was considered and if that was relevant or not

#### BC ATA for reviewing discretionary decisions

**Standard of review if tribunal's enabling Act has privative clause**

58  (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(3) For the purposes of subsection (2) (a), 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, or

(d) fails to take statutory requirements into account.

**Standard of review if tribunal's enabling Act has no privative clause**

59  (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), 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, or

(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

# CHARTER AND STANDARD OF REVIEW

## 1. Applying Charter to ADM decision

* Charter review involves minimal deference to legislative intent
* Charter review alone has potential to place judges above legislators
* **Potential review frameworks where an admin decision touches on a Charter right:**
	+ 1. Orthodox approach – use the two step Charter framework to determine legality of provision
		- Current approach to use - See ***Slaight, Multani***
		- Analyze Charter issue with Charter analysis; everything else still use admin law
		- Critical analysis takes place under Charter s 1
		- Under **orthodox approach** – court will only engage in substantive admin law review when contending values at stake if the complainant fails to establish a prima facie infringement of a discrete Charter right [only use admin if you can’t use Charter]
	+ 2. Mixed approach – see Lamer in ***Slaight***
		- a. Review legality of decision using admin law principles
		- b. If the decision is lawful under admin law then proceed with two step Charter analysis
	+ 3. Admin law approach – only review under admin law; look at whether decision is reasonable/correct
		- See ***Baker, TWU, Chamberlain***
		- TWU – decided without resort to the Charter framework (admin law approach)
			* Applied pragmatic and functional approach and reviewed decision on a standard of correctness
			* Analysis under Charter was inappropriate because s 15 equality interests of school children weren’t affected
		- Chamberlain – application of pragmatic and functional approach; review on standard of reasonableness simpliciter
			* Decision to refuse the books was unreasonable because it failed to respect principles of tolerance and secularism set out in board’s enabling legislation and regulations
	+ **It is possible that issues of standing led the majorities in *Chamberlain* and *TWU* to opt for review under admin law rather than the Charter**
		- *Chamberlain*- would have had to been granted public interest standing
		- *TWU* – would have had to allow a religiously based corporation to proceed with Charter challenge

#### Slaight Communications – first consideration of application of Charter to admin decision

* **Dickson (Majority) - orthodox approach:**
* 1. Where Charter and admin law apply - use two step Charter analysis
	+ a) was a Charter right violated?
	+ b) if yes, is it saved under s 1?
* 2. Use admin law analysis for things that aren’t related to Charter
* Charter standard is higher than admin law anyway
	+ Admin law unreasonableness as a preliminary SOR should not impose a more onerous standard upon government than would Charter review
* In comparison to Charter analysis the admin SORs lack the same degree of structure and sophistication of analysis – **Charter analysis is more structured and sophisticated than admin law**
* Oakes test seen as making admin law analysis redundant
	+ One of the principle rationales of the orthodox approach is that review under s 1 permits a more structured and explicit discussion of contending values
* **Lamer (Minority) - mixed approach:**
* 1. Analysed under admin law first
	+ Negative order was PU and therefore exceeded adjudicators jurisdiction
	+ Positive order was reasonable in light of statute’s purpose – then reviewed under Charter
		- Doing admin law analysis first shows greater deference (if you do Charter first you assume greater scope to review)
		- If the decision stands under admin law – then do Charter analysis
* 2. Charter review of legislation or the orders made under it:
	+ 1. Look at statute – Charter analysis
	+ 2. Look at acts taken under imprecise grant of discretion – Charter analysis
		- Courts should interpret statute to render it consistent with the Charter – if statute could have been applied to conform with Charter and wasn’t then focus on actions
		- If it can be interpreted that way the court should focus on orders made under the statute rather than on provisions
	+ **Binne (majority)** in ***Little Sisters*** – because custom officials could apply the Customs Act in a non discriminatory manner constitutional review must go to particular decisions rather than the Act

#### Multani

**Majority (orthodox approach):**

* If Charter rights are at stake – use Charter analysis
	+ Admin SOR analysis is inappropriate to deal with these issues
	+ Using admin law approach could reduce the fundamental rights and freedoms guaranteed by the Charter to mere admin law principles, or cause confusion between the two of them
		- Constitutional law standards are too important to subsume into admin law principles
	+ Suggests more protection is available under Charter analysis than admin law [FORD doesn’t necessarily agree]
* **Charter can apply in two ways:**
	+ 1. Legislation may be unconstitutional on its face because it violates a Charter right and can’t be saved by s 1 – **ie. Charter applies to the statute**
		- MINORITY – think you should only apply s 1 of the Charter in this situation
	+ 2. By actions of delegated decision maker in applying legislation (that on its face is valid) – **ie. Charter applies to decisions of delegated DMs**
		- Legislation remains valid and remedy for unconstitutional action may be sought under s 24(1) of the Charter
		- MAJORITY – think the s 1 analysis should be done in this situation too
			* Any infringement of a guaranteed right that results from a decision maker’s actions is also a limit “prescribed by law” under s 1
			* When delegated power is not exercised in accordance with the enabling legislation, a decision not authorized by statute is not a limit “prescribed by law” and therefore can’t be justified under s 1
* **Justification under s 1 of the Charter:**
	+ Importance of Objective
	+ Proportionality
		- Rational Connection
		- Minimal Impairment
			* Doesn’t necessarily have to be least intrusive solution
			* Rights impaired no more than necessary
			* If law falls within range of reasonable alternatives court won’t find it overbroad
* **Same approach should be applied to decisions rendered pursuant to a statutory discretion as to legislation**

#### Multani concurrence (Admin Law approach):

* **Admin law approach should be used because:**
	+ Constitutional analysis is for issues of general importance (ex. statute or regulations), not for individual decisions of admin bodies
		- Use Charter analysis for statute – not decisions made under it
		- Charter analysis is for policy decisions of legislature (in enacting statute)
	+ Basing analysis on principles of admin law prevents impairment of analytical tools developed specifically for each field
		- Maintains usefulness of admin law principles
* **Admin law analysis doesn’t exclude, but incorporates, arguments relating to the Charter – admin law principles are as demanding as Charter analysis**
	+ Where discretion given, it must be exercised in accordance with boundaries imposed by the statute, principles of ROL, principles of admin law, fundamental values of Canadian society, and principles of the Charter
* Simply raising a Charter argument doesn’t make admin law inapplicable
	+ And doesn’t automatically = correctness standard
* While admin bodies have the power and duty to take Charter values into account, it doesn’t follow that their decisions must be subjected to the justification process under s 1
	+ Hard to imagine decision that would be considered reasonable or correct if it conflicted with constitutional values
* **An admin decision maker shouldn’t have to justify their decision under the Oakes test – which is based on societal interests and is better suited to the concept of “prescribed by law”**
	+ The test is based on the duty of the executive and the legislature to account to the courts for any rules they establish that infringe protected rights
	+ The duty to account is not easily applied to admin tribunals
* A trib’s decision should not be subject to a justification process as if it were a party to a dispute
* Admin bodies can’t disregard Charter values unless express indication that legislature intended to allow it to do so
* **Application of reasonableness SOR:** By disregarding freedom of religion, and invoking safety of the school without consideration of less intrusive solutions the school board made an unreasonable decision

## 2. Can ADMs interpret and apply the Charter to their ES

* Cases: ***Douglas College, Cuddy Chicks*** and ***Tetreault***
* Because s 52(1) of the Constitution declares the constitution to be the supreme law of the land and inconsistent law of no force and effect – ADMs with power to interpret law must also interpret and respect this supreme law
* Although ADMs can’t declare infringing provisions invalid (only courts can) – they are authorized to apply the Charter to their enabling legislation and refuse to give effect to provisions they determine to be inconsistent with it (under s 52(1))
* Court retains authority to review agency determinations of Charter issues on standard of correctness

#### R v Conway

* ***Mills***: a court of competent jurisdiction (Charter s 24(1)) = a “court” with jurisdiction over the person, subject matter and the remedy sought **[no longer good law]**
* ***Slaight***: any exercise of statutory discretion is subject to the Charter and its values
	+ Charter applies to ADMs; legislature can’t delegate to ADMs things that violate the Charter
* ***Cuddy Chicks*** trilogy: specialized tribunals with expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates
	+ If ADM has power to interpret law = power to interpret Charter and have to apply Charter
		- Power to interpret law is viewed narrowly – essentially has to be explicit in ES
		- Can’t declare provision invalid – but can’t give effect to violating provision (basically pretend it isn’t there)
		- SOR for JR of Charter interpretation = correctness (on jurisdiction to look at Charter, and actual interpretation under Charter)
* Admin tribs which have the authority to apply the law have the jurisdiction to apply the Charter to the issues that arise in the proper exercise of their statutory functions
	+ Expert trib’s should play a primary role in the determination of Charter issues falling within their statutory jurisdiction
	+ In exercising their statutory discretion they must comply with the Charter
* ***Conway* TEST:**
	+ 1. Look to ES (does ADM have jurisdiction to interpret Qs of law)
		- Must be explicit - in ES terms or implicit – look at ES as a whole (***Martin***)
		- If yes = presumption ADM can look at the Charter
	+ 2. Is there anything explicit in ES that eliminates presumption
		- Explicit/clear implication of withdrawal of authority to decide constitutional Qs (ex. *ATA*)
	+ 3. Once found ADM has jurisdiction to apply the Charter – **ADM has to apply it** (***Martin***)
* If ADM has power to interpret Qs of law and NO clear contrary legislative intent = ADM can resolve Charter Qs (and must resolve them)
* ADMs have to act consistently with Charter values when exercising statutory functions (***Slaight***)
* Charter belongs to the people (***Cooper* dissent – majority in *Martin***)
	+ Entitled to assert rights/freedoms in most accessible forum
	+ ADM’s Charter review provides a record for JR
	+ Decisions will be reviewed on SOR = correctness

# STATUTORY REFORM: Administrative Tribunals Act

Introduced to improve the administrative process

 Only applies to BC tribunals – not fed or other provinces

If dealing with fed trib; other province, or trib not included under ATA provision = go to CL

**ATA is built around five main areas:**

 **1. Appointment process [ss 1-8]**

 Ensure independence, accountability and qualifications

 Reduce the opportunity for people to be appointed for reasons other than merit

Chair and members appointed for merit and for fixed terms – no at pleasure appointments [ss 2, 3] – members initial term = 2 to 4 years

 **2. Changes to institutional design and statutory powers given to tribs**

 **3. Focus on dispute resolution in effort to avoid proceeding to JR [ss 11, 28]**

 **4. Charter and human rights jurisdiction [ss 43 - 46.3]**

 Largely moved these issues out of trib jurisdiction

 **5. Standard of Review – codified the SOR for BC tribs**

### Appointment Process

Chair and members are appointed based on merit [**ss 2, 3**]

 Chair’s initial term = 3-5 years [**s 2(1)**]

 Members’ initial term = 2-4 years [**s 3(1)**]

After resignation or appointment expiration – can retain jurisdiction over matters you were working on [**s 7**] - You get to finish what you were on - if Chair authorizes it

 Appointment can be terminated for cause [**s 8**]

### Time Limit for JR [s 57]

Application for JR must be started within 60 days of decision

 Substantially shorter time limit than what CL would give

More streamlined; but preventing access to courts (gives ADMs more power and courts less opportunity to review them)

**"privative clause"** means provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;

**Full privative clause - finality provision and ouster provision**

**If trib doesn't have both then you don't have a privative clause**

### Standard of Review with Privative Clause [s 58]

(1) If ES contains a privative clause, trib is considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction

(2) On JR of trib with privative clause:

(a) SOR for finding of fact or law or an exercise of discretion = patent unreasonableness

(b) forprocedural fairness trib must have acted fairly

(c) for everything else, SOR = correctness.

(3) discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith, (definition of bad faith from before ***Baker***)

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

### Standard of review if tribunal's enabling Act has no privative clause [s 59]

(1) SOR for anything (other than finding of fact, discretion) = correctness

(2) SOR for finding of fact = unreasonableness

(3) SOR for discretionary decision = patent unreasonableness

(4) 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, or

(d) fails to take statutory requirements into account.

(5) For application of CL rules of natural justice and procedural fairness tribunal must act fairly

### Dispute Resolution Process

Trib can make rules respecting dispute resolution processes [**s 11**]

Trib can appoint someone to conduct the dispute resolution process [**s 28**]

“Dispute resolution process” – is confidential and without prejudice [**s 1**]

Can make rules respecting ADM’s own practice and procedure [relevant for ***Baker*** factor 5] [**s 11**]

Internal appeal must be applied for within 30 days of decision [**s 24**]

An application for appeal under s 24 does not operate as a stay [**s 25**] – original decision still in effect

Right to be represented by counsel and present submissions [**s 32**] – doesn’t apply to all tribs

Charter questions – sections enacted for consistency; idea that constitutional questions should be dealt with by the courts

Labour Relations Board & Securities Commission have jurisdiction to determine Charter issues [**s 43**]

Can refer the question to courts for determination [**s 43(2)**] and can be forced by AG to refer to courts [**s 43(3)**]

Certain tribs don’t have jurisdiction over constitutional questions [**s 44**]

Certain tribs don’t have jurisdiction over Charter questions [**s 45**]

Can choose to refer the question to the courts [**s 45(2)(a)**] or can be forced by AG to refer to courts [**s 45(2)(b)**]

#### Khosa – relationship between common law SORs and statutory instruments (ex. ATA, Fed Court Act)

MAJORITY:

* Statutory provisions have to be integrated into CL SOR analysis
	+ Don’t displace courts by introducing this legislation
	+ ***Dunsmuir*** SOR analysis is read into legislation

**First step:** **analyze JR legislation** (ATA, Fed Court Act)

* Legislature can expressly ousted CL SOR analysis
* If not and legislative language permits, the courts:
	+ Won’t interpret grounds of review as SOR
	+ Will apply ***Dunsmuir*** to determine appropriate approach to JR
	+ Will assume courts have discretion to make determinations about SOR – JR is always discretionary so ***Dunsmuir*** SOR analysis is how to determine if you should exercise that discretion

**SOR Analysis:**

1. **First step:** look to precedent (***Dunsmuir***)

2. **Second step:** Factors (***Pushpanathan***)

**Application of SOR:**

* Reasonableness is a single standard (not a broad spectrum) (***Ryan***)
* “justification, transparency and intelligibility” (***Dunsmuir***) – require courts to look at reasons
	+ reasons are primary form of accountability of the decision maker to the applicant, the public and the reviewing court
* reviewing courts are not supposed to reweigh the evidence

ROTHSTEIN – concur with outcome, disagree with approach

* Where legislature has expressly or impliedly provided for SORs, courts must follow that legislative intent, subject to any constitutional challenge
	+ Legislation occupies field and ousts common law in SOR analysis
	+ Majority’s insistence that ***Dunsmuir*** applies even where Parliament specifies a SOR - inconsistent with the search for legislative intent
		- **There is no justification for imposing a duplicative CL analysis where the statute expressly provides for the SOR**
* Recognizing expertise as free standing basis for deference on questions that reviewing courts are normally considered to be expert – departs from search for legislative intent
* Legislature determines what constitutes expertise and what admin bodies have expertise (in any area including legal)
	+ Privative clause is expression of this legislative intent that that body has expertise
	+ Court shouldn’t be determining if body has expertise
	+ Time for courts to recognize that privative clauses and trib expertise are two sides of the same coin
* SOR emerged to reconcile judicial/legislative tension created by privative clauses
	+ Only use ***Dunsmuir*** SOR analysis if there is a strong privative clause and legislation doesn’t provide SOR
	+ Treat ADMs with no privative clause like lower courts
		- Defer on questions of law and mixed fact/law that can’t be separated
		- Don’t defer on questions of law

#### Khosa and the BC ATA

* Binnie (Maj): Can’t create a statute that’s inflexible and not sensitive to context
	+ Even PU in BC continues to evolve through admin law cases
	+ *ATA* specifies the SOR, but not the content of that SOR – go to ***Push*** and ***Dunsmuir***
* Rothstein: the *ATA* is no more rigid than the 2 ***Dunsmuir*** SORs
	+ Legislative intent shouldn’t be ignored

# Delegation as a Tool

* **1. Regulations and Rules**
	+ Legally binding requirements
	+ Power to make them must be expressly granted under statute
	+ Form of law developed by the executive
	+ Typically don’t set general government policy as statutes do
	+ Explain how statutes will actually work
	+ Binding on all those who are subject to them
* **2. Soft Law**
	+ Not legally binding
	+ Also developed by the executive
	+ Power to make soft law doesn’t have to be expressly provided in a statute
* **Reasons for delegating:**
	+ Expertise
		- It is impossible for legislators to have sufficient expertise to understand and evaluate all various detailed requirements in a vast range of areas that comprise the regulatory and welfare state
	+ Time
	+ Information
	+ Flexibility
		- To allow the requirements to be changed as new information arises
	+ Costs
	+ Underlying values: trust, reliance, best interests, public good
* **Controlling Risks of Delegation (no CL PF for making rules):**
	+ 1. Structural controls – who is delegated to, control resources available
	+ 2. Legislative oversight
	+ 3. Judicial review of substance
		- Basic legitimacy problem – courts aren’t supposed to make policy
	+ 4. Process requirements – public consultation, public accountability
		- Costly, slow, not necessarily effective

Thorne’s Hardware

* **Court took a strong position against examining the actions of Cabinet in making orders in council**
	+ Decisions involving public convenience and general policy are final – not reviewable by courts
	+ Decisions made by GinC pursuant to ES are reviewable for jurisdictional and procedural error
* **Courts can look at jurisdiction and procedure – not general policy**
	+ **But it will take an egregious case to warrant striking down an OiC on jurisdictional or other compelling grounds**

Enbridge Gas [process requirements around consultation]

* Courts are reluctant to review soft law
	+ Will review where there is fettering – where guideline or policy is in effect mandatory or binding on a DM taking away the discretion that has been granted to him
* Don’t use SOR analysis to review rule making power – look at jurisdiction
	+ Does statute give power to make rules or not?
* ES contained “notice and comment” provision [process meant to give rule credibility – no other oversight process]
	+ To make the rule must send out notice
	+ Allow comment from interested parties
	+ Then they can make the rule – making rule is all internal to ADM
* No evidence they didn’t give adequate consultation = the rule is good
	+ Standard = did info provided accord reasonable opportunity to make written submissions

**Rules – only review on procedure and/or jurisdiction (*Thornes, Enbridge*)**