**Administrative Law 210 Hoole/Spring 2012**

**Nature of ATs**

* Not judicial
* Varying degrees of independence

**Sources of AT power**

* Statute

**Rationale For Admin Tribunals versus Trial-Type Hearings**

* + 1. **Cost: Flexibility/informality** in the process🡪 access to justice (perhaps no need for counsel, fees, submit docs in same way)
		2. **Efficiency:** Trials not universally applicable (evaluation of conduct vs determination of misconduct), and not suitable for comparing different individual interests vs government efficiency interests. Biggest reason for ATs.
* **Fact-Finding:** Trials are good for determining facts
* **Choice:** But trials are bad when making value judgments
	+ 1. **Expertise:** Expertise in areas beyond the law (e.g. tariffs or licensing) / Specialized knowledge. Courts are generalists, ATs are specialists.
		2. **Independence**: from government & partisan concerns [overall duty on public body to act fairly in making decisions that affect rights, interests or privileges of individuals]
			- **Transparency**
		3. **Less adversarial**: sometimes better for solutions if less of a legal perspective
		4. **Settlement reaching capabilities:** Because of legal costs, courts are pre-disposed to reach a legal settlement. ATs are not liable to settlement and therefore lend themselves to the resolution of disputes.

**Powers of ATs**

* Can govern their own procedure: ***Prasad v. Canada (MEI)*** – ATs are generally masters of their own procedure.
	+ “As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.”
* The enabling statute may not be very detailed (hearing/no hearing, cross-examination allowed, etc).
* Necessarily implied powers
	+ Statutes can be quite detailed but there are always gaps. Courts have endorsed the principle that the legislator does not have to necessarily enumerate every constituent power of the AT.
	+ ***Bell Canada v. Canada (CRTC)***
		- CRTC’s statute didn’t explicitly allow the CRTC to revisit interim tariff orders. The SCC held that such powers may exist by necessary implication. SCC said that the courts must avoid “sterilizing” the ATs powers through overly technical interpretations of enabling statutes.

**Limitations on the Powers of ATs**

**Constitution**

* Example: Privative clauses. Most ATs appear to be insulated from the courts. Privative clauses tend to attempt to prevent courts from interfering with the actions of the AT. If the court cannot examine the decisions of an AT, then it can’t issue remedies.
* Courts don’t like privative clauses because of s. 96 of the BNA Act.
	+ S. 96 “The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.”
	+ This section has come to mean that provinces cannot create entities that are insulated from courts. Otherwise a province might have in effect created a judge. Only the federal govt has the power (per s. 96) to create courts.

***Re Residential Tenancies Act* (SCC) – Court-like tribunals are contrary to s. 96**

**H**: SCC said that s. 96 will trump any provincial attempt to create a court. Ontario had tried to create a residential tenancy tribunal which looked suspiciously liked a court (tribunal members looked like judges). SCC said that creating a tribunal with privative clauses and “judges” will not work because of s. 96.

***Crevier v. Quebec (AG)*-**

**F:** QC had created an AT that was to hear appeals from various professional discipline boards. Any aggrieved member could appeal to that board. No policy mandate, just heard appeals. Specifically, it had the power to determine conclusively its own jurisdiction. Its decisions were not subject to JR.

**H**: Privative clauses on questions of law may be permissible. But privative clauses on questions of jurisdiction were contrary to s. 96. Part of the rule of law (which is constitutionally protected).

**The Charter**

* Some ATs are not allowed to apply the Charter.
	+ Concern for efficiency in AT system justifies this move.
	+ In most of Canada, this is no longer the case. ATs can now hear Charter arguments.
* But in BC, the Charter cannot be considered by ATs.
	+ The constitutionality of the ATA on this point has not been challenged yet.

***Nova Scotia (WCB) v. Martin*, 2003 SCC- ATs can hear Charter arguments**

**F**: NS tried to put time period on the benefits that workers with chronic pain could get. Workers argued that it was contrary to s. 15. AT agreed. NSCA found the AT could not consider the Charter, overturned the decision.

**H:** SCC: Held that the AT did have the authority to hear Charter arguments and concluded that the chronic pain policy was invalid.

* Per McLachlin quote from *Cooper*: “The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception.”

***R. v. Conway*, 2010 SCC- Can the AT issue Charter remedies?**

**F**: Conway had been declared NCRMD and had been placed in the psychiatric system. Continued presence in that system is governed by an AT. Conway was concerned about his treatment, lodged a Charter complaint and asked for Charter remedy.

**H**: Concluded that the Charter remedy shouldn’t be issued, but that the review board had the authority in theory to consider the Charter arguments.

* Test for whether an AT can consider a Charter remedy:
	+ First, does the AT have jurisdiction, explicit or implied, to decide questions of law? (Threshold question)
		- Unless the legislature had made it clear that the AT was excluded from applying the Charter, the AT can consider and apply the Charter and associated remedies.
	+ Second, given the statutory scheme, can the AT grant the particular remedy sought? Look at the legislative intent, AT statutory mandate, structure and function.

 **Human Rights Legislation**

* HRs legislation is quasi-Constitutional.
* ***Human Rights Code* (BC)**
	+ S. 4 – “If there is a conflict between this Code and any other enactment, this Code prevails.”

***Tranchemontagne v. Ontario (Director, Disability Support Program*), 2006 SCC**

**F:** Pf was alcoholic, denied benefits on that basis. Sued claiming discrimination contrary to ON HR Code. Issue was whether AT had authority and was required to consider HRs legislation.

**R**: Where AT has the authority to deal with general issues of law, it has the ability to consider HRs codes.

**Statutory Interpretation**

* Powers of ATs are determined by statute. Therefore, statutory interpretation can be used to limit the powers of ATs.
* Principles of SI:
	+ Driedger’s golden rule (cited in *Rizzo Shoes*) – “The words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.”
	+ Plain meaning
	+ Avoid absurdity in outcome
	+ Interpret provision in statutory scheme
	+ Presumption of constitutionality
	+ Look at the French translation
	+ Presumption against tautology- that legislation speaks for a reason. Give effect to each part and word of the statute.
	+ Harmonious interpretation of conflicting statutes.
	+ Purposive interpretation
	+ When a statute has a grab all provision (e.g. and any other thing), this means that any other thing that comes from the previous list.
	+ Look to the definition if provided in the Act itself.

**Other Statutes that Relate to ATs**

***Administrative Tribunals Act* (BC)**

* BC’s attempt to eliminate cronyism in the appointment of tribunal office holders. Put in requirements for office holders and streamlined the delivery of AT justice.
* Three themes
	+ Procedural – tells ATs what they can/can’t do.
		- E.g. s. 11- allows ATs to create binding procedural rules
		- S. 14-15- Allows ATs to issue orders
		- S. 18- ATs are given the power to dismiss for failure to comply with an order
	+ Constitutional jurisdiction
		- SS. 44, 45 and 46.1
			* Some ATs are excluded from considering the Constitution (44), Charter (45) and Human Rights Legislation (46.1)
		- To determine whether the AT can consider the Constitution, look to the test (below).
		- ATA defines constitutional question as a matter requiring notice under the *Constitutional Questions Act* (leaves some grey space).
	+ Effort to codify standard of review
		- S. 58 and 59 create SOR. Describes the deference the courts will use in reviewing a particular ATs decision.
		- Post-Dunsmuir, this provision is only applicable to ATs in BC that are covered by the ATA.

***Judicial Review Procedure Act* (BC)**

* If you want to challenge an AT decision you go by petition (application for leave and judicial review). Default position is that breach of natural justice leads to quashing of decision. JRPA tells you what remedies you can get.
* However, s. 8- grants the court residual discretion to refuse a remedy even if you meet the requirements. Court can refuse a remedy for laches (not coming quickly enough) and “unclean” hands.
	+ Westfair Foods Ltd v. United Food and Commercial Workers Union; Compass Group Canada (Health Services) Ltd. v. HEU (BCCA).
		- These are cases where the courts refused to grant remedies despite a breach of PF. In these cases the breach was so trivial and unlikely to affect the outcome of the statutory DM’s conclusion that no remedy was granted.
* JRPA does not impose a time limit for filing a JR (note: the ATA does require application within 60 days for ATs covered by it).

***Federal Courts Act***

* Governs the jurisdiction of federal tribunals (IRB).
* S. 18.1- Grounds for review
	+ (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
		- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction
		- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
		- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
		- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
		- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
		- (f) acted in any other way that was contrary to law.

**PROCEDURAL FAIRNESS**

**History of PF**

* Flowed from latin maxims (hear the other side/no man shall judge their own case)
* Previously there was a distinction between quasi-judicial tribunals and policy-oriented bodies. Natural justice was limited to the former, not the latter.
	+ As govt developed towards welfare state, distinction became more blurred.

***Nicholson v. Haldimand Norfolk (Regional) Policy Commissioners* (1979, SCC)**

**F**: Nicholson was a cop who had been employed for 15 months before being fired. He was not really told what the issues were and was not given a hearing. He was a public office holder and his firing was done by a public body. Statute said that if you were employed for 18 months, you could have a hearing. If not 15 months, the procedure was unclear.

* Lower courts said that the statute clearly meant to distinguish between pre/post 18 months (maxim: “if the legislator provides one thing, they didn’t provide for anything else”). Because Nicholson was pre-18 months, he was not entitled to a hearing.

**I**: How much PF was he entitled to?

**H**: Decision was quashed.

* SCC agreed that the statute distinguished between pre/post 18 months, but they said that Nicholson was still owed some fairness. The maxim should not be applied when it would lead to inconsistency and injustice.
* Nicholson was owed a residual degree of fairness. Shouldn’t be treated like a post-18 month cop but Nicholson should at least be told what the problems were and be given a chance to respond to them.

**R**: Furthered the process of getting rid of the distinction between quasi-judicial, judicial and administrative. This distinction is no longer relevant in Canada.

* Note: This was largely overturned by *Dunsmuir.* Now, where public employee is employed under contract, regardless of public office holder, the applicable law governing his/her dismissal will be contract law/employment law. *Nicholson* and *Knight* stand for the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him/her without any protection whatsoever when dismissed (*Dunsmuir*).

***AG Canada v. Inuit Tapirisat et al.* (1980, SCC)**

**F**: Bell and ON/QC were in a dispute before the CRTC about rates. IT (consumer group) wanted lower rates. CRTC decided in Bell’s favour. IT asked the GIC use its discretion to change the CRTC decision (allowed per s. 64 of the National Transportation Act). IT had not taken advantage of their right (per S. 64 (2) of the Act) to have the CRTC’s decision JR’d by the FCA.

* IT’s request was received/read by the bureaucracy not the GIC. Bureaucracy asked Bell to respond (which Bell did). Eventually denied IT’s request.
* IT sought JR of the GIC’s refusal. They claimed it was not a political decision but quasi-judicial. Argued that (1) they were not able to petition GIC directly and (2) were not given a chance to respond to Bell’s response.

**H**: SCC abandoned administrative/quasi-judicial distinction. Instead look to the statute and determine whether some fairness should be given.

* Applying this, the SCC said that (1) GIC’s ability to refuse was policy-laden, (2) IT had an option to go the court, (3) GIC is busy so it’s not feasible for parties to expect to have their arguments heard directly (not by bureaucracy).

**R:** (1) Distinction between quasi-judicial/administrative is gone; (2) Look to statute to see whether (and how much) PF applies. Nowadays, the tension is in determining the content of PF, not its application.

***Cardinal v. Kent Institution* (1985, SCC)**

**F:** Cardinal was prisoner alleged to have been involved in hostage-taking at Mission prison. Transferred to Kent prison, placed in solitary (1st decision). Director decided that this was necessary for good order and safety.

* At the review of his solitary confinement it was recommended that he be released and join the general prison population. Director disagreed and left Cardinal in solitary (2nd decision). Didn’t tell Cardinal why he was still confined and didn’t give him a chance to respond.
* Cardinal applied for habeas corpus on the basis that the Director didn’t accept the board’s decision and didn’t give him PF.

**H:** Decision quashed.

* No PF owed for 1st decision because it was made in an emergency setting.
* Director had duty of PF WRT the 2nd decision. Emergency context didn’t apply to this one. The Director was acting under a statute and was impacting Cardinal’s interests.
* Content of PF?
	+ “General CL duty of PF on a public authority making administrative decisions which is not of a legislative nature and which affects the rights, privileges and interests of an individual.”
* PF was marginal in this case (prison context, Cardinal wasn’t sympathetic plaintiff).
	+ SCC said the Director should have informed Cardinal of decision and given him a chance to state his case.
	+ Issue here was that the proper procedure was not followed. Result doesn’t matter if the procedure was faulty. “The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.”

**R:** Where individual’s rights, privileges, interests are impacted by DM, some PF will arise. Also important for the principle that where there is a failure to observe proper procedure, the decision will be quashed irrespective of the fact that “they got it right.”

***Knight v. Indian Head School Division No. 19*, (1990, SCC) – Statutory office holders (overturned partially)**

**F:** K was director of education for school board (appointed public office holder). School board was an administrative decision-making body. Board and K disagreed and latter was fired with 3 months notice. K disagreed with termination and sought JR of the decision. Argued he wasn’t given sufficient notice, hadn’t been told of the case against him nor given an opportunity to respond.

* Statute didn’t set out procedural safeguards around terminating directors of education.

**H:** Because the school board is a public body, it must exercise powers in due regard to administrative law. The degree of PF will vary according to the context.

* Three part test to see whether general duty of fairness arises:
	+ (1) Consider the nature of the decision- was it policy-laden? Inter-party dispute? Less policy-laden, more PF owed.
	+ (2) Closeness of the relationship between the body/individual
	+ (3) Decision’s effect on individual’s rights
* Applying this, SCC said some PF was owed to K before termination. SCC found that notice had been given to K through the board’s communication with him.
* SCC also distinguished between final and preliminary decisions. Preliminary decisions do not attract PF (e.g. investigation ends with recommendations to board, not final, just preliminary).

**R:** Three important things- (1) 3 step test; (2) administrative law applies to a public office holder within a statutory body; (3) PF applies but the exact content will vary in the circumstances.

* Note the overturning of part of this decision (above under *Nicholson*).

***Dunsmuir v. New Brunswick*, (2008, SCC) – Overturns Knight in part**

**F:** D was lawyer working for NB Court Registry (appointed by GIC). Had a private contract with the court. Had problems with employer for 3 years and eventually fired with no cause given. D asked for JR claiming the right to know why he was fired and chance to respond.

**H:** Decision upheld.

* D was a public official and the court was a public body. But D also had a private contract and therefore had access to private employment law remedies. SCC said he wasn’t a true public office holder. Thus, employment law was the right sphere for D to appeal to.

**R:** Public officials with private contracts should be dealt with by employment law.

* Two exceptions to this rule: (1) where a public employee is not, in fact, protected by a contract of employment.
	+ Examples of public officials to which Knight still applies: judges, ministers of the Crown, other officials with constitutionally-defined roles who require some degree of independence for their decision-making.
* (2) When a duty of fairness flows by necessary implication from the statutory power governing the employment relationship. If the statute specifically provides for a degree of PF (will be rare).
	+ Example: If dismissal of a teacher can only take place with 3 weeks’ notice, the teacher should be able to make representations at the meeting where dismissal is being discussed. Why else give notice procedure in the first place. Specific type of procedural requirements will depend on specific wording of statute.
* Knight’s discussion of admin law and PF is still relevant though.

***Baker v. Canada (MCI)*, (1999, SCC) – Degree of Procedural Fairness & Written Reasons**

**F:** Baker was Jamaican citizen who came to Canada in 1981 on visitor visa. Worked as live-in domestic worker and overstayed visa. Began to suffer from paranoid psychosis after birth of 4th children in Canada. Lost custody of kids (two to father, two to foster care). Medical conditions improve and foster kids were returned.

* Applied to stay in Canada on H/C grounds. She submitted docs on the impacts of her illness and how leaving Canada would hurt her (+ kids).
* Minister refused Baker’s request, she asked for reasons and was sent Officer Lorenz’s notes from his interview with her.
* Lorenz’s notes showed bias, a lack of structure, personal opinion and consideration of irrelevant factors and didn’t reference the statute (nor the best interests of the child as demanded by the UN CRC). Decision didn’t convey sense that justice was done.

**H:** Decision quashed. Two points to remember: (1) Five factors to determine PF’s content; (2) provision of written reasons will sometimes be required.

1. Nature of the decision being made and the process followed in making it.
	1. The more the process provided for, the function of the tribunal, the nature of the DM body and the determinations that must be made to reach a decision resemble judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.
2. Nature of the statutory scheme and the terms of the statute pursuant to which the body operates.
	1. Role of the particular decision with the statute’s scheme and other surrounding indications. Greater procedural protections, for example, will be required when there is no appeal or when the decision is determinative of the issue and further requests cannot be submitted.
3. The importance of the decision to the individual or individuals affected.
	1. More important, the more stringent the protections will be.
	2. Professional disciplinary decisions are deemed to require high degree of protection.
4. Legitimate expectations of the person challenging the decision.
	1. Expectations as to process, not substance/outcome. If claimant has legitimate expectation that particular process will be followed, this procedure will be required by the duty of fairness.
	2. Does not create substantive rights outside of the procedural domain.
	3. Based on a reasonable person standard.
5. The choices of procedure made by the agency itself.
	1. Prior choice of the agency in question in similar situations will be taken into account. Fairness will be calibrated to take into account whether the statute empowers the agency to make decisions as to its procedure.
* PF will sometimes require the provision of written reasons (when decision has important significance for individual and there is a statutory right of appeal).
* Application:
	+ There was no fixed procedure, so Baker had not legitimate expectations.
	+ Baker should have had a meaningful opportunity to present her case (oral hearing). Written submissions were fine too.
	+ Some reasons were required in this case (Lorenz’s notes sufficed).
	+ Problems with Lorenz’s notes:
		- Reasons were adequate (there was enough there for Baker to know why she was refused).
		- Bias was the problem. Evidence that Lorenz displayed individual bias against Baker. PF demands that you can’t have a biased DM.

***Newfoundland and Labrador Nurses’ Union v. Nfld.* (2011, SCC) – Written reasons not always required**

**R:** SCC said that Baker didn’t say that you have to provide reasons. Rather, that the reasons in that case were terrible.

***Reference Re Canada Assistance Plan (B.C.)***, **(1991, SCC) – PF n/a to legislative/ministerial decisions**

**H:** Parliamentary govt would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the govt from introducing legislation in Parliament. Promises made in election campaigns or made by predecessor govts cannot be the basis of legitimate expectations.

**R:** PF does not apply to legislative or ministerial decisions.

***Vancouver Island Community Forest Action Network v. Langford (City)***, **2010 BCSC**

**R:** Municipal by-laws are an exception to n/a of PF to legislative decisions. There was no dispute in this case that PF applied. The dispute in this case concerned the level of document disclosure that was required. Several questions to be considered in this analysis:

* Does the bylaw create a conflict of interest for the municipality?
* Does the rezoning significantly affect only one or two people, or is it a broad legislative decision?
* Do the disputed records add anything to the debate?
* Does the contemplated rezoning result in a significant change in land use from the previous zoning?
* Do the disputed records pertain to the concerns of the petitioner?
* Was the public hearing mandatory?
* Was the petitioner already aware of the contents of the records?
* Are the documents relevant to zoning, or are they relevant to site-specific development or other concerns?
* If the impugned document is an agreement, was that agreement still subject to negotiation?

**PROCEDURAL FAIRNESS- INDEPENDENCE AND BIAS**

“Justice should not only be done, but should manifestly and undoubtedly be seen to be done.” (*Rex v. Sussex Justices*, 1924, England)

**Two key factors to bear in mind in a bias argument:**

1. Waiver – the person alleging bias must make the allegation as soon as they become aware of the facts indicating bias/at first instance before the DM. If you fail to do this, then you can’t make the argument on JR.
	1. Exception for unrepresented person (not expected to raise it at first instance).
	2. If you don’t become aware of the facts until after the AT comes to its decision, then waiver will not apply.
2. CL presumption against biased DMs can be displaced by evidence of statutory intent- this must be done clearly. Barring constitutional arguments, the claimant cannot argue bias afterwards.
	1. Constitutional arguments would have to be based on s. 7 (PF, doesn’t apply very often), s. 11 (d) (which includes the right to be tried by impartial and independent DM or soft constitutional principles and the preamble to the BNA Act (unwritten constitutional principles such as rule of law).

***R. v. S (S.D.),* (1997, SCC) – Onus in Bias and Signals**

**R:** Onus is on the person alleging bias.

* Test for reasonable apprehension of bias:
	+ “If a reasonable person with an informed understanding of how the tribunal functions perceives that the decision-making is biased, this is enough to have the decision quashed.”
* Difference between individual and institutional bias.
	+ Signals of individual bias:
		- Relationship with counsel
		- Racism
		- Strong political views of the decision-maker
		- Stake in the outcome
		- Prior decisions that you’ve issued
	+ Signals of institutional bias
		- Concern flows from the overall structure of the decision-maker as a whole.
		- Examples:
			* Regulatory agencies where the AT both recommends laying charges and decides cases as well
			* ATs cannot make mandatory recommendations as to how particular decisions should be made. Seen as fettering their discretion.
			* Proximity (physical or not) between DMs and other staff (pensions, office sharing).

**Individual/Personal Bias**

* Very unusual and hard to prove.
* Test (Committee for Justice): Whether a reasonable, well-informed person having thought through the matter would conclude that an administrative decision-maker is sufficiently free of factors that could interfere with his or her ability to make impartial judgments.
	+ It’s about the apprehension of bias (Baker).
* Factors (R. v. S. (S.D.)):
	+ Relationship with counsel
	+ Racism
	+ Strong political views of the decision-maker
	+ Stake in the outcome
	+ Prior decisions that you’ve issued

***Committee for Justice and Liberty v. National Energy Board*, 1978 SCC – Test for Bias**

**F:** Claim arose out of hearings surrounding an oil pipeline proposed for the Mackenzie River valley. Crowe had stated his opinion that the pipeline should be built and indicated a preference for a particular company. He then became the chair of the panel (2 other members) to evaluate proposals. His alleged bias was raised, submissions made on the issue and the question was referred to the courts.

* FCA said Crowe’s prior experience was okay and you generally want ATs to have expertise. If you understand the issues, you are likely to have been involved in the industry.

**SCC Held:** (Majority) Overturned FCA, said that the reasonable observer might perceive Crowe to be biased. The key point was his previous statement before going to the board.

* Test: “The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.”
* Dissent: Now more well-known than majority. Said that the majority was over-sensitive about Crowe’s past involvement and comments.
	+ Grounds for RAB must be substantial and not related to the very sensitive or scrupulous conscience.
	+ Examination for RAB in an AT is very different than that of a judge/court. Administrative DMs are entrusted because of their experience.
	+ DMs can have their previous experience and views. They are not “flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”

***Newfoundland Telephone Co. v. NF (Board of Commissioners of Public Utilities)***, 1992 SCC

**F:** Board was to investigate the rates of executive pay. One of the board members (Wells) had made statements in the press calling the pay ludicrous and unconscionable. Made statements before and after the hearing.

**H:** SCC applied dissent from *Committee for Justice*. Didn’t find bias in the pre-hearing statements but did find bias in the statements made during the hearings and afterwards.

* Found that there would be a variety of standards for bias for ATs, especially in a situation where the AT was involved in policy-making. A lot of discretion in policy-making.
* Basically as long as you don’t have a closed mind then you’re not biased.

**Institutional Independence and Bias**

* Two step test to assess institutional bias/independence (Matsqui):
	+ (1) Whether a reasonable, well-informed person having thought through the matter would conclude that an administrative decision-maker is sufficiently free of factors that could interfere with his or her ability to make impartial judgments in a substantial number of cases? (*Committee for Justice* as applied in *Matsqui*).
		- Is there a need for independence? This will determine how stringently you will assess the factors
			* Presumption in favour of independence can be rebutted by explicit language (Ocean Port).
			* If Charter or constitutional issues are implicated, AT must be independent (Ocean Port).
			* More adjudicative the proceeding, the more independence that will be required (Geza)
			* More important the rights to be adjudicated the more independence required (Geza)
			* Heavier caseload/difficulty of mandate might lead to less heavy expectation of independence (Geza)
		- Factors to take into account:
			* At pleasure appointments okay if in statute and no special circumstances (Keen)
			* Overlapping functions between administrators, adjudicators, counsel investigator generally not okay (Regie/Geza)
			* Security of tenure (Valente)
				+ Fixed-term appointment suffices here (Regie).
			* Financial security (Valente)
				+ One year severance is not sufficient financial security (McKenzie).
			* Administrative independence (Valente)
			* Full board meetings to discuss legal issues (Consolidated)
				+ Okay as long as optional for the AT, discuss only policy, any new submissions disclosed to other party.
			* The creation of lead cases (Geza)
				+ Does the lead case affect future cases too much?
			* Regulatory agencies where the AT both recommends laying charges and decides cases as well. (Regie/R. v. S.(S.D.))
			* ATs cannot make mandatory recommendations as to how particular decisions should be made. Seen as fettering their discretion. (R. v. S.(S.D.))
			* Proximity (physical or not) between DMs and other staff (pensions, office sharing). (R. v. S.(S.D.))
			* What point on the judicial< - > policy spectrum does it occupy? More judicial, more independence that will be expected (McKenzie).
	+ (2) If no, allegations of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis.
		- Go back to personal RAB test (above).

***R. v. Valente,* 1985 SCC – Features of institutional independence**

**F:** Concerned provincial court judges. PCJs are not judges in completion. Crown lawyer thought that a particular PCJ was biased because he gave easy decisions on DUIs. Says that this is a contravention of s. 11 (d) of the Charter.

**H:** Three indicia of independence:

1. Security of tenure
	1. Judge is only removable for cause, that any attempt to remove is subject to independent (of govt) review at which the judge will have full opportunity to be heard.
2. Financial security
	1. For superior court judges means that you should earn enough that you won’t take bribes. This salary is determined by statute (hard to change).
	2. For PCJs, you had to have a legally enforceable right to your salary (contract of statute).
3. Administrative independence
	1. Show that any particular PCJ is free from administrative influence by the executive.

***IWA v. Consolidated-Bathurst Packaging Ltd*, 1990 SCC**

**F:** There was a dispute concerning when something needed to be disclosed during labour negotiations. A full board meeting was held to discuss the issue without the claimant present. The board gave advice to the LRB. The issue was at the same time being considered by the LRB. Claimant argued the LRB was biased therefore biased as he was not given an opportunity to make his case before the initial board.

**H:** LRB was not biased.

* Applied the test for RAB given in Committee for Justice.
* It was okay to discuss the broad policy concerns as long as no specific effort was made to force a panel to reach a particular conclusion.
* Labour Relations Board is somewhat judicial but has a strong policy role. This was a tri-partite tribunal with three members (union, employer, neutral/chair). It was long standing practice to do this sort of thing.
* While the LRB might have been helped by the board’s advice, the advice didn’t unduly influence their conclusion or bind them to the board’s conclusion.

***Geza v. Canada (MCI)*, 2006 FCA – Creation of Lead Case was Institutionally Biased**

**F:** IRB wanted to create a “leading case” that would deal with Hungarian Roma CR claimants. IRB understood there would be an increase in these applications. To foster efficiency and consistency, the IRB decided they would run a few leading cases to not have to reinvent the wheel each time.

* No consultations with the refugee bar took place. It looked like the IRB was looking for cases that would make for easy denials. One when of the admins of this “leading case” system became a DM, the link became clear.
* Geza was denied CR status.

**H:** Quashes the decision.

* Three considerations to take into account when examining independence:
	+ (1) The standard of impartiality expected of a particular administrative DM depends on the context and is to be measured by reference to the Baker factors.
		- App: The IRB’s independence, adjudicative procedure and functions and the possible Charter impacts indicate that impartiality/PF is very important in this context. Closer to judicial end of spectrum.
	+ (2) Administrative mandate of the IRB. Big caseload and large membership. Has to keep abreast of HRs devts in far-flung places.
	+ (3) The legitimate interests of the agency in the overall quality of its decisions cannot be ignored. Both bias and independence deal with allegations that improper considerations were involved in the decisions.
* Nothing wrong with setting up a template for some of the more common cases you’ll see.
* Factors that lead to FCA determining a lack of independence: (1) The lack of consultations with the refugee bar; (2) the IRB’s selection of the cases; (3) the designer of the system becoming a DM; (4) fact that denials went up afterwards.

***Canadian Pacific v. Matsqui Indian Band*, 1995 SCC – Institutional Bias Test**

**F:** Matsqui set up board which told CP that it had to pay $ to the band. CP applied to FC to quash the decision of the board. Board had an appeal procedure. Matsqui argued CP should have to go through internal appeal first.

* CP argued the internal appeal procedure was inadequate so they could go straight to court. Two main reasons:
	+ (1) Only Matsqui reserve residents were on the appeal board. They had pecuniary interest as the money CP was to pay would go to reserve.
	+ (2) Statute that set up the appeal board said that members of the appeal board may be paid for their service. CP argued that they didn’t have security of income and therefore might be punished for making a decision the reserve chief doesn’t like.
		- Statute also provided that the band council appointed the members of the appeal body. CP argued that they could therefore stack the deck against them.

**H:** (Per Lamer CJ, not majority but now accepted). CP should be allowed to proceed directly to Federal Court.

* States that the principles of judicial independence outlined in Valente are applicable to ATs, where the AT is functioning as an adjudicative body settling disputes and determining the rights of parties.
* Level of institutional independence required of an AT will vary according to the nature of the AT, the interests at stake and other indices of independence.
	+ High level of independence required where AT decisions affect SotP.
	+ Lesser level of independence required in this case where property taxes are being assessed.
* Two step test to assess institutional bias (above):
* Application: Lamer wasn’t convinced by the pecuniary interest argument. But he was concerned about the lack of security of tenure and income. If the appeal body lacked sufficient institutional independence then this is a relevant factor in determining whether CP should be required to pursue their jurisdictional challenge before it.

**R:** ATs should demonstrate some elements of independence.

***2747-3174 Quebec Inc. v. QC (Regie des Permis d’Alcool),* 1996 SCC – QC’s Different System for Quasi-Judicial Tribunals**

**F:** Company’s liquor license was revoked. S. 23 of the QC Charter entrenches tribunal independence. S. 56 of the QC Charter resuscitates the quasi-judicial characterization of a tribunal. Effect is that where a tribunal is quasi-judicial, you have s. 23 rights.

* Company sought JR for the revocation of its license because of a lack of independence. The same lawyers were involved in identifying problems, prosecuting the case (in effect) and writing decisions.

**H:** Decision quashed. Prosecuting counsel must never be in a position where they participate in the adjudication of the case. Counsel can participate in each of the areas but you can’t have counsel that work across all areas.

* WRT Valente criteria, SCC held that as long as you had a fixed term appointment, security of tenure was sufficed for the purposes of an AT. AT DMs do not have to be appointed for life (like judges).

***Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC**

**F:** Liquor licensing body suspends the license. Ocean Port appeals, suspension upheld. Ocean Port brings JR. Argued that the members of the liquor appeal board were not independent as they “served at pleasure.”

**H:** Appointment at pleasure was explicitly granted by the statute. So CL notions of independence were overcome by the statute’s terms.

* ATs lack the constitutional distinction from the executive. ATs are created to implement govt policy.
* SCC says there’s no constitutional requirement for independence (except if there’s an s. 11 (d) issue, the AT is from QC or the issue involves s. 7). Absent these constraints, the legislator can displace the CL presumption of independence.
* Court said this is a policy-laden area, not like a judicial decision.

***McKenzie v. Minister of Public Safety and Solicitor General,* 2006 BCSC**

**F:** McKenzie was residential tenancy adjudicator. She was fired one year into her 5 year contract without cause (and given one year severance pay). This was allowable under the Public Sector Employers Act. McKenzie argued that 1 year was not sufficient to be procedurally fair in his role (indicated a lack of independence).

* BC conceded that they had not given notice and had not given her an opportunity to respond.

**H:** BCSC found that one year severance was not enough to give sufficient independence. Residential tenancy decisions are adjudicative, not policy-laden (residential tenancies used to be handled by the courts). This gives rise to an appearance of bias (because the govt’s ability to fire them after one year).

* TJ said Ocean Port does not apply to more adjudicative ATs. ATs that are assigned responsibilities lifted straight from the court’s jurisdiction are different than Ocean Port types.
* BCCA overturned the decision, but Hoole argues that the pendulum is swinging away from Ocean Port.

***SK Federation of Labour v. SK (AG, Dept of Advanced Education, Employment and Labour*, 2010 SKCA**

**R:** Concerned a SK statute that allows the SK govt to fire all AT members after an election. The SKCA found this legitimate.

***Keen v. Canada (AG)*, 2009 FC**

**F:** President of the Nuclear Safety Commission was terminated. Her office was held “at pleasure.”

**R:** Because her position was held “at pleasure,” she could be terminated despite good behaviour. The Commission was not a court and there was nothing special about nuclear safety.

**PROCEDURAL FAIRNESS: ADEQUACY OF REASONS**

* Baker told us that sometimes reasons will be required for PF. Failure to supply reasons would be a separate ground of PF.
* Importance of reasons (FH v. MacDougall)
	+ Appeal purposes – helps the person determine whether to appeal/JR and on what grounds.
	+ To justify and explain the result: focus on decision-maker – makes them explain exactly why they are making their particular decision.
	+ Legitimacy- permits the stakeholders (and public) to at least understand that outcome and perceive it as legitimate.
	+ Assists the AT generally by improving decision-making across the board (DMs see one another’s decisions).
* Regardless of whether there is a duty to give reasons, any reasons given must be adequate.
	+ “With respect to each important conclusion of fact, law and policy, the reasons should answer the question, ‘why did the tribunal reach that conclusion?’ Reasons should state the findings of fact that support the conclusions and identify the evidence on which they are based. The rejection of important items of evidence and findings of credibility should be explained.” (Blake, *Administrative Law in Canada*).
* DMs making decisions pursuant to statutory authority should link their decisions to the provisions they are applying (*Woodhouse*)

***F.H. v. MacDougall*, 2008 SCC – Reasons and Credibility**

**F:** FH was a victim of sexual abuse at a residential school. Dt was priest, alleged that the allegations were 40 years old. Difficult for the pf to adduce evidence.

* TJ provided modest reasons that she was alive to the fact that there were some credibility issue and generally canvassed the issues. Summarized some of the issues that the Dt had raised but didn’t cover them all. Concluded that FH had made out his case.

**H:** WRT adequacy of reasons, SCC said that when you are dealing with credibility, the reasons need not respond to every point. Higher court can overturn the decision for overall inadequacy weighing of the factors, but you can’t overturn for a lack of consideration. The TJ had recognized that FH had been inconsistent in some of his statements.

* Recognized that explaining a finding of credibility is difficult. Assessment of credibility will be a combination of pulling many threads together to arrive at an overall conclusion. Will not need to be a recitation of each and every factor nor need respond to each and every point raised by the parties.
* Test for adequacy of reasons:
	+ “Reasons are sufficient if they are responsive to the case’s live issues and the parties’ key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue.”

***Gichuru v. LSBC,* 2010 BCCA**

**F:** Gichuru suffered from relatively benign case of depression. Objected to the LSBC asking a question about mental illness, filed successful complaint about LSBC in the BC HRC in 2004.

* 2008, filed complaint with LSBC about his employer (unrelated to earlier complaint). This was dismissed. Gichuru filed another complaint with the HRC arguing that the LSBC’ dismissal of his 2008 complaint was a retaliation for his 2004 HRC complaint.
* HRC applies and gets his claim struck down as providing no chance of success. G asked for JR, claimed the HRC’s reasons were inadequate as it had not described the 2004 interactions between G/LSBC in the reasons. As the animosity started from the 2004 conflict was the source of the new claim, G argued the lack of mention indicated inadequacy of reasons.

**H:** Reasons were adequate. Fact that member hadn’t mentioned earlier dispute didn’t breach PF.

* “Where a tribunal’s failure to deal with a critical issue leaves the tribunal’s reasoning unclear or interferes with the ability of a reviewing court to assess the tribunal’s decision, the error can be characterized as a failure to provide adequate reasons...On the other hand, where the tribunal’s reasoning is clear notwithstanding its failure to mention a piece of evidence or a particular argument, the issue is not one of adequacy of reasons or of procedural fairness. Rather, the question is whether the omission is indicative or a substantive error by the tribunal.

***Woodhouse v. Canada (Correctional Services)*, 2010 BCSC**

**R:** PF applies to parole officers when making decisions to suspend parole. Baker factors indicate that POs must provide reasons for parole suspension.

* (1) Involves liberty interest, (2) interpretation of statutory criteria, (3) parole suspension is a judicial-like process
* Degree of reasons can vary (simple parole violation, simple reasons are adequate).
* Reasons must be tied to statutory criteria. Length of reasons determined by the circumstances of the case.
* Reasons must explain the decision in relation to the scope of the statutory power exercised.

***Newfoundland and Labrador Nurses’ Union v. NFLD and Labrador (Treasury Board)*, 2011 SCC – Might be a big change, adequacy of reasons not stand-alone PF ground**

**F:** Experienced labour arbitrator was brought in to interpret a collective bargaining agreement. Dispute concerned whether nurses should be credited with leave that they accumulated when they were casual employees once they become permanent. Arbitrator decided they shouldn’t (referred to the relevant provisions).

**H:** SCC says that adequacy of reasons is not a free-standing argument for PF anymore.

* SCC says that adequacy of reasons is part of the new substantive JR test in Dunsmuir. As long as there are some reasons, there will be no separate PF basis for quashing the decision. The proper way to attack such decisions will be on the substantive reasoning.

**R:** Narrows the scope of duty to give reasons significantly.

* Raises the idea of deference and respectful attitude to the reasons offered or which could be offered in support of a decision.
* Retrenchment from the expansive notion of reasons that had existed until this case.
* Note: It could be argued that this case doesn’t apply to BC ATA tribunals. Dunsmuir doesn’t apply, so if reasons are part of that substantive JR framework, then arguably this case’s reasoning doesn’t apply to BC ATA tribunals.

***Telecommunication Workers Union v. TELUS Advanced Communications*, 2011 BCSC**

**F:** Worker had long-term absenteeism, Telus wanted to fire her. Arbitrator said they could, didn’t list the explanations for her absences in his reasons.

**R:** Notes the NF Nurses case and states that the burden to give adequate reasons has been diminished in light of it.

***Power v. Newfoundland and Labrador*, 2012 Nfld – Courts trying to retain reasons req’t**

**F:** Compensation case which centred on a dispute between doctors for the worker/board. Board’s previous practice was to consider the competing doctor’s qualifications in such circumstances. Board didn’t do so.

**R:** Court notes the reduced role for reasons in JR (NF Nurses case) but then says that if no supporting reasons are provided or the reasons are flawed, the court retains the power to quash the decision under review. Hoole thinks this decision is out of line with the SCC’s direction from the NF Nurses’ case.

**Oral Hearings and Cross-Examinations**

* In the tribunal context, these are controversial due to efficiency concerns.
* Where a serious issue of credibility is at stake, fundamental justice requires that credibility be determined on the basis of an oral hearing (Singh v. Canada (MEI) cited by Joshi (BCCA)).

***Innisfil Township v. Vespra Township*, 1981 SCC- Hearing will usually be req’d**

**F:** Annexation of town to Barrie. ON sent letter stating their position, board decided they wouldn’t permit cross-examination on the letter as annexation was a policy decision.

**H:** Not up the board to determine if there’s any point in hearing cross-examination. Also doesn’t matter that the result would be the same. Breach of PF leads to quashing.

* “Where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen’s right to meet the case made against him by cross-examination.”

**R:** SCC embraces the idea that cross-examination can happen in an AT context.

***Re County of Strathcona No. 20 v. Maclab Enterprises*, 1971 AltaCA – Cross not always req’d.**

**R:** Right to an oral hearing and cross-examination is not absolute. If the person is afforded an equally effective method of answering the case made against him, then natural justice will have been met.

***Allard v. Assessor of Area #10- North Fraser Region*, 2010 BCCA**

**F:** Dispute concerning home value. Act didn’t explicitly accord right to full hearing. Provided that board could do written, electronic or oral. Board had discretion to operate in brief manner. Assessment guide informed the person being assessed of the appeal process (which would be done by written submissions).

* Allard informed board that he disputed his home’s assessed value and wanted to cross-examine the person who had done the assessment. Chair said they would proceed by written submissions. Allard didn’t complain and simply continued with written proceedings.

**H:** Three decisions from the BCCA (3rd judge agreed with both of them).

* Rowles
	+ Noted the high volume of decisions the board deals with. Makes little sense to require cross. Allard could have submitted competing written property assessments to dispute factual differences. Allard’s legitimate expectations would have been tailored by the guide he received which indicated a written appeal process was the norm. Neither an oral hearing nor cross was therefore required.
* Garson- said that Allard had waived his claim to an oral hearing/cross by not complaining right away.

***Djakovic v. BC (WCAT)*, 2010 BCSC**

**F:** Pf was worker’s compensation claimant. Claim was accepted by WCB and he received benefits. Attended some physio/OT programs during which he injured his back a 2nd time. No one saw him injure his back the 2nd time and he didn’t complain to doctor nor mention it to his program. WCB denied his 2nd injury claim.

* Pf wanted to bring two physios for oral testimony. Appeal panel instead sent 3rd party to ask physios questions. They gave evasive/unclear answers twice, after which the WCAT dismissed the case for insufficient evidence.

**H:** Decision quashed.

* Applied the Baker factors and concluded the level of PF was high in this case (important for pf and no appeal).
* Purpose of cross-examination:
	+ It can help the party to establish their own case.
	+ Cross-examination is necessary when it is needed to contradict something put forward by the other side.
* AT shouldn’t consider whether the cross/oral evidence would have been useful or not but whether fairness required it.

***Johnson v. Alberta (Appeals Commission for Alberta Worker’s Compensation*, 2011 ABCA**

**F:** 4 docs indicated that Johnson’s injury was healed and that it was probably psychological. Johnson’s doc indicated otherwise.

**H:** When you have competing opinion, you may need cross-examination if there is no other way to resolve the dispute.

**Document Disclosure**

* Typically any evidence that the AT intends to use or consider must be disclosed. Documentary disclosure will be less extensive in ATs.
* S. 34, ATA – sets out the powers of ATs and parties to secure disclosure of documents and evidence.
* S. 40 (3) ATA – rules of evidence such as solicitor-client privilege, spousal privilege, etc continue to apply in tribunal proceedings.

***Kane v. UBC*, 1980 SCC**

**F:** UBC prof in dispute with university. UBC President present at his hearing, then goes for dinner with the DMs and discusses his observations on the case (Kane and lawyers not present). Kane didn’t have chance to correct President’s observations, but then the President’s observations were used by board of governors to decide.

**H:** Appellate authority must not hold private interviews with witnesses or hear evidence in the absence of a party whose conduct is impugned and under scrutiny.

* Board of Governors should have notified, at the very least, Kane in writing of what was discussed over dinner and give him an opportunity to correct or meet any adverse statements.

**Delay**

* Delay could ground either a s. 7 claim or an abuse of process claim (Blencoe).
* S. 7 of the Charter could theoretically apply to delay issues where the delay creates serious, state-imposed psychological stress.

***Blencoe v. BC (HRC)*, 2000 SCC**

**F:** Blencoe was Cabinet Minister who lost his job over sexual harassment complaints. Developed depression and could only work as security guard. Allegations had serious impact on his life. BC HRC didn’t do anything with the harassment allegations for 2.5 years. When BC HRC eventually moved the process towards proceedings, Blencoe applied for stay and argued the delay was a violation of s. 7 and an abuse of process.

**H:** SCC determined that s. 7 doesn’t normally apply to these types of proceedings. S. 7 is usually applicable in more penal contexts.

* But court said that SotP included the right not to be significantly psychologically damaged by a govt actor.
* Test:
	+ Prove that you are suffering serious damage
	+ The damage is as a result of the govt body.
* SCC determined that Blencoe was not suffering the type of harm that could trigger s. 7.
* What about Blencoe’s administrative law argument that the delay constituted an abuse of process?
	+ Abuse of process is where the AT’s conduct is so bad that it offends a sense of justice.
	+ Remedy is a stay of proceeding.
	+ Majority said there wasn’t an abuse of process.

**CONSEQUENCES OF BREACH OF PF**

* Default position is that breach of PF leads to the decision being quashed (*Cardinal*).

**Exception to Default: Triviality**

* Breach is trivial or the impact of the breach is so minor (de minimus) that no remedy will be granted, notwithstanding *Cardinal*.

***Westfair Foods Ltd. v. United Food and Commercial Workers’ Union*, 2007 ABCA**

**F:** Arbitrator did not give employer the right to reply in a labour dispute with union. Arbitrator considered that the additional submissions (two new cases) by the union (to which the employer was not given a right to reply) were not relevant or helpful. Employer sought JR.

**H:** ABCA confirmed the arbitrator’s decision. Noted that the arbitrator was aware that he was denying the employer a right to reply. His reasons specifically addressed the union’s two new cases so was alive to the concern. The new cases were irrelevant and so tangential as to not matter.

***Compass Group Canada v. Hospital Employees’ Union*, 2007 BCCA**

**F:** Arbitrator failed to mention evidence on two factors in a labour relations test.

**R:** The evidence was inconsequential. In an unrelated proceeding with the exact same issues the LRB had come to the same conclusion. Therefore, the court knew with near certainty what would happen if they sent it back for reconsideration.

**Exception to Default: Mootness**

* No live issue in the case, pointlessness.
* Why mootness doctrine (Borowski)?
	+ The existence of adversarial context (need to have opposing sides)
	+ Judicial economy and the conservation of judicial resources
	+ Need for the court to demonstrate awareness of its proper function.

***Moose Jaw Central Bingo Association v. SK*, 1994 SKCA**

**F:** SK liquor and gaming authority refused Moose Jaw bingo players their license. SK authority appeared to lack structural independence and didn’t consider relevant evidence.

**H:** There were only two Moose Jaw bingo licenses and both were taken. So even if the claimants could prove their case, they couldn’t get their license as both were taken.

***Bago v. Canada (MCI)*, 2004 FC**

**F:** Immigrant’s application for extension of temporary residence was rejected. Lodged a spousal application (accepted) and sought JR of first rejection. Crown argued this was moot as Bago was now a resident. Bago argued that there might be others in her situation.

**H:** The issue was moot. Other people in her situation could bring their own claim.

* Mootness allows a court to decline to decide a case which raises merely a hypothetical or abstract question.
* Two step test:
	+ First, has the tangible and concrete dispute disappeared/have the issues become academic?
	+ Second, if yes, should the court exercise its discretion to hear the case anyway?

***Mobil Oil Canada Ltd v. Canada-Nfld. Offshore Petroleum Board*, 1994 SCC**

**F:** Mobil applied for a hearing to gain control of more offshore oil licenses. They had already been denied previously but new statutory scheme mandated that they be given a hearing. The board denied Mobil a hearing claiming that they didn’t have a chance of winning.

**H:** Board’s decision upheld. A new hearing was technically required. But statutory interpretation revealed that the new statutory scheme was designed to help with new applications not old ones that were being re-tried.

* This is an exceptional circumstance which can only be authorized when there is a very high degree of certainty in outcome.

**Exception to Default: Exhaustion of Internal Remedies**

* Some ATs have layers of decision-making within their structures. Where there is one, the general position in law is that you are required to exhaust those internal remedies before seeking JR.
* Why?
	+ Efficiency/cost
	+ Adhere to legislative intent
	+ Allows for as complete an evidentiary record as possible
	+ Allows for internal fixing of problems
* Exhaustion of internal remedies and de novo hearings
	+ Where the second layer of DMs does de novo hearings, exhaustion of internal remedies will be a strong argument.
	+ Where there is a non-de novo hearing system, you may have a better chance of arguing that there’s no point in exhausting your internal remedies.

***Harelkin v. University of Regina*, 1979 SCC**

**F:** Social work student was expelled for bad grades, filed JR instead of appealing to Senate Committee.

**R:** As the Senate Committee was de novo, the student should have gone through internal remedies first.

**Exception to Default: Prematurity**

* Even if there is no layered system, you still have to go through the internal process and allow it to run its course.
* Why?
	+ Notwithstanding your concerns, you might win your case.
	+ Associated delays and expenses might bring admin of justice into disrepute.
* Exception: when your complaint is so significant that you should have to wait for the AT to complete its process.
	+ Bias, AT’s constitutional jurisdiction and the AT’s power to make declaratory judgments are examples of things which go to the very jurisdiction of the AT and are therefore special circumstances that warrant immediate JR (Zundel).

***Zundel v. Canada (HRC)*, 2000 FCA**

**F:** Holocaust denier objected to some preliminary decisions concerning expert witnesses made by the DM. Sought JR of those decisions.

**H:** FCA said that absent jurisdictional issues, ruling made during the course of the AT’s proceedings should not be challenged until the AT’s proceedings have been completed.

***Secord v. St. John (City) Board of Commissioners*, 2006 NBQB**

**F:** Cops were brought before a complaint’s panel. Chief of Police had sworn in a lawyer to be on the panel (sham move). Cops complained to the panel, lawyer decided there was nothing wrong. Cops sought JR of this preliminary decision.

**H:** Court said in general preliminary decisions were not subject to JR. But because the case concerned the jurisdiction of the panel to hear the case itself, this was an exception to prematurity. Considered the case and found there was nothing untoward in the process.

**Exception to Default: Curing**

* An appeal within the AT’s system can “cure” the error. Related to exhaustion of internal remedies.

***Taiga Works Wilderness Equipment Ltd. v. BC*, 2010 BCCA**

**F:** Dispute concerning whether workers were constructively dismissed. Director of Employment Standards heard case, agreed with worker, ordered damages. Director had failed disclose documents to employer that he relied on. It was on the record (as being part of his decision).

* Employment Standards Tribunal (appeal body) was not a strict de novo body: have to find error of law, breach of PF or overturn on new evidence. If it finds a problem, it must remit to Director. If there’s new evidence, it can reweigh the evidence.
* EST tried to cure the Director’s mistake by hearing the new evidence and assessing its significance.

**H:** Appellate tribunals can in appropriate circumstances cure breaches of PF by an initial tribunal. Task is to look at the overall circumstances, was it fair overall? Don’t focus on the last step, make sure that the last step can cure the error. Depends on the nature of the breach of PF and the powers of the appellate tribunal.

* The employer was making submissions to the wrong body here. The EST wasn’t empowered by the Act to cure the problem.

**Exception to Default: Waiver**

* Where the parties to a proceeding have all the knowledge necessary to know that their procedural rights have been infringed and yet don’t complain, they are deemed to have waived their right to seek JR on that issue.
	+ You have to have enough information to reasonably know that there’s a PF problem. You must be sophisticated enough to be able to raise the issue.
	+ Concern for the unrepresented party. Cannot take advantage of their ignorance.
* Rationale: efficiency! People should give the AT a chance to fix their own problem.

***Allard v. Assessor of Area #10*, 2010 BCCA**

**R:** (Per Garson JA) Knowledgeable and sophisticated litigant didn’t raise the problem with oral hearing/cross-examination at first instance. He waived his right to complain.

***Cougar Aviation v. Canada (Min of Public Works and Government Services)*, 2000 FCA**

**R:** Allegations of bias must normally be raised at the earliest practicable opportunity. If not done so, they will be considered waived and cannot afterward be used to impugn the validity of a decision.

***Kvelashvili v. Canada (MCI)*, 2000 FC**

**F:** Unrepresented CR claimants couldn’t speak English but could speak some French. Had informed the ID they needed francophone hearing. On day of hearing, were told that the procedure would be changed. Were given short period of time to have the procedure explained to them, no ILA. Not informed that they could refuse to participate in the new procedure.

**H:** Decision quashed. If a claimant is pressured into consenting or if he does not understand what he is doing, there is no valid consent.

**Exception to Default: Unclean Hands**

* Equitable principle, discretionary remedy. If party comes to court with blame on their hands, the court may reject your claim on that basis.

***Cosman Realty v. Winnipeg (City)*, 2001 MBQB**

**F:** City had expropriated some of Cosman’s land for a new devt. Cosman argued that the province was the only party that could have expropriated it.

**H:** City and province were working together so Cosman’s argument doesn’t matter. Cosman was using the legal proceeding to get a higher price from the city. No expectation of success.

* Where requested equitable relief would not advance the stated purpose but rather some oblique one, the court must look very closely at the true purpose. If the true purpose is improper, then the equitable relief should be refused.

***Jaouadi v. Canada (MCI)*, 2003 FC**

**F:** Bad lawyer advised CR claimant to lie about his involvement in a Tunisian political party and claim that he would harmed if returned. After year and a half of hearings (proceeding adjourned many times), he admitted his lie. Panel was angry, claimant’s new lawyer said that they were biased and asked them to recuse themselves. Panel refused and denied claimant’s CR claim.

**H:** FC said that claimant didn’t come to court with clean hands and therefore his JR claim was dismissed.

**STANDING FOR ATS ON JUDICIAL REVIEW**

* Impartiality is the key issue
* Advantages to having ATs represented: (1) expertise; (2) there may not be any one else there to argue the other side.
* Generally, ATs may appear to explain the record, make submissions on jurisdiction, speak to appropriate SoR (Northwestern Utilities).

***Northwestern Utilities Ltd v. Edmonton (City)*, 1979 SCC**

**F:** Alta Utilities Board increased the utilities rates, Edmonton objected. Act gave Board standing to any proceeding.

**H:** In the absence of clear language suggesting that the Board can have a full role in the proceedings, the requirements of impartiality restrict the scope of the Board’s role in the proceedings.

* The Board’s active and aggressive participation had the effect of discrediting their impartiality as an AT. The Board’s opportunity to make its point is provided for in its reasons for its decision.
* Where the statute is silent as to the role or status of the AT, it will be confined strictly to the issue of its jurisdiction to make the order in question.
	+ Jurisdiction does not include the right to enter into the merits of its decision. Just means that the AT can talk about why they had the authority to enter into the decision-making process in the first place.

***Canadian Assn of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, 1989 SCC**

**F:** Paccar was going out of business but was going to keep a warehouse open. Union had a collective agreement with them. Paccar notified them that the agreement was over. Labour Board found that it was fine for Paccar to change the terms of employment, employees had to accept new terms or find new job.

* SCC wanted to hear from the Labour Board.

**H:** Two SCC judges in the majority spoke to Board’s standing (bindingness is unclear).

* Granted Board standing to speak to the record, to jurisdiction (authority to deal with the issue), the appropriate SoR and why its decision was not patently unreasonable.
* Noted that the AT is in the best position to speak to its specialized jurisdiction or expertise. This may help to explain what might otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.
* SCC also noted that the Board had not made submission that their decision was correct, rather, that it was a reasonable approach for them to adopt.

***Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2005 ONCA**

**F:** Claimant involved in number of accidents as a kid, was represented by ON Children’s Lawyer. Later on wanted to complain about her legal service. Requested litigation record. Children’s lawyer denied access on the basis of the FIPPA (didn’t make submission on Crown Counsel exemption to FIPPA). Commissioner found for the kid, said that all info should have been disclosed (didn’t address the CC exemption). Children’s lawyer brought appeal on the CC exemption.

* Commissioner participated in JR, argued that CC exemption doesn’t apply because you aren’t being a CC when you’re representing a child. Tried to “bootstrap” his original reasons (as they didn’t address the CC exemption).
* Children’s Lawyer objected to Commissioner’s standing and the bootstrapping.

**H:** Commissioner’s standing was upheld.

* When the legislation is unclear on the AT’s role, standing is discretionary. Court must consider:
	+ Importance of fully informed adjudication of the issues before it
	+ The importance of maintaining AT impartiality.
	+ Nature of the problem, purpose of the legislation, the extent of the AT’s expertise, and the availability of another party able to knowledgeably respond to the attack on the AT’s decision.
* Noted that the Commission process is inquisitorial, not adversarial. Thus, impartiality concerns are lessened.
* Noted that if the Commissioner was not represented, there would be no other side to argue the point.
* Bootstrapping issue: In general, an AT won’t be permitted to add to its decision on JR. But the CC exemption was not put to the Commissioner and the point was not so unrelated to the decision so as to preclude the Commissioner from being able to address it.

***Brewer v. Fraser Milner Casgrain*, 2008 ABCA**

**F:** Brewer brings HRs complaint to HRC. HRC chose not to refer complaint to HRT. Brewer successfully challenges this decision on JR. HRC and FMC separately appeal the JR decision (HRC appealed separately from FMC).

**H:** Finds for Brewer. ATs must be patently neutral. ATs should not be allowed to appeal as an AT when no one else wants to appeal. ATs must not become litigants as this would bring impartiality into question.

**ATs Standing in BC**

* S. 15, JRPA – Grants ATs option to be a party to any JR of their decisions.
* ATs have a right to be there, but it’s up to the court to decide what you’re allowed to do.

***British Columbia (Securities Commission) v. Pacific International Securities Inc.*, 2002 BCCA – ATs can’t speak to PF/merits in BC**

**F:** Commission identified some problems in Pacific’s operations, advised that a hearing would take place. Didn’t give Pacific much information so they asked for more disclosure. Commission gave them some information but Pacific was still unhappy. Exercised their statutory right to appeal to the BCCA. Commission also exercised their statutory right to participate. Pacific challenged their standing.

**H:** Commission’s standing

* Noted that for the purposes of making arguments on jurisdiction, it makes no difference whether the proceeding is a JR or a statutory right to appeal.
* Found that the Commission is not able to speak to the merits of the PF claim.
* Note: the Executive Director had a separate statutory standing to speak about the PF issue before the BCCA. So although the Commission couldn’t appear, the ED could do so and make the same arguments.

***Global Securities Corp v. British Columbia (ED, Securities Commission)*, 2006 BCCA**

**F:** Global was brought before TSX Panel and the Commission for charges. TSX wanted to intervene in the hearing. Global applied to have TSX removed.

**H:** Court looked at the functional difference between the TSX and the Commission. The TSX as a separate and independent regulator should have standing.

* BCCA endorsed a contextual determination of standing.

***Pacific Newspapers Group Inc...v. Communications, Energy and Papersworkers Union of Canada, Local 2000*, 2009 BCSC**

**F:** Dispute between Telus and its union boiled over to the Vancouver Sun and the Province’s union. VS’ union refused to perform certain function that would be seen as helping Telus. VS brought its union before the LRB trying to get money to compensate for its losses. Sought JR of decision, argued LRB shouldn’t be allowed standing.

**H:** Standing denied.

* Notes that the parties are sophisticated and there’s no real need to hear from the LRB (increases costs and inefficiency). Factors do not indicate a need to hear from the LRB.

***Harrison v. BC (Information and Privacy Commissioner)*, 2009 BCCA**

**F:** Harrison was accused of molestation, filed created in Ministry of Children and Families but no follow-up. Harrison later tries to work in youth centre, fired after Ministry reveals the previous accusation. H sought declaration that Ministry had breached privacy right by disclosing information. Commissioner disagreed, H sought JR.

* Chambers judge allowed JR and ordered costs to Harrison. Ministry/Commissioner both appeal.

**H:** Commissioner granted standing because the Chambers judge had ordered it to do something illegal and subjected it to costs. In these circumstances, you’ll have the ability to appeal.

***Henthorne v. British Columbia Ferry Services Inc*, 2011 BCCA**

**F:** Henthorne was captain of BC Ferry that sunk. He raised safety concerns (unrelated to the sinking) about the ferry at the inquiry afterwards. He was then fired. Was reinstated by the WCB and then fired again. Sought JR.

* WCAT applied for standing at the BCCA, was very aggressive against Henthorne’s factum. Went way beyond neutral role of ATs. The WCAT decision was also very long (what more could they argue before the BCCA?)

**H:** BCCA determines that *Northwestern* is the law in BC (not *Children’s Lawyer*), subject to some encroachments from *Paccar*.

* Struck WCAT’s factum and ordered costs.

***Western Forest Products Inc. v. Sunshine Coast (Regional District)*, 2008 BCSC**

**F:** SCRD claimed Western Forests was contaminating the watershed. Called a health board and found against WF. Overturned on JR based on lack of jurisdiction.

**H:** ATs are not normally required to pay costs. Subject to exceptions:

* (1) Where the AT exhibited misconduct or perversity in the proceedings before it
* (2) Where the AT argued the merits of the JR application rather than its own jurisdiction.
* SCRD had over-exceeded its role on JR (argued the merits). Therefore costs were awarded against it.

**STANDARD OF REVIEW: COMMON LAW BEFORE *DUNSMUIR***

* Fundamental tension in SoR is between the rule of law and Parliamentary supremacy.
	+ Example of this tension is a privative clause (legislature telling the courts to stay out of the ATs decisions).
		- Courts don’t like privative clauses.
* How do you solve this tension?
	+ Don’t want to adopt same method of review as the court system but don’t want to give ATs a free hand.
	+ Recall *Residential Tenancies* and *Crevier* which found that the rule of law is constitutionally protected and Parliament cannot rule JRs out absolutely.

***National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 SCC**

**R:** SCC recognized that courts may not be as well equipped as ATs to deal with issues which Parliament had chosen to regulate through bodies exercising delegated power. These issues require careful expertise and a specialized understanding. Courts may not also be the best interpreters of these ATs constitutive statute.

***CUPE v. NB Liquor Corporation*, 1979 SCC – End of Prelim Questions/Beginning of JR**

**F:** Labour dispute. Statute was a trade-off between employers/union which said that (1) no employee could picket; (2) employers could not replace striking workers with any other employee. Liquor corp puts management in to fill striking worker’s positions. Union was successful before the Public Service Relations Board (said that LC’s action was inconsistent with the trade-off). There was a privative clause in place for the PSRB’s decisions.

**H:** SCC said the provision was very uncertain. Got rid of the preliminary question/collateral theory (too prone to manipulation). Introduces the idea of jurisdiction (is the question w/in the ATs jurisdiction? If so, privative clause will apply. If not, PC will not apply.

* Question of jurisdiction will be on a correctness standard. The AT must get that right.
* If question is w/in jurisdiction, the AT will only lose jurisdiction is the findings are patently unreasonable.
* Applying this to the PSRB’s decision, SCC says that it has expertise and therefore should be shown deference.
* PSRB could lose its jurisdiction if (1) decision was patently unreasonable (not rationally supported by the relevant legislation); (2) tribunal acted in bad faith; (3) based decision on extraneous matters; (4) failed to take relevant factors into account; (5) breached natural justice; (6) misinterpreted the provisions of the Act by embarking on inquiry or question not remitted to it.

**What’s Jurisdiction?**

***UES, Local 298 v. Bibeault*, 1988 SCC**

**F:** Competing union. 1st union wanted to certify 2nd union under successorship. 2nd union objected. Question concerned whether there was in fact a successorship issue. If there was, jurisdiction was granted.

**H:** First mention of pragmatic and functional test for determining jurisdiction.

* Court should examine the wording of the statute conferring jurisdiction but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.
* Case continues to have relevance in BC to ATA Tribunals. S. 58 of the ATA provides that where a matter is within the exclusive jurisdiction of a tribunal, particular SofR apply. Determining exclusive jurisdiction is partially determined by the Bibeault analysis.

***Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 SCC**

**F:** Southam was newspaper chain, buying up number of community newspapers. Competition board suspected monopoly was developing. Competition Director argued before the tribunal that Southam should divest of 3 newspapers. Tribunal ordered Southam to sell one.

* Competition Act had straight appeal to CA on questions of law.

**H:** Court creates reasonableness standard.

* Reasonableness is more deferential than correctness, less deferential than patently unreasonableness.
* Application: Weighed factors in favour/against deference:
	+ For: (1) dispute is over mixed law and fact; purpose of the Competition Act is broadly economic and thus is better served by exercise of economic judgment; (3) application of principles of competition law is squarely within the area of the Tribunal’s expertise.
	+ Against: (1) existence of unfettered statutory right of appeal from Tribunal decisions; (2) presence of judges on the Tribunal.
* Ultimately the expertise of the Tribunal was the most important consideration.
* Per Iacobucci: Unreasonable decision is one that cannot stand up to a somewhat probing examination.
	+ Difference between patently unreasonable and unreasonable is in the immediacy of the defect. If defect is apparent on the face of the tribunal’s reasons, then the decision is PU. But if it takes some searching or testing to find the defect, then the decision is unreasonable.

**Pragmatic and Functional Test**

* PPEQ (*Pushpanathan*) – no one factor is determinative. Cumulative test.
	+ (1) Privative clause – presence will indicate a greater degree of deference. What does the PC say?
		- Absence of PC doesn’t equal high scrutiny where other factors indicate deference.
		- Full PC is compelling evidence of deference to be shown.
		- Clause in Act permitting appeals suggests less deference.
	+ (2) Purpose of the Act as a Whole and the Provision in particular
		- What is the statute meant to do? The broader the issue in society, the more policy-laden – more deference.
		- Purpose is often revealed by the specialized nature of the legislative structure and dispute-settlement mechanism.
		- Where the purposes of the statute and the decision-maker is thought of as a delicate balancing between different constituencies, then deference increases. The more polycentric (involving large number of interlocking and interacting interests and considerations) the decision-making process, the more deference will be shown.
		- Look to the remedies available – the more options there are, the more deference.
		- Where statute is about resolving disputes and determining rights as between two parties, less deference. The more the legislation approximates a conventional judicial paradigm, the less deference.
	+ (3) Expertise
		- Does the statute require expertise of the ATs members?
		- If the statute creates a constant flow of work and allows for long-term DM appointments, those DMs will be seen as experts because of experience.
		- Greater the expertise, the more deference.
		- Expertise is a relative assessment (*Pushpanathan*):
			* Consider the expertise of the tribunal
			* Consider the court’s own expertise
			* Identify the specific issue and consider it in light of the DMs specific expertise.
		- Expertise can arise from number of sources and can relate to questions of pure law, mixed fact/law or fact alone (*Dr. Q*)
	+ (4) Nature of the Question
		- Question of law? Fact? Discretionary matter?
		- Questions of general law get less deference.
			* The broader the proposition asserted, the further the implications of such decisions to stray from the core expertise of the AT, the less deference. Presumption that courts are to deal with general legal propositions (Pushpanathan).
		- Questions of special law the AT is expertise at will get more discretion.
		- Questions of law include questions of jurisdiction.
		- Facts will be more deferential
		- Exercises of discretion will get more deference (there’s no right answer to them).
* Purpose of the test – the court is trying to discern the legislature’s intent.
	+ Look at PPEQ as they appear in the statute

***Pushpanathan v. Canada (MCI)*, 1998 SCC**

**F:** CR claimant, given residency under administrative process. CR claim never resolved. After few years in Canada was convicted of heroin trafficking. Minister decided to deport based on 8 year conviction. Deportation order was made subject to his CR claim. IRB determined that P was the kind of person who should be excluded from CR status under the UN Convention.

**H:** SCC undertook the pragmatic and functional approach to evaluate the IRB’s decision.

* Issue was what SOR to apply to the IRB’s interpretation of the UN Convention?
* Enunciated the PPEQ test above.
	+ Notion of leave from the Federal court suggests that Parliament intended judicial supervision of issues.
	+ Noted that IRB is expert in some areas, but not in assessing the meaning of the UN Convention.
	+ Purpose of the provision in the UN Convention was much broader than simply guidance to the IRB in Canada.
	+ Nature of the question was legal, therefore attracting less deference.
* Concluded that the SOR was correctness. Found the IRB had got it wrong. The UN Convention applied to worse kinds of people (genocide, etc). There are alternative ways to deal with drug dealers.

**Standard of Review and Discretionary Decisions**

***Baker v. Canada (MCI)*, 1999 SCC**

**H:** Immigration Act provided that where the Minister is satisfied, he/she could allow for exemption on compassionate and humanitarian considerations.

* Determined that the pragmatic/functional approach would also apply to discretionary decisions.
* Application:
	+ Absence of privative clause in the Act and the explicit contemplation of JR by the FC/FCA indicates less deference.
	+ Expertise of the DM- the DM here is the Minister, who has some level of experience in determining when exemptions should be granted.
	+ Purpose of the provision- provision involves a large degree of choice on the part of the Minister. Involved applying relatively “open-textured” legal principles.
	+ Nature of the Question- Discretionary decision indicated a high degree of deference. This involved a considerable appreciation of the facts of that person’s case. Not really about the application/interpretation of legal rules. More deference.
		- This was an individual case, not a polycentric balancing exercise. This indicated a lower degree of deference.
* Concluded that the SOR was reasonableness simpliciter.

***Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC**

**F:** Dr. Q was accused of improper conduct. Board held a hearing and suspended him for 18 months. Affected his earnings and reputation. Board believed the complainant and made credibility findings WRT Dr. Q.

* Chambers judge re-weighed the evidence. The previous regulatory scheme essentially created an appeal process. Judge overturned the Board’s finding.

**H:** SCC said that judge shouldn’t be re-weighing evidence. Instead, apply the pragmatic/functional approach, decide the SOR and apply it.

* Privative clause wasn’t strong and there was a statutory right of appeal; expertise was not a factor -> less deference
* But the Board is also to balance competing interests and policy objectives like protection of public, education and qualification of members, standard-setting and ethics -> more deference.
* Against this was the fact that the statute was about resolving particular claims of professional misconduct. This process was quasi-judicial in nature.
* Key point: credibility assessments will be shown high level of deference. The Board had heard viva voce evidence and credibility was based on that.

**STANDARD OF REVIEW: UNDER THE ATA**

* ATA was enacted in 2004 and intended to simplify things by telling the court what SOR to apply.
* ATA does not apply to all ATs in BC. Only to those DMs whose home statutes referentially incorporate the ATA (e.g. the Labour Relations Code says that ATA, s. 58/59 apply to the Labour Relations Tribunal). If no reference to ATA in home statute, ATA doesn’t apply.
* ATA, s. 1- Definitions:
	+ Privative clause: means provisions in the tribunal’s enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court.
	+ Tribunal: Means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal’s enabling Act.
* Key provisions: S. 58- SOR if the AT’s home statute has a privative clause
	+ (1) If the tribunal’s enabling Act contains a privative clause, relative to the court the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
		- Note: no definition of “exclusive jurisdiction” in the ATA.
	+ (2) In a JR proceeding relating to expert tribunals under subsection (1):
		- (a) a finding of fact or law or an exercise of discretion by a tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interference with unless it is patently unreasonable.
		- (b) questions about the application of common law rules of natural justice and PF must be decided having regard to whether, in all the circumstances, the tribunal acted fairly, and
		- (c) for all matters others than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal’s decision is correctness.
	+ (3) For the purposes of (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 purposes
		- (c) is based entirely or predominantly on irrelevant factors, or
		- (d) fails to take statutory requirements into account.
* ATA, s. 59 – SOR if the AT’s home statute has no privative clause.
	+ (1) In a JR proceeding, the SOR 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 PF.
	+ (2) Court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
	+ (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
	+ (4) For the purposes of (3), a discretionary decision is patently unreasonable if the discretion:
		- (a) is exercised arbitrarily or in bad faith
		- (b) is exercised for an improper purposes
		- (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 PF must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.
* Order of Analysis:
	+ (1) Do you have an AT to which the ATA applies?
	+ (2) If yes, does it have a privative clause? If yes, go to s. 58.
	+ (3) If no privative clause, go to s. 59 for the SOR.
* How do you determine if something is within the “exclusive jurisdiction” of the AT per s. 58 (1)?
	+ Initially BCCA said that you should use the pragmatic/functional approach.
	+ ***Kerton v. Workers’ Compensation Appeal Tribunal*, 2011 BCCA**
		- **R:** Changed the approach. Now, the preferred approach is to simply examine whether the privative clause covers the “matters” in issue. The common standard of review analysis is instructive though and particular attention must be paid to the governing legislative provisions.
	+ So look first to the privative clause. If the subject-matter appears to fall within its range, then you are under s. 58
	+ If not/unclear/uncertain, then you might be able to look to the pragmatic/functional approach to determine exclusive jurisdiction.

**STANDARD OF REVIEW: *DUNSMUIR* AND BEYOND!**

* *Dunsmuir* altered the pragmatic/functional approach to a 3-step test and got rid of patent unreasonableness.
	+ Just two SORs now, correctness and reasonableness.
	+ Determined that if there is a precedent telling you what the SOR is, just follow that.
* What is reasonableness per Dunsmuir?
	+ Deferential standard animated by same principles which underlay the patent unreasonableness standard. Recognizes the tension/conflict between parliamentary supremacy and rule of law.
	+ States that ATs have a “margin of appreciation within the range of acceptable and rational solutions.” Sometimes there are a number of reasonable answers; AT doesn’t have to pick the right one, just one within the range of acceptable ones.
		- “Reasonableness is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”
	+ Reasonableness is most concerned with the existence of “justification, transparency and intelligibility” within the decision-making process.
		- About whether you can see the DM’s reasoning.
* How do you determine which SOR to apply per *Dunsmuir*?
	+ (1) Existence of privative clause – more deference if present.
	+ (2) A discrete and special administrative regime in which the DM has special expertise.
	+ (3) Nature of the question of law
		- Question of law that is of central importance to the legal system...and outside the...specialized area of expertise of the administrative decision-maker will always attract a correctness standard.
		- Question of law that is not so important could be assessed on reasonableness if the two other factors allow for it.
	+ Exhaustive review is not necessary- look to precedents to identify the appropriate SOR.
		- Example: constitutional issues will always be assessed against correctness.

***Dunsmuir v. New Brunswick*, 2008 SCC**

**F:** Above
**H:** The arbitrator was dealing with question of law that was not central to the legal system as a whole. There was a privative clause and the arbitrator had expertise. The SOR was reasonableness.

* The finding of law in question was found unreasonable.

***Canada (Canadian Human Rights Commission) v. Canada (AG)*, 2011 SCC (Mowatt)**

**F:** Ex-member of the Canadian military who was fired brought claim to the HRC for sexual harassment against the Army. CHRC accepted her allegations gave her $5,000 damages. She had spent $147,000 in legal fees so she requested costs. Could CHRC award costs?

* Statute allowed CHRC to compensate victims for expenses. Did paying for expenses include payment of legal fees by losing party to winning party?
* Not really a question of expertise, more of a general question of law which could have central importance to legal system.

**H:** SOR of reasonableness.

* Stated that costs was not a question of central importance to the legal system and was outside the specialized expertise of the CHRC. So correctness was not applicable.
* Dispute was fact intensive. CHRC had heard lengthy history of facts and lawyers were present throughout.
* Correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator’s expertise, as well as to questions regarding the jurisdictional lines between two or more competing specialized tribunals.

***Khosa v. Canada (MCI)*, 2009 SCC**

**F:** Khosa had killed someone in road-racing, given prison sentence. Never had citizenship so was going to be deported. Applied to have deportation removed on H/C grounds. IAD made finding of fact that he was not sufficiently remorseful so didn’t remove deportation.

* Federal Courts Act sets out SOR for findings of fact – not to be removed unless they are perverse or capricious.

**I:** Should the courts use the Fed Courts Act grounds or the correctness/reasonableness standards?

**H:** Reasonableness is the SOR. The Federal Courts Act’s words are just one factor to be rolled into the Dunsmuir analysis.

* Applied the 3 part test to determine the SOR (didn’t apply perverse and capricious).
* SCC specifically noted that PU will continue to live on in BC, but the content of PU and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.

**How does Khosa affect the interpretation of PU in BC under the ATA?**

***Viking Logistics v. BC (WCB)*, 2010 BCSC**

**R:** BCSC stated that PU would be interpreted in light of *Dunsmuir*’s description of the common law.

***Coast Mountain Bus Company v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada)*, 2010 BCCA**

**R:** States that BC courts should use the law as it existed pre-Dunsmuir.

***United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy (Allied Industrial and Service Workers International Union, Local 2009) v. Auyeung*, 2011 BCSC**

**R:** The SCC’s jurisprudence has not diluted or otherwise altered the PU standard under the ATA.

**What is PU under the ATA? (*Speckling v. BC (WCB)*, 2005 BCCA)**

* Strict test.
* Patently unreasonable means openly, clearly, evidently unreasonable
* PU is to be applied to result, not to the reasons leading to the result.
	+ The court is not to ask itself whether it is persuaded by the tribunal’s rationale for its decision. Rather, ask whether, assessing decision as a whole, there is any rational or tenable line of analysis supporting the decision such that it is not clearly irrational.
	+ Is the decision so flawed that no amount of curial deference will cure it?
* Decision based on no evidence is PU, but decision based on insufficient evidence is not.

**CONSTITUTION AND ADMINISTRATIVE LAW**

* Tensions between Charter/Constitution/HRCs that are the fundamental laws of the land. Average citizens should be able to have access to them (access to justice). But these issues are quite complex and it would be very difficult to make a case without a lawyer, time-consuming and would bog down AT’s proceedings.

**Initial Narrow Scope**

***Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 SCC**

**F:** College wanted to retire some profs at 65. Legislation allowed them to do this. Faculty asked a labour arbitrator to find that the legislation was contrary to s. 15 of the Charter. Arbitrator decided preliminarily that he had the power to make this decision and that the Charter was engaged. College appealed this prelim decision.

**H:** The arbitrator had the power to consider Charter arguments.

* Per statute, arbitrator had authority to make final and conclusive determination of the dispute and to interpret and apply any Act for that purpose. SCC were reluctant to allow anybody to rule on constitutional issues, but the broad power given to the arbitrator here sufficed.
* SCC also emphasized the expertise and helpfulness of the arbitrator to the process.
* Any review of an AT’s constitutional findings would be on correctness anyway so a court would always get the final word.

***Cuddy Chicks v. Ontario (Labour Relations Board)*, 1991 SCC**

**F:** Union wanted to certify Cuddy Chicks’ agricultural workers. ON Labour Relations Act had exclusion for the unionization of agricultural workers. Union challenged the exclusion before the Labour Relations Board as being against Charter (freedom of association).

* Per statute, Board had exclusive jurisdiction to exercise...determine all questions of fact and law on any matter that arises before it.

**H:** LRB could hear the constitutional arguments. SCC is warming to the idea of ATs having such jurisdiction. SCC emphasizes the expertise of the LRB. Says that legal process will be better served where the LRB make initial determination of jurisdictional issues arising from constitutional challenges.

***Tetrault-Godoury v. Canada (Emp and Immigration Commission)*, 1991 SCC**

**F:** TG had worked till over 65, then lost her job. Would have been eligible for UI but for the law which stated that people over 65 only entitled to small lump sum payment and no other entitlements. TG argued this is contrary to s. 15.

* Went to Board of Referees, they declined to hear Charter challenge. Act didn’t say anything about the Board’s powers to hear certain questions.
* TG could have appealed to an Umpire (Federal Court judge). Umpire had power to decide any question of law or fact necessary for disposition of the appeal.
* Act also provided the option of going straight to court.

**H:** Board doesn’t have the power to hear constitutional issues as there is nothing in the Act saying that they can. The Umpire has that power, not the Board.

**Broad Approach to ATs and the Constitution**

***Cooper v. Canada (CHRC)*, 1996 SCC**

**F:** Airline pilots challenged retirement age provision in the CHRA which allowed for discrimination if it was a bona fide occupational requirement. CHRC now had to determine whether its home statute was constitutional.

**H:** CHRC had no jurisdiction to determine constitutional validity of its own legislation.

* CHRC is a screening body that sends cases to the CHRT to be determined. No legislative indicia of intention to determine facts/law.
* No provisions giving it power over general questions of law.
* CHRC had no expertise other than in relation to fact finding.
* CHRC could determine what its own statute meant, not general constitutional stuff.
* Dissent by McLachlin: Argued on access to justice grounds. The CHRC had the power to screen complaints out, if they could do this, your constitutional argument would die. Shouldn’t make the Charter/constitution a holy grail only for judicial initiates.

***Nova Scotia (WCB) v. Martin*, 2003 SCC – Overturns Cooper, new Test for Const. Juris.**

**F:** Chronic pain WC claimants disentitled from further payments under NS law. Claimed Charter violation. NS WCAT said it was contrary to Charter.

**H:** Cooper overturned. As long as the AT has jurisdiction over questions of law, it can consider Charter arguments.

* Test: (1) Under the AT’s home statute, does it have jurisdiction, implied or explicit, to decide questions of law arising from a legislative provision?
* (2) (a) Explicit- from terms of home statute
* (2) (b) Implied- from the statute as a whole (is it necessary for the AT to determine question s
* (3) If yes, presumption of constitutional jurisdiction arises.
* (4) Presumption can be rebutted by (a) an explicit withdrawal of authority to consider the Charter or (b) convincing the court that an examination of statutory scheme leads to conclusion that the legislature intended to exclude constitutional questions from the scope of the ATs jurisdiction.

***R. v. Conway*, 2010 SCC – ATs can give Charter remedies!**

**F:** Conway declared NCRMD, wanted to challenge a ruling of the review board on Charter grounds and wanted a Charter remedy.

* Question here was whether the review board was a “court of competent jurisdiction” per s. 24 of the Charter.

**H:** Review board is a “court of competent jurisdiction.”

* Test for whether an AT can consider a Charter remedy:
	+ First, does the AT have jurisdiction, explicit or implied, to decide questions of law? (Threshold question)
		- Unless the legislature had made it clear that the AT was excluded from applying the Charter, the AT can consider and apply the Charter and associated remedies.
	+ Second, given the statutory scheme, can the AT grant the particular remedy sought? Look at the legislative intent, AT statutory mandate, structure and function.
* The review board is a quasi-judicial body with significant authority over vulnerable population.
	+ Has powers related to detention, treatment, assessment of people in its care.
	+ The Criminal Code indicates that the Board has power to make legal determinations.

**Constitutional Questions under the ATA**

* ATA, Definitions:
	+ “Constitutional question” means any question that requires notice to be given under s. 8 of the *Constitutional Questions Act*.
* S. 44 – Blanket prohibition on constitutional questions
	+ (1) The tribunal does not have jurisdiction over constitutional questions.
	+ (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.
* S. 45 – Prohibition on Charter arguments
	+ (1) The tribunal does not have jurisdiction over constitutional questions relating to the Canadian Charter of Rights and Freedoms.
	+ (1.1) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.
	+ (2) If a constitutional question, other than one relating to the [Charter], is raised by a party in a tribunal proceeding:
		- (a) on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case, or
		- (b) on the request of the AG, the tribunal must refer that question to the court in the form of a state case.
* Constitutional Questions Act, s. 8
	+ (1) In this section:
		- “constitutional remedy” means a remedy under s. 24 (1) of the [Charter] other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;
		- “law” includes an enactment and an enactment within the meaning of the Interpretation Act (Canada)
	+ (2) If in a cause, matter or other proceeding:
		- (a) the constitutional validity or constitutional applicability of any law is challenged, or
		- (b) an application is made for a constitutional remedy
		- The law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the AG Canada and the AG of BC in accordance with this section.
	+ (3) If in a cause, matter or other proceeding the validity or applicability of a regulation is challenged on grounds other than the grounds referred to in subsection (2) (a), the regulation must not be held to be invalid or inapplicable until after the notice of the challenge has been served on the AG BC in accordance with this section.
* Can the ATA Tribunal Deal with Constitutional Arguments?
	+ (1) Look to the tribunal’s enabling statute. See which section of the ATA it referentially incorporates.
		- S. 44- Blanket prohibition on CQs
		- S. 45- Prohibition on Charter arguments.
		- If home statute doesn’t incorporate s. 44/45, then you can presume it has constitutional jurisdiction.
		- Home statute might also say that division of powers is out of bounds.
	+ (2) If the AT is prohibited from dealing with the constitutional document, then look to see whether you’re actually dealing with a constitutional question. If the AT is not prohibited from dealing with the constitutional document, then you don’t need to deal with this 2nd step.
		- Anything that would require notice to the BC AG is a CQ.
		- Notice is required anytime the validity or applicability of a law is at stake or any time a constitutional remedy is requested.
		- Some grey area- could argue that you are simply asking the AT to interpret the law in accordance with Charter values.
		- Pay attention to the subject matter of the constitutional question (Charter, constitutional or division of powers). Ss. 44/45 delineate between these.

**Human Rights Legislation and Administrative Law Generally**

* If AT has the power to deal with general questions of law, then it has the ability to decide HRs challenges under whatever HRs legislation in question (*Tranchemontagne v. Ontario*).

**Human Rights Legislation and ATA**

* Split response- some ATA Tribunals have discretion to hear the HRs argument or send it to a more appropriate forum (46.1), some have discretion but cannot hear arguments as to whether the HRC conflicts with another law (46.2), some can’t hear the HRs argument at all (46.3).
* S. 46.1- Discretion to decline jurisdiction to apply the Human Rights Code
	+ (1) The tribunal may decline jurisdiction to apply the HRC in any matter before it.
	+ (2) Without limiting the matters the tribunal may consider when determining whether to decline jurisdiction under subsection (1), the tribunal may consider whether, in the circumstances, there is a more appropriate forum in which the HRC may be applied.
* S. 46.2- Limited Jurisdiction and Discretion to decline jurisdiction to apply the HRC
	+ (1) Subject to subsection (2), the tribunal may decline jurisdiction to apply the HRC in any matter before it.
	+ (2) The tribunal does not have jurisdiction over a question of whether there is a conflict between the HRC and any other enactment.
	+ (3) Without limiting the matters the tribunal may consider when determining whether to decline jurisdiction under subsection (1), the tribunal may consider whether, in the circumstances, there is a more appropriate forum in which the HRC may be applied.
	+ (4) This section applies to all applications made before, on or after the date that this section applies to a tribunal.
* S. 46.3 – Tribunal without jurisdiction to apply the HRC
	+ (1) The tribunal does not have jurisdiction to apply the HRC.
	+ (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

**Competing ATs and Human Rights Tribunals**

***BC (WCB) v. Figliola*, 2011 SCC**

**F:** Similar facts to Martin, chronic pain issue. In process of raising compensation claim before WCB, raised a HRs complaint. WCB decided workers comp claim and HRs claim (WCAT confirmed it). Pf then went to BC HRT and made same complaint. WCAT applied to have claim dismissed as it had already been dealt with by the WCB. BC HRT took jurisdiction (said they had expertise).

**H:** BC HRT should have dismissed the claim out of concern for:

* Public interest in the finality of AT decisions
* Finality of decision increases fairness and integrity of the courts, ATs and the administration of justice. Creates duplicative proceedings.
* The availability of JR from the WCAT decision.
* The integrity of appropriate review mechanisms in administrative decision-making.
* The avoidance of unnecessary expenditure of resources.
* Basically, once a claimant chooses a particular AT, they should stay within that structure.

**Reconsideration of AT Decisions**

* Cheaper, more effective way to get decision overturned. Common feature of most ATs which allow them to re-decide a matter in certain circumstances. Not an appeal, but residual jurisdiction to fix decision that has an error in it.
* Reconsiderations are an exception to the functus officio principle (once DM makes decision, can’t revisit it).
* Reconsideration states that if there are particular kinds of errors present in the decision (breach of PF, error of fact/law that is outside the SOR deference), the decision is a nullity because it exceeded the jurisdiction granted to it.
* Slip rule: a typographical error will never be considered functus.

***Chandler v. Alberta Association of Architects*, 1989 SCC**

**F:** Board made a number of ultra vires findings and orders which were quashed. Could the Board reconsider their decision?

**H:** Functus is applied flexibly and less formalistically in the AT context. If the decision suffers from an error that taints the whole decision (breach of natural justice), the AT is allowed to start afresh.

**Reconsideration/Amendment to Decisions under the ATA**

* S. 53: (1) If a party applies or on the tribunal’s own initiative, the tribunal may amend a final decision to correct any of the following:
	+ (a) a clerical or typographical error
	+ (b) an accidental or inadvertent error, omission or other similar mistake
	+ (c) an arithmetical error made in a computation
* (2) Unless the tribunal determines otherwise, an amendment under subsection (1) must not be made more than 30 days after all parties have been served with the final decision.
* (3) Within 30 days of being served with the final decision, a party may apply to the tribunal for clarification of the final decision and the tribunal may amend the final decision only if the tribunal considers the that amendment will clarify the final decision.
* (4) The tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (3)
* (5) This section must not be construed as limiting the tribunal’s ability, on request of a party, to reopen an application in order to cure a jurisdictional defect.

**DELEGATION OF STATUTORY POWERS**

* Power to make a particular decision and the power to hear an appeal are both delegated powers.
* Key thing to remember is that the scope and nature of the delegation are matters to be determined by statutory interpretation.
* Problem with delegation is that it can be non-democratic- Minister may be responsible for making regulations, but the regulations (which can impact people’s lives in significant ways) can sometimes not be debated in Parliament.
* Rationale:
	+ (1) Practicality, can’t have every single rule debated in Parliament.
	+ (2) Quicker response – delegated authorities can respond to events quickly.
	+ (3) Expertise
* Four methods to hold delegated authorities accountable:
	+ (1) Through statutory accountability features. Some statutes require that rules made by delegated authority pertaining to them will be confirmed by Parliament.
	+ (2) Delegation is paired with obligation to consult with stakeholders. Stakeholders can input their views.
	+ (3) Inquiries/Royal Commission – created by legislature but not regularly.
	+ (4) The courts – courts were not happy with shift to delegated authorities.
		- Maxim: delegatus non potest delegare – delegate can’t do anymore than the power specifically given to the delegate. Permitted the courts to restrict the delegation of authority.

***Queen v. Harrison*, 1977 SCC – Senior Officials is okay**

**F:** Harrison was acquitted of crime. Crown wanted to appeal. Statute said that notice of appeal must be filed by Provincial AG or Deputy AG. Notice was filed by someone acting on behalf of Crown Counsel. Harrison raised the latin maxim, argued that the power to file notice of appeal hadn’t been delegated so the notice was a nullity.

**H:** Any senior official was sufficient to file notice unless statutory interpretation indicates otherwise.

* The maxim can be displaced by the language, scope or object of a particular administrative scheme. Different approach would lead to inefficiency, chaos, etc.

***Interpretation Act*, [R.S.B.C. 1996] c. 238 – Codifies Queen v. Harrison for Senior Officials**

Powers to act for ministers, deputy ministers and public officers

**23**  (1) Words in an enactment directing or empowering a minister of the government to do something, or otherwise applying to the minister by his or her name of office, include a minister designated to act in the office and the deputy or associate deputy of the minister.

(2) If a deputy minister is absent or unable to act, an assistant deputy minister, or some other official authorized by the minister, has the powers and must perform the duties of the deputy minister.

(3) Words in an enactment directing or empowering a public officer to do something, or otherwise applying to the public officer by his or her name of office, include a person acting for the public officer or appointed to act in the office and the deputy of the public officer.

(4) This section applies whether or not the office of a minister or public officer is vacant.

(5) Subsection (1) does not authorize a deputy or an associate deputy of a minister to exercise an authority conferred on the minister to enact a regulation as defined in the *Regulations Act*.

***Edgar v. Canada*, 1999 ONCA – Specific language will rebut the Senior Official Doctrine**

**F:** Whistleblower blows a customs-evading scam. Statute permitted whistleblowers to share in the profits gained from busting illegal operations. Allowed Minister in his sole discretion to authorise payment of reward.

* Edgar’s claim never got to Minister himself, was eventually denied by Deputy. Edgar argued the statute only allowed the Minister to deny claim, not underlings.

**H:** Deputy Minister’s decision was nullity. Reference to “in his sole discretion” meant the Minister was required to make the decision.

* The maxim is still applicable. The codification of the senior official doctrine in the Interpretation Act is just a presumption and can be overcome by specific language indicating otherwise.
* Whenever you see “in his sole discretion,” it’s a hint that the senior official doctrine may not apply.

***Thorne’s Hardware Ltd. v. Queen*, 1983 SCC – Delegation is a matter of SI and Orders in Council are near untouchable**

**F:** Irving Oil gets Thorne Hardware to build tanker platform just outside Halifax harbour boundary to avoid fees/taxes. GIC, under statute, changes the boundary of the harbour to include Thorne’s.

* Statute allowed GIC to change boundaries for reasons related to administration, management and control of the harbour.

**H:** Delegation is a matter of statutory interpretation. Look at the statute, interpret the words used, determine whether they capture the action in question.

* The GIC was empowered to make decisions related to tanker traffic going through harbour. The harbour was paying $ for these tankers anyway so expanding the boundary was justified.
* Can Orders in Council be JR’ed? SCC says except in the most egregious cases (Roncarelli), the courts cannot look at GIC’s motivations in making its decision. Can only examine whether the statute permits them to make the decision.

***Enbridge Gas Distribution v. Ontario (Energy Board)*, 2005 ONCA – Look to objects and purposes to determine whether decision is within delegated authority**

**F:** Ontario consumers used to get two bills for gas, one from supplier, another from distributor. ON Energy Board amalgamated the billing process so that consumers got one bill, in the process also selected which sellers of gas would be allowed. Enbridge (distributor) got mad, argued the OEB didn’t have authority to amalgamate billing practices.

* OEB’s statute allowed it to make rules governing the conduct of gas distributors selling or offering to sell gas to a consumer. Could also establish conditions of access to gas distribution infrastructure.

**H:** Statutory interpretation is the way to go. Interpret the statute in light of its broader context and its objects and purposes. Don’t show any deference to the way the Board understood its powers (ONCA had tried to do this).

* The Act was about ensuring consumer protection, so it made sense for the Board to simplify billing practices for ON consumers.

***Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA – Look to the broader purposes of the statute when assessing delegated decision**

**F:** Globalive wanted to buy airwave space in Canadian market. CRTC found that they weren’t “Canadian” controlled corp within meaning of the Act and denied them access. GIC reversed the CRTC’s decision (as allowed by Statute). JR sought by Globalive’s competitors and CRTC.

* GIC had referred to the interest of ensuring access to foreign capital and expertise in tele-communications in their reversal of the CRTC. This was not a policy objective stated in the Act. Argument was that the CRTC decision was quashed for purpose not consistent with the Act.

**H:** FCA said that the promotion of access to foreign capital and expertise can further a number of the stated policy objectives in the Act even if not stated openly. So the GIC decision was okay.

* When looking at the exercise of delegated authority, look at the provision in the broader purposes of the statute.

***Thamotharem v. Canada (MCI)*, 2007 FCA**

**F:** CR claimant was subject to a new Guideline that changed the order of evidence in IRB proceedings. Allowed for a Refugee Protection Officer to lead with questions for the claimant. CR claimant was allowed to apply to have the case heard the normal way.

* Chairperson of the IRB allowed to make guidelines for CL claimants under two methods. One to create non-binding guidelines (not subject to review by GIC/Parl) and the second for binding rules (subject to GIC/Parl oversight). Guideline 7 had been created under the first method. Thamotharem claimed that the Chairperson should have used the second method for such a document.

**H:** Guideline 7 is not invalid on its fact as a breach of duty of fairness because the claimant could ask to put their evidence first. But a breach of fairness might occur in some circumstances if a member refuses a CR claimant’s request to be questioned first by their counsel.

* ATs do not require an explicit grant of authority to issue soft law guidelines and such. These are non-binding and intended to help DMs in their decision-making.
* There was nothing wrong with implementing Guideline 7 under the non-binding method. Parliament hadn’t imposed a rigid scheme for selecting one of the other, so the court will not imply one.
	+ RPD has a heavy caseload so it made sense for it to use easier route.

**Delegation and Retroactivity**

***Skyline Roofing Ltd. v. Alberta (WCB)*, 2001 ABQB – Unless explicitly indicated otherwise, delegated powers do not include power to make retroactive law**

**F:** Alta WCB made a retroactive new policy which would have forced Skyline to pay for WC claims for its subcontractors. WCB was empowered to create binding “compensation policy” but Skyline argued that this power didn’t include retroactive policies.

**H:** General presumption that policies cannot be retroactive. Power to make retroactive policy cannot be inferred unless statute requires it to be. Need explicit language.

***Canadian Forest Products Ltd. v. BC*, 2009 BCSC – Subordinate source of authority cannot overcome presumption against retroactivity**

**F:** BC govt wanted to retroactively increase stumpage fees. Authority to do this was granted in a Manual (subordinate source of authority). Canfor argued that the Minister could not do this as the Manual was not binding. The Forests Act indicated that stumpage rates would be applied when the timber was scaled.

**H:** The Manual was inconsistent with Statute. Stumpage fees would be set when logs are scaled. Presumption against retroactive power was not overcome.