**Evan Straight Admin Can Winter 2013 Warren Hoole**

**Wider Socio-Political Context**

**Administrative Law** exists when the judicial branch of government supervises the executive branch’s implementation of legislation duly enacted by parliament.

* Certoriari is to quash
* Mandamus is to compel something

***Dunham*** 2012 BCSC 748

Impediments to access court system upsets the balance between judiciary and other branches of government, preventing them from performing their role and ensuring government accountability. Thus manipulating court fees violates judicial independence.

This is a perfect example of the tension between courts and executive branch of government.

**Executive Branch**: spectrum exists from quasi legislative (cabinet) to quasi judicial, towards legislative end the courts are more deferential to the checks of democracy. Yet, when accountability to voters is not present, and a decision maker is approaching a judicial area, activism and supervision are common. Scrutiny varies based on spectrum site.

**Sources of Admin Law**

**Statute**

* Enabling legislation is source of authority for the admin tribunal
* Admin tribunal: shorthand for a range of decision makers such as commission, board of inquiry, individuals, government employees, council appointees

**Contract**

* Some Ks create an authority for a non court body to make a decision
* Labor agreements provide for an arbitrator of first instance
* Often the powers of the arbitrators are supplemented by an Act (Labor Relations Code, Commercial Arbitration Act)

**Common Law**

* Tribunals are “masters of their own procedure” so long as they are conforming with natural justice and fairness
  + ***Prassad v Canada*** 1989SCC: General rule is that SDMs are masters of procedure. In absence of explicit statutory procedures this general rule stands except as limited by rules of fairness and rules of natural justice (only in judicial or quasi judicial roles do natural justice principles govern)
* “Necessary Implication” doctrine of statutory interpretation expands the explicit provisions of a statutory authority
  + ***Bell Canada v RCTC*** 1989 SCC: Although statute gave no explicit authority to CRTC to retroactively modify fees, court concluded it was a necessary implication for the purpose of the CRTC, and the explicit authority to order “interim” tariffs implied an authority to amend them
  + Powers of admin tribunal may exist by necessary implication from the wording of the Act, its structure and its purpose

**British Columbia Administrative Tribunals Act**

* Smorgasbord legislation from which tribunals and legislatures can pick and choose
* Enabling legislation will incorporate by reference certain sections of ATA, but not EVERY provision is incorporated by EVERY tribunal, nor is every tribunal covered by ATA at all
* Includes the “contempt power” which codifies CL

**Limits on Admin Law**

**Rule of Law**

* 1867 Constitution references the UK law in preamble, thus importing R of L
* 1982 Charter specifies R of L in preamble
* Rule of Law: “Man! That’s outrageous!”
* If you have a problem in Admin system you can fire a rule of law argument by speaking to arbitrariness, patent unfairness, unkindness, unconscionability
  + Prevent arbitrary exercise of authority by government (Roncarelli)
  + Ensure everyone is equally answerable and bound by the law
  + Ensure laws are clear, capable of being fulfilled
  + Indepdent judiciary
  + Access to court (Dunham)
  + Avoiding retroactive changes to law
  + Coherency within law
  + Law should be properly and publicly promulgate
* ***Roncarelli***: SCC uses “rule of law” to remedy a facially legitimate but clearly unfair action by a government official, and calls it a “fundamental postulate of our constitutional structure”
* ***Patriation reference*** defines rule of law, widely, as “a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority".
* ***Reference re Secession of Quebec*** 1998 SCC: At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.  It provides a shield for individuals from arbitrary state action.
  + Democracy, federalism, constitutionalism and the rule of law, rights of minorities compete
* ***British Columbia v Imperial Tobacco Ltd***, 2005 SCC 49: defines rule of law narrowly to give full expression to explicit constitutional provisions which may otherwise be redundant in the face of such a broad R of L principle. Otherwise valid written provisions will not be invalidated by unwritten principles, because the remedy is the ballot box and using rule of law to strike down democratic legislation is a bad example of judicial activism trumping the dictates of elected government. The explicit sections of Charter are used to inform court’s continued interpretation of the unwritten R of L concept.

**Sections 96-101 of the *Constitution Act 1867***

* Purpose: uniformity of law across Canada
* Section 96 is exclusive appointment power for Federal government
* S 96 interacts with Admin law wherever a Privative Clause is used with intention of depriving court of supervisory authority
  + “final and conclusive … not open to question or review in Court … not affected by injunction, or remedy of a court”
* Court uses s 96 to undercut these privative clauses or read them down. This section prohibits provinces fro creating something that looks like a court
* ***Re Residential Tenancies Act*** 1981 SCC: Appointing judges to superior courts is ulta vires provincial authority, so if the Tribunal looks like a superior court then this is unconstitutional. Yet, on these facts the 3rd point of the test was not met so no issue here.
* 3 step test (must fail all 3 to have a problem)
  + 1. Historical Conditions in 1867: can’t take power from courts’ traditional areas
  + 2. Consideration of the function within its institutional setting to determine if this is a judicial function: what is the nature of the dispute? Court like? Is it between two people with one winner and one loser, or is it s dispute about larger policy ideas of political issues of wide impact (former is court like, latter is political)
  + 3. Reviewing tribunal’s function as a whole, in its entire institutional context: even if there is some judicial functions, if the majority is policy then no violation of s 96
* ***Crevier v AG Quebec*** 1981 SCC: section 96 prohibits a province from immunizing from review the decisions of tribunals on matters of jurisdiction

**The Charter**

* ***Nova Scotia Workers Compensation Board*** (2 cases) 2003 SCC: Everyone engaging the state should have access to fundamental principles of law from Charter, so tribunals must consider Charter, hear Charter arguments, use Charter limits on authority if they have the power to consider questions of law
* ***Cooper*** (McLachlan in dissent): All law and law‑makers that touch the people must conform to it.  Tribunals and commissions charged with deciding legal issues are no exception.  If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.

**Human Rights**

* ***Tranchemontagne v Ontario*** 2006 SCC: application of human rights legislation by many administrative actors fosters a culture of respect for human rights

**Statutory Interpretation**

* While a wide reading can be a source, a narrow reading can be a limit
* Driedger’s Modern Approach as cited in *Rizzo and Rizzo Shoes*: words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament

**Statutes**

* ***Sections 44-46 BC ATA***: removes Charter jurisdiction
  + Process: look at the ATA definition of constitutional question, go to Constitutional Questions Act and see if notice is required, figure out if the particular tribunal is captured by limitation in ATA
* ***Judicial Review Procedure Act:*** instructs courts on how they can limit tribunals authority on review
  + Provides discretion to order remedies
* ***Federal Courts Act*** is basically the same as outdate JRPA
  + Grounds of Review under FCA are when tribunal:
    - Acted without jurisdiction
    - Failed to observe a principle of natural justice
    - Erred in law
    - Made an erroneous finding of fact that it made in a perverse or capricious manner or without regard for materials before it
    - Acted or failed to act by reason of fraud or perjured evidence
    - Acted contrary to law

**Boundaries of Admin Law: Public Law v Private Law**

***Air Canada v Toronto Port Authority*** 2011 FCA: Outlines the factors within the test for when something is public or private

* The character of the matter for which review is sought
  + Private and commercial, or of broad public import
* The nature of the decision-maker and its responsibilities.
* The extent to which a decision is founded in and shaped by law as opposed to private discretion.
* The body’s relationship to other statutory schemes or other parts of government
  + Is the body woven into network as government?
* The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity.
* The suitability of public law remedies.
* The existence of compulsory power.
* An “exceptional” category of cases where the conduct has attained a serious public dimension.
* ***Mavi*** seemed like a private law matter, but there is an overtone of governmental policy issues here

**Procedural Fairness**

**Generally**

* Concerned with procedure used, has nothing to do with merits of the outcome
* It is inappropriate for a tribunal to defend its own procedure in front of court
* The degree of procedural fairness required changes along the spectrum from quasi judicial to quasi legislative
* Although it doesn’t happen, statute can override the CL rules of procedural fairness
* Generally, PF goes like this:
  + PF is a right when a SDM is affecting rights, entitlements, interests
  + Legislative action is exempt
  + Baker factors determine the amount of PF owed
  + PF encompasses certain things (Baker)
  + Baker applies \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
* Ultimate Question: Was the right amount of fairness given?

**Latin Underpinnings**

* Audi Alteram Partem: you have to give other side a chance to know the case and make their case
* Nemo Judex in Sua Causa: no person shall judge her own case, tribunals must be independent and unbiased
* Expression Unius est Exclusio Alterius: Stating one thing excludes other things that are not stated (a rule of interpretation to use when Driedger’s rule is ambiguous)

***Nicholson v Police Commissioners*** 1979 SCC (widens PF)

* Although there was no full entitlement to procedural fairness until month 18 (based on the Police Act) there was still a CL entitlement to general fairness under Audi Alteram rule (should know the case against you and get to respond)
* The donnee of a power must “act fairly”
* SCC rejects application of Expressio Unius est Exclusio Alterius when it leads to inconsistency or injustice
* SCC expresses “the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question”
* If tribunal is affecting rights and obligations they have a responsibility to be fair even if not explicitly stated in statute.
* Look to consequences to individual when determining content of the duty of fairness

***Attorney General of Canada v. Inuit Tapirisat et al.*,** 1980 SCC (narrows PF)

* Facts: there was no opportunity for Inuit to respond to submissions of Bell (opposed in interest), there was no hearing by cabinet and they received Inuit submissions through the summaries of an intermediate bureaucratic layer that doesn’t report to Inuit on what it has told cabinet
* Issue: is the cabinet, acting as SDM, subject to procedural fairness?
* Court narrows Nicholson decision, says that cabinet is not subject to duty of PF when acting in a large scale policy role
  + Was not affecting single consumers or single persons, but affecting a large section of public
  + This makes it a legislative action
  + Since it occurs on the legislative end of spectrum, no PF is needed
* PF not important when SDM is acting in legislative capacity
* Degree of PF required in each case is determined by scheme of act and intention of parliament
* Court also pointed out that scheme of Act can be important in elucidating intention of the legislature who legislated it
  + The bifurcated opportunity to appeal to court instead of cabinet may have affected the amount of PF fairness here
  + A short time frame in a statute precludes many aspects of civil procedures from being possible to import or intended as such by legislature

***Reference Re Canada Assistance Plan (B.C.)*,** [1991] 2 S.C.R. 525

* Doctrine of legitimate expectations is essentially an estoppel argument
* SCC rejects BC’s argument
* 1. PF does not apply to legislative process
* 2. Legitimate expectations doctrine can never give a substantive remedy, only a procedural entitlement
  + Doctrine can’t affect the substantive outcome, so assurances as to outcome are not binding
  + Expectations regarding procedure are binding
  + Legitimate expectations doctrine only binding to extent of procedure and not substantive outcome

***Cardinal v. Kent Institution*** 1985 SCC

* SCC expands PF: there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.”
* If there is a breach of PF the result is a quashing of the tribunals order or decision, regardless of whether it would have made any difference to the outcome
* It is the right, not the result of the right, the causes requirement of PF, so outcome doesn’t matter (even if correct) if procedure is no good
* When rights, obligations, or privileges are affected by tribunal then some fairness should pertain

***Knight v. Indian Head School Division No. 19*,** 1990 SCC

* Knight is appointed by statute as head of education, school fires him
* The school is acting as SDM when they fired him, so a SDM is affecting the rights, obligations or a person appointed under statute
* Court said that while you have a right to procedural fairness in these circumstances, this didn’t extend to a full hearing or to anything more than the negotiations you underwent already
  + Everything that needed to be said was said in negotiations
  + Court says no issue here since there would be no purpose in a hearing
  + The procedures afforded were sufficiently fair to discharge SDM’s obligation to give PF
* Knight never got notice that negotiations were over or that school had made a decision to fire him for whatever the reasons
* Sort of runs against Cardinal, since now court is saying a hearing would be pointless in the circumstances
  + Cardinal said it would quash any decision with a PF error regardless of the effect
* PF is eminently variable in content and applicable only within each specific case
  + “Natural justice is but fairness writ large and juridically.”

***Dunsmuir v BC*** 2008 SCC

* SCC largely eliminated the notion that a public office holder (such as Knight or Nicholson) are entitled to PF when fired by SDM
* Most people appointed pursuant to statute are limited to employment law remedies
* Public office holders no longer get procedural fairness when required, just go to employment law remedies and treat this person like any other private employee/citizen
  + They do leave a few small exceptions where Knight still applies
* “Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What ***Knight*** truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.”

***Baker v Canada*** 1999 SCC

* 5 factors to determine the duty of fairness, which is eminently variable
  + 1. Close to judicial? Is it narrow in its belligerents of policy writ large
    - one vs one? Wide policy?
  + 2. Look at statute carefully
    - short time frame mandates pre empt lots of procedure
    - alternate avenues of appeal/recourse provided in statute reduce PF at first instance/level
  + 3. Importance of decision to individual affected
  + 4. Legitimate expectations of the parties
    - what is typically afforded in these matters
    - legit expecations can give procedural not substantive rights
  + 5. Has the Tribunal done this sort of thing before?
    - Speaks to expertise and knowledge of a tribunal
* In Baker, based on these 5, was found to be in the mid range of fairness
* So she has right to make her case in a reasonable hearing
  + Baker got to make sufficient written submissions with aid of counsel and knew the case she had to meet (compassionate grounds criteria)
* She has a right to reasons (a new feature in Admin law after this case)
  + Officer’s reasons were sufficient to discharge obligation to give reasons
  + Enough to evaluate whether an appeal is wise/likely to succeed
* Another aspect of PF is Nemo Judex in Sua Causa (right to an independent and informed decision maker)
  + She was not afforded this right here, since there was a “reasonable apprehension of bias” in the reasons of the Officer
  + In the mid range of fairness this must be met to a higher level than here
  + This is where SCC quashed the deportation order

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

* An exception to general rule, there are some PF aspects to law making
* Bylaws are one area where courts can remedy things, citizens not left to ballot box here, can be limited PF
* “In general, members of the public are entitled to receive in advance of the public hearing all documents put before council. Whether the public is entitled to more expansive or restricted access depends on several factors, including the following”
  + 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**

**1. Personal Bias from perspective of a particular decision maker**

* The notion that a particular decision maker will not approach his or her task of decision making with an open mind
  + Pecuniary rewards
  + Friendships
  + Past practice areas that you have not “cooled off” from
* TEST: whenever reasonable and informed person with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that adjudicator’s conduct gives rise to a reasonable apprehension of bias (in the case at hand) (***Matsqui*** cites this)

***Rex v Sussex Justices*** 1924 UK: Justice must appear to be done manifestly and undoubtedly

**Presumptions**

* Presumptions of natural justice, Latin maxims and all CL presumptions can be defeated by enabling legislation
  + Section 7 can be used to overcome statutory restrictions on fairness but doesn’t apply to economic rights and doesn’t help overcome enabling legislation that defeats a CL presumption
  + Quebec Charter section 23 guarantees a right to independent and impartial decision maker for all quasi judicial decision makers, so in QC you have a constitutional ability to overcome most enabling statutes for tribunals that purport to limit procedural fairness of CL, and this applies to all features of fairness, not just bias
* The presumption is that adjudicators and institutions act in a non biased manner, so the burden is on the person alleging bias, and the presumption of non bias is quite strong
  + You must raise the facts that may create bias at the tribunal of first instance and not wait to raise it on judicial review
  + If you do, you will have waived your right to claim this and you will be deemed to have consented to the bias

***Committee for Justice and Liberty et al. v. National Energy Board et al.,***1978 SCC

* NEB conducted hearings into whether the certificate of convenience and necessity for the pipeline should be granted, but the Chairman of the Board had recently been employed as the director of an organization that was intimately connected to an earlier proposal to build this pipeline. He had quit that job to work for NEB less than 6 months before the hearings, and he assigned himself to be on 3 person panel hearing this
* FCA said this was fine, but SCC majority focused on the apparent impartiality losing groups may perceive, deemed this to be a reasonable apprehension of bias (shows that an “informed and reasonable person” is subjective)
* Test: “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.”
* SCC Dissent agreed with FCA
  + Presumption of law that people should be able to distinguish their biases in a new context
  + There was an oath of office that included impartiality and unbiased
  + Refused to accept that the test be related to the very sensitive or scrupulous conscience

***Newfoundland Telephone Co. v. Newfoundland,***1992 SCC

* There are many type of tribunals on the spectrum, and this one sets rates for wide population so it is more policy based
* Took Dissent from National Energy Board
* He was entitled to have his opinion, up until the hearing but once it started he must be visible amenable to persuasion and not set in his views
  + Can have strong opinions before if you are still open to persuasion, but once hearing begins more discretion is required
* For a policy side tribunal, tribunal members need not be as impartial as a quasi judicial tribunal member prior to hearing, but once hearing starts must keep opinions quiet and be open minded
* This is the penultimate case for personal bias

**2. Institutional Bias from perspective of the statutory body as a whole**

* Notion that features of a body itself suggest that each and every decision maker in the institution may not approach certain issues with an open mind
  + Government is opposing in case and the government created the body
  + Enabling legislation permits interference
  + Appearance that government can influence SDM
* TEST: whenever reasonable and informed person with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that adjudicator’s conduct gives rise to a reasonable apprehension of bias in a substantial number of cases (***Matsqui***)
* Gold standard of institutional independence is a judge of a superior court
  + Tenure to 75, subject to difficult appointment procedures, salary set by Act of Parliament, structure of courts in terms of who hears cases and which rooms get most heat is not up to government. Government can’t interfere with appointed judges
  + The absence of any of these things can make up a bias argument
* ***Valente*:** 3 criteria for establishing/comparing to Gold Standard of independence
  + 1. Security of tenure
    - firing subject to review, all impugned judges get to argue case
  + 2. Financial security of salary and pension
    - set out by statute
  + 3. Institutional independence of tribunal with respect to government more generally
    - Who assigns cases? Who controls chambers? Who oversees SDMs?
  + Test for independence (restated): what would an informed person, viewing the matter realistically and practically -- and having thought the matter through – concluded”

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

* Issue: had employer breached duty to act in good faith in labor negotiations
* Labor board called mandatory meeting of all its members to discuss legal implications of the duty to advise a union, during negotiations, that it may close a plant. When does good faith requirement require notification of this potential closure
* Employer complained on judicial review about institutional bias, arguing that forcing all members to this meeting, including the 3 members hearing this case, would/could influence the 3 members to adopt the institutional decision on this matter
* Common law presumption of institutional independence applied since no statutory authority for this meeting
* SCC saw the meeting as a practical means to ensure consistency in the law
  + Meeting only talked about law, didn’t address facts of this case
  + Nobody influencing 3 members on the facts
  + Although the Labor board is quasi judicial this specific decision was very policy laden
* SCC said it would be a problematic meeting if the facts were discussed or there was pressure on panel to reach a specific outcome, but since this didn’t happen the problem was not real

***Geza v Canada***2006 FCA

* IRB tried to streamline approval process for Roma immigrants by coming up with a thorough leading case to help guide precedent in the future
* Applies the test for bias: The general test (as cited above many times) plus 3 preliminary considerations: the context as per the 5 *Baker* factors, the nature of the decision and scrutiny on the makers (public/policy vs. judicial), and the presence of circumstances that seem “improper”
* Court applies the Baker factors to set the level of PF:” the independence of the Board, its adjudicative procedure and functions, and the fact that its decisions affect the Charter rights of claimants, indicate that the content of the duty of fairness owed by the Board, including the duty of impartiality, falls at the high end of the continuum of procedural fairness.”
* Court also considered that the Board operated in the glare of strong political and public attention
* There is no problem with the idea of a leading case, but the way IRB did this was problematic to court
  + One member of leading case panel was senior management of IRB who was involved in the idea of a leading case
  + Some emails between senior management could be seen as indicating an interest in reducing success of Roma claims
  + Arguable that motivation behind leading case was for it to fail so all Roma cases would be easier to deny
* To court, this process lacked institutional independence, or the appearance thereof

***Canadian Pacific v Matsqui Indian Band*** 1995 SCC

* Matqui were authorized by own bylaws to levy taxes on their land, which the Railway owned part of, and Railway argues that this tax assessment violates the constitution and their property rights
* Railway company did not want to go through the Matsqui appeal structure, alleging institutional bias of this appeal structure
* Lamer CJ: “I agree and conclude that it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent.  Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension.”
* The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.
* Lamer CJ shows that the Gold Standard does not need to be fully and completely met, factors must be considered, but are not determinative
  + “In some cases, a high level of independence will be required.  For example, where the decisions of a tribunal affect the security of the person of a party (such as the Immigration Adjudicators in *Mohammad*, *supra*), a more strict application of the ***Valente*** principles may be warranted.   In this case, we are dealing with an administrative tribunal adjudicating disputes relating to the assessment of property taxes.  In my view, this is a case where a more flexible approach is clearly warranted.”

***2747-3174 Québec Inc. v. Quebec***1996 SCC

* This case is about how overlapping functions and too many points of contact between how tribunal works and is structured and the person who is hearing the specific casee
  + Too much contact between decision maker and the executive and organization of Regie, such that specific decision maker is overly influenced structurally by the way the Regie is set up
  + Chairman of Regie sent a letter to the company, assigned a member to the panel, assigned himself to it, had counsel from Regie conduct prosecution in front of him
  + Prosecutor, judge and investigatory powers were all connected to Director
* Enabling legislation allowed all this, which would be a fine way to oust protections of CL everywhere except Quebec where Section 23 governs
  + Statutes can overcome the CL
  + In QC legislation can not avoid (even explicitly) a constitutional value
* Tenure was another issue, decision makers at Regie got 2 to 5 years tenure
  + SCC says this is sufficient independence to meet section 23 (short time)
* Court defined quasi judicial
  + Test for when a tribunal is at the judicial edge (subsumed by ***Baker***)
  + (1)  Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
    - Accepted practices and past actions are involved here
  + (2)  Does the decision or order directly or indirectly affect the rights and obligations of persons?
  + (3)  Is the adversary process involved?
    - If so, likely judicial in function
  + (4)  Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense
    - shows how you move into policy area
* Regie director instituted the investigation which is problematic since it can be seen to signal his opinion to subordinates who will be tempted to follow the boss’ decision

***Khan v. College of Physicians and Surgeons of Ontario*** 1992 (Ont. CA):

* Tribunal counsel can be involved but to a limited extent
* Tribunal counsel can assist with the drafting of reasons, so long as they are not the decision maker, and so long as they disclose their memos to the parties and submissions are heard
* “The ultimate aim of the drafting process is a set of reasons which accurately and fully reflects the thought processes of the Committee … It must also be recognized that the volume and complexity of modern decision-making all but necessitates resort to "outside" sources during the drafting process … To hold that any "outside" influence vitiates the validity of the proceedings or the decision reached is to insist on a degree of isolation which is not only totally unrealistic but also destructive of effective reason-writing”

***Ocean Port Hotel v BC*** 2001 SCC

* Court of Appeal: Decision makers must have a fixed tenure in line with *Regie* precedent of 2-5 years
* SCC: narrows playing field for arguing indepdencne in tribunal settings
  + Look to statute, and if it necessarily implies or explicitly permits the institutional structure to exist then court won’t modify it
  + Court emphasizes the policy role of this SDM and this means parliament has the responsibility to determine composition and structure of SDM
  + A good counterpoint to the ***Residential Tenancies*** case
  + “It is not open to a court to apply a common law rule in the face of clear statutory direction.  Courts engaged in judicial review of administrative decisions must defer to the legislator’s intention in assessing the degree of independence required of the tribunal in question … Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.”

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

* Facts: McKenzie is Residential Tenancy adjudicator, she was fired one year into her five year term, without cause alleged
* *Public Sector Employees Act* provided that notice for removing appointees must be either remaining duration of term or 12 months, whatever is shorter
* First Court: distinguishes ***Ocean Port*** as relating to policy functions, and when the responsibilities of tribunal are judicial there must be an independent and impartial tribunal or the Rule of Law is violated
  + Users of tribunals have a right to a SDM with security of tenure
  + Secure tenure is a constitutional right of the users of the SDM
  + This decision leaves open a sliver of hope that some real independence is required even outside of QC
* BCCA: uses precedent to duck the issue and say she should get what ***Knight, Nicholson,*** and ***Cardinal*** got
  + In obiter they disagree with argument that rule of law requires more than 12 months, but this is not how they decide the case, so not binding

***Saskatchewan Federation of Labour v. Saskatchewan*** 2010 SKCA 27

* Court of Appeal accepts that the labour board was policy oriented and government should be able to use legislation to oversee comprehensive reform of the SDM, and this involves cleaning house so old appointments don’t undercut new policy
* Court of Appeal reiterates that as along as the outcome is permitted by statute then it is fine
* Prof hates this, thinks it is offensive to the importance of an independent labour board, and the extract deems it a violation of rule of law
* Evan disagrees with prof because if the remedy for certain policy laden tribunal actions is at the ballot box then the new government must be able to clean house or ballot box remedies can never be effective

**Adequacy of Reasons**

* ***Baker*** instituted this requirement, based in natural justice
  + Allows parties to understand, plan next move / leads to better decisions
* ***Baker*** requirement for reasons was expanded thereafter, to a high water mark: “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. If an application is dismissed by reason of insufficient evidence, the material deficiencies in the evidence should be identified. If a statute requires the consideration of certain factors, they should be discussed in the reasons. If several incidents of misconduct were alleged in the notice of hearing, the reasons for decision should identify which incidents are proven and the reasons for the disciplinary order”

***Gichuru v Law Society BC*** 2010 BCCA

* Case shows how far standard for reasons had come from Baker and gives a good test
* “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.  Such a failure is a breach of the duty of procedural fairness, and will be reviewable on the standard applicable to such breaches.  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 of a substantive error by the tribunal.”

***Newfoundland and Labrador Nurses’ Union v. Newfoundland*** 2011 SCC 62

* SDM engaged in statutory interpretation to make his decision, first instance judge didn’t like his process, said reasons were inadequate
* SCC halted the expansion of adequacy of reasons, does about face, if court can supplement reasons itself that will be ok
* So long as there are some reasons, there is no longer a free standing ground to overturn a decision on procedural fairness due to inadequate reasons
* ***Baker*** stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision. It did not say that reasons were always required, and it did not say that the quality of those reasons is a question of procedural fairness.
* Adequacy of reasons has crossed the floor from procedural review to substantive review
* “It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis”
* This case dealt with a SDM who had no statutory obligation to give reasons, but many SDMs do have this, and this may distinguish the weak obligation in NFLD, and allow adequacy of reasons to swing back to procedure

**British Columbia: the Stunted Branch**

* ***Dunsmuir*** revised ***Knight*** and moved some aspects of fairness, including reasons, into substantive review
  + Reasonableness analysis well situated to decide if reasons are intelligible and transparent
* ***Dunsmuir*** does not apply to BC ATA Tribunals, so arguable Newfoundland Nurses case doesn’t apply as forcefully to BC ATAs
* Basic rule is that adequacy of reasons is basically dead, should be dealt with under Standard of Review, BUT there is an argument that in BC, for ATA Tribunals there is a greater obligation to provide reasons as an aspect of fairness than ***Newfoundland Nurses*** said
* However, ***Phillips v. British Columbia***2012 BCCA 304 appeared to adopt the ***Newfoundland Nurses*** decision about reasons and wants them argued under the standard of review, as set by the ATA
* In rest of Canada, adequacy of reasons largely gone from procedural fairness
* ***Construction Labour Relations v. Driver Iron Inc.*,** 2012 SCC 65 confirmed that Tribunals do not have to consider or comment on every issue raised by the parties when giving the reasons for the decision

**Oral Hearings**

* Generally, written submissions are fine unless there is a credibility issue (***Singh)***
* If you have a question of credibility, plus are at high end of ***Baker*** fairness spectrum, then you are entitled to a hearing
  + Subject to if the statute explicitly says no and there is no superior legislation to overcome this explicitly exclusion

***Singh v. Minister of Employment and Immigration*,** [1985] 1 S.C.R. 177

* Credibility issues require an oral hearing
* “As I have suggested, the absence of an oral hearing need not be inconsistent with fundamental justice in every case. My greatest concern about the procedural scheme envisaged by ss. 45 to 48 and 70 and 71 of the *Immigration Act, 1976* is not, therefore, with the absence of an oral hearing in and of itself, but with the inadequacy of the opportunity the scheme provides for a refugee claimant to state his case and know the case he has to meet.”
* “in my view the proceedings before the Immigration Appeal Board were quasi‑judicial and the Board was not entitled to rely on material outside the record which the refugee claimant himself submitted on his application for redetermination.”

**Cross Examination**

* The greatest legal engine for discovery of truth is Cross Exam because it allows you to test credibility of a witness, help someone to remember something otherwise forgotten, and make a case through another party’s witness

***Innisfil Township v. Vespra Township*, [**1981] SCC

* SCC agreed in the context of this decision and the enabling statute that parties had a right to the X exam
* “[W]here 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.”
  + SDM statutorily obligated to let affected parties be heard, SCC implied right to cross exam into this

***Re County of Strathcona No. 20 v. Maclab Enterprises Ltd.*** (1971) ABCA

* Since there was an “effective” opportunity to explore the expert opinion fully, the Court was satisfied there was an opportunity to question the expert such that the limited cross exam was not a breach of procedural fairness. In some facts, a written resolution of facts is sufficient
* The order to prevent cross exams was said to be no good, luckily it was never enforced anyways, so no issue here (what about quashing based on the right and not the result—from ***Cardinal v Kent***)
* ***“***A person appearing before quasi-judicial bodies is entitled to be heard and to present his case, and when this is not permitted there is a denial of natural justice. In the process of presenting his own case he is entitled to weaken and destroy the case that is made against him. In trials in Court this is often effectively done by cross examination … A party is often able to advance his own case from the mouths of his opponent’s witnesses. It does not follow that the refusal of or the placing of limitations upon the right of cross-examination will always require that the Court quash an order made in proceedings in which these restrictions are enforced. If he is afforded an equally effective method of answering the case made against him, in other words is given “a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice” (to quote the words used above) the requirements of natural justice will be met. Accordingly, the right to an oral hearing and cross-examination has never been absolute. It may be subject to statutory limitations (which may be subject, in turn, to the Charter), and other procedures may be substituted where they afford “an equally effective method of answering the case.”

***Allard v. Assessor of Area #10 – North Fraser Region*,** 2010 BCCA 437.

* Allard did not agree with the value of his assessed property and wanted to challenge
* Section 55 of enabling statute stated hearing could proceed by oral or written submissions or a combo, so didn’t exclude or affirm right to cross exam
* Allard argued that on the Baker factors he was entitled to high degree of fairness (affected his property, judicial side of spectrum)
* Court of Appeal disagreed in 2 decisions, both are good law in BC
* Rowles J finds no obligation to cross exam and no expectation of such a right present
  + saw Section 55 as affirming SDM is master of own procedure
  + Assessment re-evaluated every single year
  + Assessment office has massive volume of work
  + Assessment authority had a “Guide” pamphlet that advised parties their disputes would most likely proceed by written submissions
  + The factual issues relevant to residential assessments fall into regular patterns and all expert opinions on value are accessible to all, so written submissions are enough here
* Gossin J finds that Allard had been advised that if he wanted to cross exam he must raise the issue again, but he never did, so he waived his right to complain about lack of cross exam
  + Doesn’t focus on whether the cross exam was or was not a right, just says that regardless you waived this ground of argument by silence
  + Important to renew requests and insist upon complaints even after one rejection of the matter

***Djakovic v. BC (Workers’ Compensation Appeal Tribunal),*** 2010 BCSC 1279

* Went though ***Baker*** factors and concluded a high level of fairness was owed, was not given, and thus the lack of cross examination was a breach of procedural fairness
* “First, the decision-maker pre-supposed or prejudged what success might be achieved during the cross-examination of Mr. Dorsey or his colleague. Second, as I have noted earlier, one significant object of procedural fairness is to allow a party to further his or her case and to respond to the case he or she has to meet. Cross-examination serves a potentially vital role in fostering and advancing these objects. One of the functions of cross-examination is “to correct or controvert any relevant statement.’ Its purpose can be much wider. One such use is to establish or assist in establishing, by cross-examining, the party’s own case.”
* “where a member can demonstrate that it is necessary to contradict something ... and that cross-examination is the means in which it is proposed to do so, a board would run a serious risk of breaching rules of natural justice if it refused leave”.
* “The question was not whether the Tribunal had the information required to arrive at a decision. Rather the question was whether Mr. Djakovic was given the opportunity to "fully and fairly" present his case.”

***Johnson v Alberta*** 2011 ABCA 345

* Prof uses this as an example of how not to evaluate fairness
* Court says it doesn’t need to consider ***Baker*** to determine requirements of fairness
* COURT IS WRONG—ALWAYS REFERENCE BAKER IN FAIRNESS ISSUE

**Disclosure**

* Formal rule: where SDM intends to rely on evidence, that evidence must be disclosed to the parties that are affected (that is the tribunal’s obligation-but they may not have all documents)
* In addition, parties can subpoena evidence from other parties sometimes, or they may apply to tribunal for the evidence to be compelled and tribunal will order the other party to provide it (***ATA s 34)***
  + So it is up to you to get this kind of evidence
* Rules of evidence, such as Solicitor Client privilege still apply in Tribunals (***ATA s 40(3))***

***Kane v UBC*** 1980 SCC

* UBC prof being disciplined by Board of Governors, who disclosed all their evidence to Kane and he made submissions. However, then Governors went to dinner with President who provided new evidence to the Governors that was never shared with Kane
* SCC quashed governors decision on grounds that procedure was unfair
* “An appellate authority must not hold private interviews with witnesses … The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so … The Board was under an obligation to postpone further consideration of the matter until such time as Dr. Kane might be present and hear the additional facts adduced; at the very least the Board should have made Dr. Kane aware of those facts and afforded him a real and effective opportunity to correct or meet any adverse statement made.”

**Delay**

***Blencoe v BC Human Rights Commission*** 2000 SCC

* Issue was whether it was fair to make a person wait months for a tribunal decision or hearing
* The case is important for the detailed analysis of when delay in SDM can give rise to remedy
* 1. Where delay impairs fair hearing because the delay prevents you from bringing your case forwards (unfair procedure)
  + ie. Key witness has a memory failure, or they die
  + Generally: if the passage of time, for some reason, precludes you from marshalling a proper case, then delay will permit a remedy
  + Must be “proof of significant prejudice”
* 2. Charter section 7 (very unlikely this argument would work)
  + Blencoe became depressed, had to flee province for shit work, his life had fallen apart (loss of dignity, anguish, upset)
  + SCC says that: if the delay is so egregious that it causes serious harm to a person’s psychological integrity, then this may impair security of the person and engage section 7
  + Must be “serious state-imposed psychological stress”
  + Court rejected there was a security of person issue for Blencoe
  + He may have been upset and miserable, he hadn’t suffered serious harm to his psychological integrity
  + And, a lot of trauma you are experiencing isn’t due to the delay, but is due to the media and the fact that you lost your job based on the complaint. These factors have nothing to do with delay
* 3. Principal of abuse of process (from Roncarelli) (also hard to establish)
  + Where the delay is so egregious that the community would be outraged by the unfairness of it or would bring administration of this justice into disrepute, then you may have an abuse of process, which is a breach of fairness that permits quashing or some other remedy by the courts
  + “The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.”
* Both majority and dissent agree there was no abuse of process and no section 7
* But they did find delay was outrageous enough to hit the tribunal body with costs for both Blencoe and the complainants (hundreds of thousands of dollars)

**Investigations**

***Swanson v. Institute of Chartered Accountants of Saskatchewan*** 2007 SKQB 480

* Court said there is a less level of fairness in an investigation than a hearing, but there is still some fairness required
  + Investigation committee cannot affect Swanson in the way he can be affected by an adverse hearing of discipline committee
  + It is not the broad duty of fairness that typically is associated with rights to complete disclosure and to a full hearing. It is a limited duty to act fairly.
* He should receive a bare outline of the problems and a chance to respond and destroy those which are unfounded
  + “the member should have an opportunity to respond and to have that response considered by the committee that is deciding whether to proceed to a hearing”

**Procedural Fairness Exceptions and Exemptions**

* Even if a procedural issue is very clear, sometimes court will not order a remedy
* Remedies: certoriari (quash), mandamus (direction to SDM to act), declaration (statement of law, often in conjunction with one of other 2 remedies)

***Cardinal v Kent*** is the default position: a breach of procedural fairness is an error of law, always results in a remedy regardless of the effect on the outcome

**Exception: Triviality**

* When a fairness error is in relation to a matter that is so trivial as to have no effect on outcome of proceeding, a remedy may be withheld as being without purpose
* Goes against ***Cardinal*** default rule

***Westfair Foods Ltd. v. United Food and Commercial Workers' Union,*** 2007 ABCA 167

* Arbitrator writes in his decision that he hasn’t considered the submissions of the union, and he issues the award without waiting for employer to respond, and without disclosing union submissions to employer
* The arbitrator finds against employer, and for union, and substitutes a suspension for the demotion
* Employer attacks the decision saying they never saw or responded to union submissions
  + Sounds like an easy breach of alteram partem
* ABCA agrees that arbitrator should have either rejected the submission from the union completely (but this may violate the legitimate expectations of the union) so not to be influenced at all, OR, the arbitrator should have disclosed the submission to employer and given them chance to respond
* ABCA doesn’t suggest there is no breach. The breach of fairness is obvious
* But court points out that this is not new evidence that is relevant to matter to be decided
  + The submissions were not material; these were not new cases
    - Just further cases on same points as before. Nothing new
  + Points raised by submissions were not picked up in reasons for the award
  + Arbitrator wrote he hadn’t relied on the union’s post hearing submission, and had constricted his consideration of the law to arguments from oral hearing
* So ABCA finds this is a trivial breach that didn’t affect the outcome
* So won’t exercise discretionary authority to quash

***Compass Group Canada Ltd. v. Hospital Employees' Union***, 2007 BCCA 237

* Labour relations board was called to evaluate appropriate size of bargaining unit for Compass
* Arbitrator didn’t reference some evidence in the decision, and employer was concerned that labour relations board vice chair had failed to consider significant and relevant evidence that went to the test of appropriate bargaining unit size
* Court moved away from ***Cardinal*** said that the evidence which wasn’t referenced was trivial to the outcome
* “This Court has the unusual opportunity to know with near certainty what will happen if the matter is referred back to the Board and therefore there is no practical utility in doing so.”

**Exception: Mootness**

***Moose Jaw Central Bingo Assn. Inc. v. Saskatchewan***1994 SASK CA

* They appeared before gaming authority to secure a license, and in the course of the proceedings, it adduced evidence about why it should get that license
* SDM failed to reference this evidence in his reasons that denied the license
* Justice Malone says: even if there was a breach of pro fair, there were only 2 licenses available in the city, and by the time the bingo association had gone to court, the licenses were awarded to others
  + So even if they had been deprived their fairness, there were no more licenses to be had, and current license holders had done nothing wrong vis a vis Moose Jaw
  + So Chambers says, what is the point in us acting? There is no outcome that is of any value
* Court of Appeal hears it, says: Certiorari is a discretionary remedy from inherent jurisdiction of court, and thus is always up to court to decide whether to exercise that discretion
  + So they won’t grant a remedy either, even assuming the breach of fairness
  + Because it is futile, would have little purpose or effect

***Bago v. Canada (Minister of Citizenship and Immigration)*,** 2004 F.C.J. (T.D.)

* Judicial review applications can be struck out in exceptional circumstances where the issue of relief has become moot
* Doctrine of mootness:
* Will the decision affect the rights of the parties?
  + If this is affirmative then there are 3 more points to consider:
    - (i) the existence of an adversarial context;
    - (ii) judicial economy and the conservation of judicial resources; and
    - (iii) a need for the Court to demonstrate awareness of its proper function.
* In this case, although court recognized the awkward situation, they said other affected claimants could come forward with a live dispute. Instead of this becoming an academic exercise
  + Mootness where you already have the remedy you wanted

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

* SCC concludes that MobilOil had a right to be heard since they had an innovative and sophisticated legal argument. They deserved a hearing they didn’t get
* But on the subject matter of if legislation applied to old wells, the court rejected Mobil here
* So SCC is in position of having concluded that MobilOil should have had a hearing, but also concluding that the legal argument was wrong (and they are highest court)
* So the hearing should have happened, but the argument you want to make is not good law, so too bad, so sad, your fairness is breached but outcome is still moot

**Exception: Exhausting Internal Remedies**

* Exhausting: if there is a right of appeal within a statutory silo then you must go up the stack before you get to judicial review
  + Doesn’t need to be a separate appeal body, can be a function to reconsider original decisions
  + Prevents fragmented decision making
  + Courts want complete decisions, full records on hand for review

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

* Student did not get chance to know case against him or make submission. Audi Alteram Partem was clearly breached
* SCC says court shouldn’t use discretion to promote delay or expenditure unless there is no other way
  + Another reference to the issue of scarce judicial resources
* SCC confirms the notion that if there is a stacked system the remedy is within it before judicial review can be used
  + Even in cases like this where the beach of pro fair is very very clear
* This case show you must exhaust internal remedies

**Exception: Premautrity**

* Prematurity: trying to go to court to early
* You must wait for a decision to me made during interim disagreements
* Jurisdictional Errors (referenced in ***Zundel***)
  + 1. Doing something that at outset you had no authority to do (initial error—ability to hear it)
  + 2. You have authority to enter into the matter at the outset, but in course of exercising your otherwise valid jurisdiction the SDM does something they are not allowed to do (ie breach fairness) (subsequent error—lose authority)

***Zundel v. Canada (Human Rights Commission)*, [**2000] 4 F.C. 255 (C.A.):

* “As a general rule, absent jurisdictional issues, rulings made during the course of a tribunal's proceeding should not be challenged until the tribunal's proceedings have been completed”
  + May ultimately be totally unnecessary
  + Delays and expenses associated with such appeals can bring the administration of justice into disrepute
  + Hearing would be delayed for an unconscionably long period
* “Mr. Zündel argued the Tribunal's rulings were so significant that they went to the Tribunal's very jurisdiction. I disagree. The rulings at issue in these appeals are mere evidentiary rulings … if interlocutory appeals were allowed from such rulings, justice could be delayed indefinitely”
* “Matters like bias and a tribunal's jurisdiction to determine constitutional questions or to make declaratory judgments have been held to go to the very jurisdiction of a tribunal and have therefore constituted special circumstances that warranted immediate judicial review of a tribunal's interlocutory decision”

***Secord v. Saint John (City) Board of Commissioners,*** [2006] N.B. (Q.B.)

* Illustrates an initial failure of jurisdiction in a SDM vs. an excess of jurisdiction after making an error
* The person they wanted to hear it—a lawyer— had been a cop, but was not currently a cop, so didn’t fall into requirement of statute, so chief of police swore the lawyer in as a temporary police officer (court was alright with this, didn’t have any institutional independence arguments to act on)
* Was challenged on basis of absence of original jurisdiction, since he was not a cop, and so shouldn’t have sat on the committee
* The board responded by saying you must let the process complete before you go to court (no judicial review until matter is concluded—that is the basic rule they argued)
* Court says nope, in this case we are talking about initial creation of the SDM (not about some subsequent loss of jurisdiction)—the initial jurisdiction—and this is the exception to the basic rule against judicial review of interim matters
* An initial challenge to jurisdiction can overcome a prematurity argument

**Exception: Curing**

* Curing: idea that second or third layer decision makers will fix errors of early layers

***Taiga Works Wilderness Equipment Ltd. v. British Columbia*** 2010 BCCA 97:

* Reconsideration panel agrees this is a breach of natural justice, but they say they looked at the evidence that wasn’t provided, and have passed this to Taiga, who responded
* So the panel thinks they cured the error of the director
* But the reconsideration panel is only allowed to be applying a limited review test to the director’s decision
* The panel thus fails to appreciate that in order to cure a defect in earlier proceedings, the second proceeding must have full substitution authority to reach its decision afresh
  + The supervisory authority here is not enough
* Illustrates principle that you can cure the error of the first stack in the second, BUT, you must understand your role and you must actually cure the matter, which was not done here
  + Not enough to just look at fact that matter went to a second layer—you must understand whether whatever the error made was, could or was cured by secondary layer of process

**Exception: Waiver**

* Where you don’t complain about the problem, and you don’t raise the concern until after everyone has expended time and money issuing the decision
* Waiver is to pressure you to raise all your issues at the first instance, so it can be solved in advance of the whole process being undertaken
  + Idea of waiver is to conserve resources
* ***Allard*** is the classic case

***Cougar Aviation Ltd. v. Canada*** [2000] F.C.J. No. 1946 (C.A.)

* One argument was that government procurement agency was biased because 2 of its members (4 total) had worked closely with the eventual winner of the bid process
* But this was also well know to Cougar aviation the whole time, and they never raised this issue with the procurement body in the first place
* FCA rejects, says waiver, you should have raised these concerns before, especially given the sophistication of the parties involved
* “Allegations of bias must normally be raised at the earliest practicable opportunity; if not taken in timely fashion, an objection will be regarded as waived. It cannot be used by the unsuccessful party to impugn the validity of the decision after the administrative process has been allowed to run its course without objection.”

***Kvelashvili v. Canada (Minister of Citizenship and Immigration)***2000 180 F.T.R. 128:

* Similar to ***Cougar*** but with non sophisticated parties
* The procedure turned into a less favorable one person hearing
* The remaining panel member did tell applicant that this was less favorable in some ways
* The applicant accepted that one person panel was better than a delay, so said ok, lets do it
* Reviewing court says, even though she was sort of warned it wasn’t a great change, she didn’t have enough time to think, didn’t have a lawyer, didn’t really get it, was generally unsophisticated
* So although she had some knowledge, that wasn’t enough to constitute waiver for this unsophisticated party
* Waiver could be an issue here, but this particular person would not be expected to know enough to have “waived” any right to procedure
* Unrepresented or unsophisticated parties have a good counter argument to waiver

**Exception: Unclean Hands**

* Judicial review is an equitable remedy so parties must have clean hands

***Cosman Realty Ltd. v. Winnipeg (City****)* (2001), 160 Man. R. (2d) 32 (C.A.):

* Owner of land figured it would have a better chance at more money if it could grind all construction to a halt in the interim of compensation being settled upon and given. So, Cosman points out flaws in decision of rezoning process
* Court saw through this, and pointed out that notwithstanding the fact that Cosman was technically correct, it was bringing its petition for an improper purpose: holding the developer and municipality hostage
  + Equitable remedy can’t be used for improper purpose
  + Must look to true purpose, even if hidden or oblique

***Jaouadi v. Canada (Minister of Citizenship and Immigration)*** (2003), 257 F.T.R. 161:

* J had lied under oath, and could not therefore come to court later and complain he was denied procedural fairness on the grounds that someone was biased against him because he lied under oath
* Can’t profit from own turpitude

**Exception: Balance of Convenience**

* This can avoid a remedy or lessen one

***MiningWatch Canada v. Canada (Fisheries and Oceans)*,** 2010 SCC 2:

* The proposed developer went through appropriate provincial steps, and for federal they gave full scope of development
* But the DFO changed the scope of the project for purpose of assessment
* Mining Watch, an enviro group, didn’t feel the law (Sea Act) permitted a change of scope,
* Mining watch takes the matter on judicial review to have the Federal permits quashed
* SCC agrees that the federal government cannot under the Sea Act re-scope a proponent’s project. You must use the project as set out by the proponent
* So narrow legal question about the re-scope is decided in favor of mining watch, and in favor of not allowing the appeal
* But this left the developer in awkward situation: it had put a bunch of money into preparing the mine and it was now starting from scratch even though it had never done anything wrong
* The re-scope was done completely by feds on their own accord
* Mining company was the innocent party here, they played by the rules
* In this context, court doesn’t want to give the same broad remedy as chambers judge
* Mining watch just wanted a narrow legal declaration that feds can’t rescope something (they got this)
* Given this, the court can fashion a remedy that works for both parties
* So permits are allowed to stand even though process was flawed
* And this is based on balance of convenience
* Case shows that balance of convenience can be considered in crafting a remedy for judicial review
* And decision was unanimous
* This was not a fairness issue. It was an error of law
* But it shows that in fashioning a remedy for an error, courts may not always grant a full remedy
* There were 4 key points
* 1. Decision to rescope was actually a response to a different court case that said gov could rescope
  + so DFO was just responding to legal precedent
* 2. Developer had done nothing wrong and yet was suffering all the harm it the permits were quashed
* 3. In enviro assessment process in BC, it had already done much of same public consultation that would have been done without the federal rescope
  + in substance, it had done all the things it would have had to do anyways
* 4. Developer had a large pecuniary issue; Mining Watch did not have a pecuniary issue in the lest (just a public interest one)
  + So this is a creative remedy to allow illegally issued permits to stand, because the other party got what they had wanted too
  + This is a new idea in judicial review (2010)
  + Similar idea as in an injunction

**Tribunal Standing**

**Strategic Considerations**

* If there is no representation on the other side then there are no limits on granting of tribunal standing, often free reign is given to tribunals when the other side is not present to address something tribunal can speak to
  + Judge has an interest to hear all the arguments and issues in a balanced way, and has total discretion over which issues you can speak to
  + If there is another party, then chance for a fully formed adjudication remains even without granting a tribunal standing
* Counsel for an individual may want to keep tribunal out since their know their area of law very well
* Petitioners may want to remove tribunal to have better chance to win
  + Tribunals may have a better idea of the macro social effects of a decision or a change in law (unforeseen consequences)
* Respondents want tribunals to be present
  + Cheaper for your client since tribunal shoulders some work
* Courts want: a full record, good advocacy, full adjudication on all issues
* Tribunal standing on appeal on judicial review of their own decision is problematic since it is almost a conflict of interest and there is questionable impartiality
* Tribunals can not speak to the correctness of their own decisions, or towards a fairness issue
  + Tribunals can explain something very specific to a generalist court ***(Paccar***)
* Bootstrapping and adequacy of reasoning: providing reasons for a decision that weren’t actually in original, in order to justify it ex post facto
* Competing Views: Full and informed adjudication vs Concerns of impartiality
* Preliminary motion to strike standing or wait until hearing to bring this?
  + The issue is that in hearing the preliminary motion as to standing the entire argument will likely be heard

***Northwest Utilities*** SCC 1979

* How far have we come from this?
* SCC advanced narrow view of tribunal standing, saying right of tribunal to participate is limited in absence of clear legislative direction
* SCC: Board does have a right to be heard, but this does not permit full standing
* *Ontario v Ontario*: amicus curiae standing is not the same as tribunal standing
* Court exercised discretion to limit standing to amicus standing
* Board can speak to the record, but not the correctness of the decision or fairness

***Ontario v Ontario***

* Ontario court uses a contextual approach to Tribunal standing, but BC has stayed away from this and tended to withdraw from the contextual analysis, Alberta and NB have also rejected it
* Bootstrapping rejected in principle but not in context
* 2 important considerations: 1) whether court can make a fullyinformed decision 2) whether tribunal was solving a dispute (adversarial—2 parties present already) or applying a legislative standard
  + tribunal counsel must always act as an officer of court, never an adversary, and tone must reflect this

***Henthorne*** BCCA

* There were 2 sophisticated parties in the proceedings, no one was underrepresented
  + Full adversarial proceedings with good counsel
  + Tribunal not needed—won’t be helpful
* Court also rejects creating the appearance of a line of adversaries for Henthorne to fight off
  + Must retain perception of fairness
* Court order the factum of the tribunal be struck
  + ***Northwest Utilities*** is binding law, ***Children’s Lawyer*** not authoritative over this
* Costs ordered against tribunal for cost of responding to their factum, because their standing was irrelevant, and their factum replicated costs for Henthorne
  + Case stands for this sort of cost allocation upon success/failure of standing
* Ontario court had asserted that standing motions should be brought at the hearing and not in advance of it, but this was rejected for BC in Henthorne
* Para 42 restricts ***Children’s Lawyer,*** but prof thinks tribunals should get wider scope to operate within rules of procedure they already now—most effective

***Paccar* SCC 1989 (Last SCC authority on standing)**

* Broadens tribunal standing past ***Northwest Utilities***
* Where you have expertise you may make arguments, but if no expertise then no standing
* If expertise or field sensitivity will help the court, discretion to give standing will be exercised

***Bransen***

* More expansive view of standing than ***Paccar***
* Addresses bootstrapping

***Brewer***

* Opposite end of spectrum from ***Ontario***

***Judicial Review Procedure Act***

* Section 15 sets out rights of a tribunal to be a party to decisions it makes, but this has not been held to give standing, because “party” has been interpreted to mean something other than “standing”

***Children’s Lawyer*** ONCA

* Court recognizes that tribunals can be very helpful and expands their role in JR
* Prof thinks this is the current trajectory in Admin law

**Substantive Review: Standard of Review**

* Concerned with the merits of the outcome or decision
* Standard of review is a method of resolving the tension between having to supervise tribunals (constitutionally) and respecting properly promulgated legislation of the democratic government
* It is a construct used by courts to resolve tension between obligation to uphold rule of law and the demands of parliamentary sovereignty: underlying goal is to balance the fight between parliamentary supremacy and the rule of law
* It is a search for what degree of scrutiny legislator intended (none is invalid)
* Process
  + 1. Determine appropriate standard
  + 2. Apply the standard to the facts

**Evolution**

* In 1945, English commentators referred to Demonstrative Law as a “New Despotism” that violated the Rule of Law and demanded policing by the courts
* On questions of law, default expectation and position of courts is to overrule anything they disagree with
* On questions of fact, courts are accustomed to giving some deference
* The courts bring this mindset to developing administrative tribunal system
* Sympathy slowly grew for the propositions that SDMs are specialized experts in the field, and that there is value in limiting the extent to which courts can frustrate SDMs

**Collateral Question/Threshold Question (1950s-early 70s)**

* Courts said privative clauses only applied once the threshold questions of law had been properly answered
* Collateral question analysis was seen as a disguise for wide open judicial activism

***CUPE v NB Liquor*** SCC 1979

* Issue arises when Labor board must interpret a statutory provision, a question of law, but this provision is ambiguous, capable of multiple interpretations
* SCC says threshold doctrine is phooey, not reflective of growing realization that admin tribunals are expanding, and the system is too big to have such a high level of judicial review scrutiny
  + Sometimes there will be no ONE correct answer
  + Court doesn’t’ know the one proper interpretation, so how can they be critical of the labor board’s interpretation—if as correct as others
  + Courts should be cautious to disagree with experts in their own field
  + Dickson kills threshold doctrine
* SCC opens up new idea that findings of law by tribunal could be deferred to up until patent unreasonableness
* But, some questions of law—those that are jurisdiction conferring (initial grant of authority to hear a matter) will still be subject to correctness
* Jurisdiction authority includes initial grant of authority (initial threshold jurisdiction—correctness standard) (is the SDM properly hearing the matter?), and subsequently, once body is properly engaged in the matter, you can lose jurisdiction by issuing a patently unreasonable finding of law
  + So patently unreasonable that it could not be rationally supported by legislation
  + Can also lose jurisdiction by acting in bad faith, based the decision on an extraneous mater, failing to account for relevant factors, breaching natural justice, misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted
* Question is whether error is one of initial threshold jurisdiction (correctness still applies), or is it a question that comes after threshold jurisdiction question
* CUPE HOLD: for findings of law that are not initial jurisdiction, they can be subject to a lot of deference
  + But initial question of threshold, is still subject to correctness
  + AND—You don’t want to allow this to become the collateral threshold doctrine in practice but not in form
* Introduces patent unreasonableness and thus deference in some situations
* Shows “a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power … the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.”
* Creates the new primary issue as to when something is over threshold jurisdiction

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

* Labour arbitrator concluded it was a succesorship situation, so B should get same as A did
  + That is a finding of both law and fact
* Dealing with what constitutes, as law, succesorship, and then applying facts to the case to conclude succesorship was present
* Beetz sets out 2 two propositions, the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:
  1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
  2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.
* Beetz then sets out the pragmatic and functional test for identifying which types of questions were “within jurisdiction” and which were not
* The Pragmatic and Functional Analysis (there is some overlap within the 4 criteria) (not an exhaustive or comprehensive code—just factors to consider)
  + Statutory provision
  + Purpose of statute
  + Expertise
  + Nature of problem before tribunal
    - Is it a question of fact? Law? An exercise of discretion? An issue that will involve 2 parties only, or more policy oriented and general?
* Application to these facts: Even though labor relations is usually full of experts, sucessorship itself is an issue of corporate law, a general issue of law that doesn’t engage expertise of a labor arbitrator
* The SDM got the stuff about this wrong—which is used to prove that this is not a matter of expertise for labor relations
* Court focused on expertise as most important factor
* Court concluded the finding of the arbitrator was a jurisdiction conferring provision, because without it, could not go on to fashion the remedy
* So, in the result, SCC confirms threshold doctrine is good, they recognize that some findings can attract deference and others correctness, based on the two propositions at the start
* Also recognizes this can be hard to distinguish, but the P and F test is given (4 criteria to weigh and consider) to make this distinguish

***Canada v Southam Inc*** 1997 SCC

* Develops a third standard of review to sit in between correctness and patent unreasonableness
* Reasonableness simpliciter: “can the decision withstand a somewhat probing review”
* Case mentions the absence of a privative clause: this does not demonstrate any intention by legislature to insulate decisions from JR
  + And built in review to Federal Court suggests desire not to insulate
* So whether there is a privative clause is added to the P and F analysis, under the first criteria: statutory provision
  + So privative clause is now in the analysis
* Iacobucci is torn between the deference deserved by such an expert SDM, and the supervision demanded by the lack of a privative clause. Needs a third standard.
* “The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect.  If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable.  But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.”

***Pushpanathan v Canada*** 1988 SCC

* SCC consolidates and tries to unify the P and F analysis
* “The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal: “[W]as the question which the provision raises one that  was intended by the legislators to be left to the exclusive decision of the Board?”
* Looks to privative clause: the clause said IRB was ultimate authority, but didn’t say the courts had no authority, and didn’t say that even if court took authority, no relief would be granted
  + So a weak privative clause, technically
  + But there is also leave required to go to Federal court
  + [In effect, very few cases get into Federal Court, even without a clause requiring leave]
  + But court found the weak privative and leave to FC balance out
* Factors to consider for P-F analysis
* Privative Clauses
  + Absence of privative clause does not imply high scrutiny
  + “Full” privative clause is compelling evidence for deference
  + A weak privative clause does not have the same preclusive effect as a full privative clause
  + Clause permitting appeals compels higher scrutiny
* Expertise
  + As per ***Southam*** this is most important
  + Expertise is a relative, not absolute concept, “a lack of relative expertise on the part of the tribunal *vis-à-vis* the particular issue before it as compared with the reviewing court is a ground for a refusal of deference”
  + Making an evaluation of relative expertise has three dimensions:
    - the court must characterize the expertise of the tribunal in question;
    - it must consider its own expertise relative to that of the tribunal;
    - and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise.
  + In short, a decision which involves in some degree the application of a highly specialized expertise will militate in favour of a high degree of deference, and towards a standard of review at the patent unreasonableness end of the spectrum.
* Purpose of the Act as a Whole and the Provision in Particular
  + “Purpose and expertise often overlap.  The purpose of a statute is often indicated by the specialized nature of the legislative structure …the need for expertise is often manifested as much by the requirements of the statute as by the specific qualifications of its members.”
  + “Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes.”
  + Management function is revealed because of specialized knowledge of a SDM, but also the range of remedies available
  + That legal principles are vague, open-textured, or involve a “multi-factored balancing test” may also militate in favour of a lower standard of review. These considerations are all specific articulations of the broad principle of “polycentricity” well known to academic commentators who suggest that it provides the best rationale for judicial deference to non-judicial agencies.  A “polycentric issue is one which involves a large number of interlocking and interacting interests and considerations”
  + “While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties.  Where an administrative structure more closely resembles this model, courts will exercise restraint.  The polycentricity principle is a helpful way of understanding the variety of criteria developed under the rubric of the “statutory purpose”.”
* The “Nature of the Problem”:  A Question of Law or Fact?
  + “Even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention … Where, however, other factors leave that intention ambiguous, courts should be less deferential of decisions which are pure determinations of law.”
  + “In the usual case, however, the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown.  Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.”
* Application to these facts:
  + IRB has no expertise defining values that are contrary to UN Conventions
  + This was a generalized question with wide application to society
  + Correctness standard should be applied

***Baker v Canada*** 1999 SCC

* The leading case for the SOR for discretionary decisions
* Where legislature has conferred a discretion, particularly an open ended one, this is strong indicator that legislature intended considerable deference be afforded the decisions
* Discretionary decisions should not necessarily be reviewed on patent unreasonableness, BUT they are an important factor pushing in this direction
* Also summarizes the P/F test: “takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation.  It includes factors such as whether a decision is “polycentric” and the intention revealed by the statutory language.  The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis.”
* Application to facts:
  + Absence of a privative clause
  + Leave required for judicial review (less deference)
  + The SDM is the minister, so some expertise here (more deference)
  + Considerable choice and discretion left to minister (more deference)
  + Involves open textured legal principles (more deference)
  + Fact based decision (more deference)
* “These factors must be balanced to arrive at the appropriate standard of review.  I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language.  Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as “patent unreasonableness”.  I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.”

**Dissatisfaction with the pragmatic functional approach develops…**

***Miller v Workers Comp*** NWFLD 1997

* Can’t really understand the factors in the test, too variable/uncertain

***Toronto City v CUPE*** SCC 2003

* Lebel criticizes the subjectivity of the factors when applied to ambiguous statutory language
* “provided that the expert administrative adjudicator’s interpretation “does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention”

**British Columbia Breaks from the Pack**

***Administrative Tribunals Act, 2004***

* Legislature, in a courageous act of common sense, drops the pragmatic and functional rubbish and recognizes that courts are looking for the gov. intent, so to make it easy for the courts to find this intent, we will put it in a discrete new Act
* Section 58: when adjudicators make decisions outside their enabling statute, likely outside their exclusive jurisdiction and thus it become correctness

**Definitions**

1. **In this Act,**

**"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;

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

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

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

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

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

(c) for all matters other 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 subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

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

(d) fails to take statutory requirements into account.

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

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

(2) A 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 subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

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

(d) fails to take statutory requirements into account.

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

**Basic Terms Defined**

* Fact: weigh evidence and reach conclusion as to what happened
* Law: interpreting a phrase into a legal test, a legal finding with a legal analysis behind it
* Discretion: where legislation says “you can in these circumstances do what you want, we trust you here to exercise discretion”

***Kerton v Workers Comp*** BCCA 2011

* As per the ***United Brotherhood*** decision it is arguably good law for BC courts to go to a P/F analysis to determine whether a SDM is in its exclusive jurisdiction
* ***Kerton*** doesn’t use the P/F method, but advances a new test: whether the enabling statute covers the particular topic
  + “Anything it determines under its enabling legislation is in its exclusive jurisdiction, so ***ATA section 58*** applies.”

**SCC Goes Another Way**

***New Brunswick v Dunsmuir*** 2008 SCC

* There will only be 2 standards of review: reasonableness and correctness
* Lebel gets his CUPE opinion into the majority here
* But reasonableness is not what it used to be, it is more of a collapse of patent unreasonableness and reasonableness simpliciter into a new standard called reasonableness that is broader and more deferential
* The new reasonableness is more deferential than ***Southam***.
* Reasonableness is defined in para 47:
  + “Reasonableness is a deferential standard, in judicial review, reasonableness is concerned mostly with the existence of **justification, transparency and intelligibility** within the decision-making process.  But it 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.”
* Paragraph 55 sets out the factors/criteria: consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
  + A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
  + A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
    - a reformulation of expertise, and the nature of the legislation (purpose of act)
  + The nature of the question of law.  **A 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** (*Toronto (City) v. C.U.P.E.*, at para. 62).  On the other hand, a question of law that does not rise to this level may be compatible with reasonableness standard where the two above factors so indicate.
    - ‘Nature of the question’ aspect of pragmatic approach is also brought in under the nature of question of law
    - implies that a question of facts will weigh in favor of deference
    - will only interfere with tribunal finding of facts in extreme cases
  + If these factors, considered together, point to a standard of reasonableness, the decision maker’s decision must be approached with deference in the sense of respect discussed earlier in these reasons
* The pragmatic and functional approach is kept by para 54 and repackaged in the words of para 55
  + Prof thinks the new test is better because you evaluate substance of decision and don’t’ waste all your time looking at enabling statute
* In general most cases will fall under reasonableness
* An exhaustive review is not required in every case, existing jurisprudence may be helpful
* SCC gives some easy outs for selecting correctness:
  + constitutional questions
  + central importance to legal system
* SCC applies the new law to the facts
  + Concludes arbitrator should not have engaged in that line of inquiry

**What does of “central importance to legal system” mean?**

* Prof thinks this area of SOR will die
* Because it doesn’t recognize that SDMs don’t create precedent
* So they can’t really do anything that is of general importance to the legal system
* Evan disagrees from a structure of government and assumption of federal powers perspective
* ***Mowat*** makes it hard for a SDM to do something of importance to legal system

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

* “The two-step process in the standard of review analysis is first to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review” (para. 62)…. The factors that a reviewing court has to consider in order to determine whether an administrative decision maker is entitled to deference are: the existence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and the nature of the question of law (*Dunsmuir*,at para. 55).  *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function and with which the tribunal has particular familiarity…. ***Dunsmuir* recognized that the standard of 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 “[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals**” (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The **standard of correctness will also apply to true questions of jurisdiction** or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to “explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”
* Court applies reasonableness standard SCC said that “costs” is a term of art, well understood, but legislation uses “expenses”. And fact that legislator chose to use “expenses” and not mention “costs” means only expenses can be awarded and not costs
* Prof thinks this is more a correctness standard: “Not a deferential frame of mind”
* EVAN disagrees again, thinks it is easy to flip this and argue that what they did was the least activist

***Alberta v. Alberta Teachers' Association***, 2011 SCC 61

* Important for the presumption of reasonableness as the applicable standard of review
* “it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since Dunsmuir, the interpretation by the tribunal of “its own statute or statutes closely connected to its function, with which it will have particular familiarity” should be presumed to be a question of statutory interpretation subject to deference on judicial review.”

***Rogers Communications Inc. v. Society of Composers, Authors and Music*** 2012 SCC

* Rothstein has to eat some words of the SCC from ***Alberta Teachers,*** even though he confirms the presumption as valid. Reasonableness will generally apply for “bodies with exclusive jurisdiction under their home statute, constituting discrete and special administrative regimes.”
* Is sending one file to one person a “communication to the public”?
  + This is the issue
* Copyright board concluded that it was
  + But is the board interpreting its own statute?
  + Copyright board interpreting Copyright Act
* If they applied ***Alberta Teachers*** there would be a strong presumption of reasonableness on these facts
* But here court finds a standard of correctness even though it is an expert body interpreting its own statute
  + “the standard of correctness should be the appropriate standard of review on questions of law arising on judicial review from the Copyright Board”
  + Court leaves open the question, but suggests that this will be true for all intellectual property statutes that preserve dual jurisdiction
* There is a carve out here for correctness: “this concurrent jurisdiction of the Board and the court at first instance in interpreting the Copyright Act rebuts the presumption of reasonableness review of the Board’s decisions on questions of law under its home statute.  This is consistent with ***Dunsmuir*** which directed that a discrete and special administrative regime [emphasis in original] in which the decision maker has special expertise” was a “facto[r that] will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied” (para. 55 (emphasis added)).  Because of the jurisdiction at first instance that it shares with the courts, the Board cannot be said to operate in such a “discrete . . . administrative regime”.
* List of exceptions to reasonableness presumption:
  + General question of central importance to legal system
  + Constitutional
  + Competing tribunal jurisdictions
  + True Questions of vires
  + Concurrent jurisdiction w/ court over the same issue (from Rogers)
  + Questions of law that are not within home statute and not within the expertise of the tribunal

***Canada v Khosa*** SCC 2009

* SCC ignored the SOR set out in the ***Federal Court Act***
* “Your standards are meaningless and we will ignore them” [editorialized]
* SCC specifically said that the BC ***ATA*** will be calibrated in accordance with general principles of admin law, but still points out the need to respect legislative intent of the BC government.
* When the legislative language permits, court will rely on ***Dunsmuir*** standards

***Viking Logistics. Ltd. v. British Columbia (Workers’ Compensation)*,** 2010 BCSC

* Some saw this as wanting to collapse patent unreasonableness to reasonableness
* “I therefore conclude with Adair J. that the content of the “patently unreasonable” standard should be determined in light of the Court’s discussion in *Dunsmuir* … From this perspective, “patently unreasonable” in s. 58(2)(a) of the *ATA* stands at the far end of a spectrum of “reasonableness”, requiring the greatest deference to the decision under review … The “patently unreasonable” standard in s. 58(2)(a) requires the tribunal’s decision to have rational support.  The decision must also, since *Dunsmuir*, fall within a range of outcomes defensible in respect of the facts and the law.”

***Coast Mountain Bus Company Ltd. v. CAW-Canada), Local 111***, 2010 BCCA

* BCCA distanced itself from ***Viking Logistics***
* “Was not saying that the common law meaning of a standard of review should affect the interpretation of legislation with respect to the applicable standard of review and, indeed, he observed that effect must be given to the standard of review of patent unreasonableness prescribed by s. 58 despite the fact that this standard of review no longer exists at common law after the decision in ***Dunsmuir***.”

***United Steelworkers v. Auyeung***, 2011 BCSC

* This dispute appears to have recently been resolved in favour of simply returning to the approach under the ATA that existed prior to ***Dunsmuir***.
* “The Supreme Court’s jurisprudence has not diluted or otherwise altered the patent unreasonableness standard under the ***Administrative Tribunals Act.”***
* A one stop shop for what patent unreasonable means in BC ***ATA*** Tribunals, post ***Dunsmuir***
  + “It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational”
* Applying the patent unreasonable standard:
* 1. The standard of review is that of patent unreasonableness
* 2. "Patently unreasonable" means openly, clearly, evidently unreasonable: ***Canada (Director of Investigation and Research) v. Southam Inc***
* 3. The review test must be applied to the result not to the reasons leading to the result
* 4. The privative clause set out in s. 96(1) of the Act requires the highest level of curial deference
* 5. A decision may only be set aside where the board commits jurisdiction error.
* 6. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not

***Victoria Times Colonist v. Communications, Energy and Paperworkers*,** 2009 BCCA

* Elaborated on the third point from above, “when reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal’s rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal’s conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.”

***R v Conway***

Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.  
  
Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function