**REMEMBER:**

* Take a big deep breath – you’ve done this before!
* READ the fact pattern twice – once for comprehension and once for issue spotting
  + Make sure you understand what is being asked of you
  + Are there multiple components?
* Take some time to develop a brief structure – know where you’re going
* Make sure you reference the statutory materials provided
  + i.e. if a provision grants discretion, which one?
* Frame your argument based on your client – what remedy and outcome do they want?
  + Lots of room for argument
* When applying factors, make you go through each one and identify its weight in the overall analysis

**CAN SUMMARY:**

Preliminary Process:

* READ THE STATUTE
* What type of remedy does your client want?
  + Available remedies from the decision-maker are dictated by statute (McKinnon v Ontario)
  + Consider JR – private law or constitutional options may be more appropriate
* Is the decision-maker a public body?
  + Apply the Public Functions Test (McDonald v Anishinabek)
* Has your client exhausted all other adequate means of recourse for challenging the decision-maker’s action? (Harelkin)
  + Does the statute provide for a right of appeal?
  + What is the scope of the appeal that the statute permits?
  + Is it by right or do you need leave of the court?
  + Is there a stay of the original decision-makers decision?
* Which court will we file our claim in?
  + Relevant b/c federal courts have access to the *Canadian Bill of Rights* in procedural fairness cases
  + Also affects the jurisdiction – re: Sparvier v Cowessess Band; provincial superior court w/out jurisdiction
* Will we qualify for the discretionary remedy of JR? May be denied if:
  + Our issue has been resolved in another case
  + Lack standing
  + Outside of limitations
  + “Unclean hands” (Homex v Wyoming)
* What is my client’s issue? Did the decision-maker:
  + Breach a requirement of procedural fairness
    - Procedural fairness
  + Demonstrate a lack of impartiality or bias (RAB)
  + Step outside of the statutory grant of jurisdiction by a misuse of power or a misinterpretation
    - Acting beyond their statutory mandate (issue of pure jurisdiction)
    - Considering a *Charter* or Constitutional issue w/ out jurisdiction (re: Conway and Cooper)
  + Abuse discretionary powers
  + Make an incorrect or unreasonable decision
* Choose the appropriate framework and apply

IDENTIFY:

* Sphere of State Activity:
* Minister’s Department:
* Decision Maker(s):

**DUTY OF FAIRNESS**

**General Comments**

* IRAC is not particularly helpful in this context – need to engage with the facts
* Need to look at procedures in cases of procedural fairness
  + Why did the courts think this decision maker act invalidly in this exercise of discretion?
* The rules must be applied in context
  + Who was the decision maker?

Application:

Application:

Threshold Met:

Content:

Limit Justified:

Remedy:

* + Work with analogies to the cases we’ve dealt with in class

**Procedural Fairness Approach**

* Should have already determined:
  + Scope of my clients issue
  + Decision-maker performs a public function
  + Likelihood of JR as discretionary remedy
* **Ask:** Is this a decision that ought to attract the duty of fairness?
  + Has an individual’s *rights, interests or privileges* been affected by a decision or an action of an administrative decision-maker?
  + Threshold Test for Procedural Fairness (Cardinal v Kent)

“This Court has affirmed that 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 legislature nature and which affects the *rights, privileges or interests* of an individual”

* **Limitations:** Is the issue exempt from or limited by anything?
  + Preliminary decision (duty applies to final decisions only)
  + Legislative Exemption – policy, legislative and purely ministerial decisions (Reference Re Canada Assistance Plan)
    - Cabinet and ministerial decisions which are legislative in nature (Inuit Tapirisat)
    - Policy or “purely ministerial” decisions (CP v Matsqui, Imperial Oil)
  + “Public Officers Employed under Contract”
    - No longer applies to public officer holders employed under contract even if a statute is present (Dunsmuir; overrules Knight and Nicholson)
  + Subordinate Legislation
    - Except circumstances where it appears bipolar rather than polycentric (Homex v Wyoming)
  + Emergencies (Cardinal v Kent)
  + Note: Where a breach of procedural justice will not be protected by a privative clause – jurisdictional in nature
* **Next Ask: Was the procedure in this case fair considering all of the circumstances?**
  + To answer,contextually apply the Baker factors to determine the level of procedural fairness required; court must find a balance among an open list of factors/principles:
    1. Nature of the decision the process followed
       - Where the nature of the decision will contextualize the other factors (Canada v Mavi)
    2. Nature of the statutory scheme and the terms of review (see p. 32)
       - Enabling statute may impose procedural requirements
    3. Importance of the decision to the individual(s) affected
    4. Legitimate expectations of the persons challenging the decision (doctrine outlined in Canada v Mavi)
    5. Respect agency expertise in determining and following their own procedures
  + Elements of a fair procedure include:
    - Notice of hearing
    - Know the case to be met/disclosure (related to full answer and defence)
    - Timeliness and delay (Blencoe v BC)
    - Written submissions or oral hearing
      * Fundamental justice requires hearing where credibility is at issue (Wilson J in Singh)
    - Right to counsel in some circumstances
    - Right to call evidence and cross-examine witnesses
    - Provision of reasons
    - Impartial decision-maker (no bias)
  + Where fairness is the “minimum floor” – strong arguments needed for the ceiling
* **Remedy** = Quash the decision and send back for re-determination with reasons
* **SOR** = Fairness

Questions to Ask:

* **What procedures (if any), are specified in the statute?** 
  + Is the body close to judicial? Or is relatively informative?
  + Enabling statute sets out the minimum requirements – these may be supplemented or expanded in individual cases as the court sees fit
  + **General Rule:** Legislator always intends a duty of fairness to apply unless clear statutory language or necessary implication demands the contrary
* **Was notice sufficient?**
  + Does it comply with the procedural code and/or the enabling statute?
  + Did it go to the right party? In a reasonable amount of time?
  + Does it meet the CL requirement to let the party know what is at stake in the hearing?
  + Was she given a description of the process either in the notice or via some public means (e.g. website)?
* **Is the decision final?** 
  + Preliminary decisions generally do not trigger the duty. The less final the decision, the weaker the content.
  + Is credibility at issue with significant import to the individual? (Blencoe v BC)
* **What were her legitimate expectations about the fair procedures that will be (or might be) used?** 
  + Are procedures specified in the statute, regulations or guidelines?
  + Did the decision-maker follow the procedures?
  + What are the regular practices of the decision-maker?
  + Are there any legal interpretive presumptions (principles, international law) that may be relied upon?
  + Have there been relevant changes in circumstances since the first hearing? If so, these may require a re-hearing or a re-opening?
* **Does the claimant know the case against her?**
  + Has all of the relevant information been disclosed?
  + Are there circumstances present that would limit disclosure, e.g. confidentiality, national security?
  + Did the claimant have an opportunity to answer the case against her and be heard by the DM?
  + Case must be decided by the person(s) who heard her on the facts/relevant matters before them
* **Who was heard by the decision-maker?** 
  + If there is a duty to consult widely, have all relevant parties been heard?
* **Is the delay significant?** (Blencoe v BC)
* **Are reasons required?**

Sub-Issue: Reasons

* **Why reasons?** (Baker; Newfoundland Nurses)
  + Per Dunsmuir, the purpose of reasons is to demonstrate “justification, transparency and intelligibility”
    - Further public confidence, accountability & transparency in decision making
    - The *sine qua non* requirement for the ROL; provide the basis for upholding decisions under s. 1
  + Disclose expertise “using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist”
  + Illustrates that the outcome is reasonable, especially when more than one reasonable result is possible
* **When are they required?** Duty of PF requires the provision of a written explanation for a decision (reasons) when (Baker):
  1. The decision has important significance for the individual
     + B/c public actors demonstrate respect for those affected by justifying the decisions they make
  2. There is a statutory right of appeal
     + Difficult to assess the decision w/out arguments; required for the proper administration of justice
  3. Or in other circumstances (determined on a case by case basis)
* **Integral to both procedure and substance**
  + Inadequate reasons provide no basis for determining if the outcome was reasonable
* However, only a requirement that “some form of reasons should be required”; it is not a general duty
* **See page 19 for consideration of Baker factors in light of reasons**
* Absence of reasons where required, matter of procedural fairness
  + Assessed on a standard of fairness (akin to correctness); some deference will be shown
  + Deference as respect will compel the courts to supplement reasons before they subvert them (Alberta Teachers)
* Adequacy of reasons where required, matter of substantive review
  + Standard of review based on Dunsmuir – correctness or reasonableness
  + **See page 20 for a description of adequate and inadequate reasons**

**INDEPENDENCE, IMPARTIALITY AND BIAS**

Test for Tribunal Independence and Reasonable Apprehension of Bias (CP v Matsqui)

* [T]the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”
* Where the:
  + ONUS lies on the person alleging to raise the issue before the decision-maker at the first available opportunity
  + ONUS lies on the person alleging to adduce evidence to meet the reasonableness threshold of “more than mere suspicion”
    - That is, the grounds for RAB must be substantial
  + PROOF is on a balance of probabilities

**Key Question:** How much independence is needed? (CP v Matsqui)

* “The requisite level of institutional independence…will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office”
  + CL independence may be ousted by express statutory language
  + “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” (Ocean Port)
* The Valente principles apply to tribunals; however they are not held to the same degree of independence as courts
  + Security of tenure, financial security and administrative control
* Contextually apply the Baker framework to determine the what level of fairness the legislature intended for the tribunal
  + Nature of the decision and the process followed
  + Nature of the statutory scheme and the terms of review
  + Importance of the decision to the individual(s) affected
  + Legitimate expectations of the persons challenging the decision
  + Respect agency expertise in determining and following their own procedures

Common Problems in RAB Cases:

* Links with the Executive
* Consistency of decisions and processes
* Assessment of expertise (from statute; not assessed practically)
* Multiple and/or overlapping functions

**Need to then:**

* Placed the admin body along the *Independence, Impartiality & Bias* spectrum according to its nature, mandate & function
  + Is it more adjudicative? In the middle? Or legislative?
* Will affect how you argue your case – do they want more or less independence and impartiality?

**Option 1: Independence** = institutional relations (Ocean Port)

* Bodies that span the “constitutional divide b/w the executive and the judicial branches of gov’t”
* **Test for Tribunal Independence:** Whether a reasonable, well-informed person having thought the matter through would conclude that an admin DM is sufficiently free of factors that could interfere with his or her ability to make impartial judgments (Ocean Port)
  + The freedom to decide according to one’s conscience and opinions, not the absence of influence (IWA v Consolidated Bathurst; full board meetings)
* Deference means that the requisite degree of independence should be determined by the legislature BUT go back to the key question to determine

**Option 2: Bias** = individual judgment

* Allegation of perceived bias must be brought to the attention of the DN by the party alleging it on the first available occasion
* Focus on the perception of bias held by a reasonable, well-informed and not overly sensitive perception
  + Ground for RAB must be a substantial, real likelihood or probability of bias
    - Threshold is high; onus rest on the complainant
  + Standard varies according to context – apply Baker to determine legislative intent
* **Remedy:** Quash the decision and send back to rehearing by a differently constituted panel
* **Individual bias** = individual tribunal member (Baker)
  + A pecuniary or material interest – only direct and certain financial interests count (Energy Probe)
  + Personal relationships with those involved in the dispute
    - Key factors: Whether the relationship presents a significant enough interest to affect the impartiality of the decision-maker and the amount of time that has passed (In re Pinochet; HL Justice had connections to intervener in the case)
  + Prior knowledge or information about the matter in dispute
    - Requires direct previous knowledge or involvement (Wewaykum Indian Band v Canada; Binnie had participated in a meeting in which the band’s claims were discussed
  + An attitudinal predisposition towards the outcome (i.e. a prior or fixed view) (Chretien v Canada)
    - Gleaned from the decision-makers’ comments and attitudes during and outside of the proceedings – the DM’s statements of his own lack of bias are not relevant
    - Flexible standard depend on the nature and function of the DM; most lenient is “closed-mind” test
* **Institutional bias** = body as a whole
  + Use test for challenges to particular institutional practices that affect independence (Consolidated Bathurst; full board meetings)
  + **Test for Institutional Bias** – II part test to determine if an apprehension of bias exists institutionally:
    1. Having regard for a number of factors including, but not limited to, the potential for conflict between the interests of tribunal members and those of the parties who appear before them, will there be a RAB in the mind of a fully informed person in a **substantial number** of cases?
    2. If the answer to that question is no, allegations of an apprehension of bias **cannot** be brought on an institutional level, but must be dealt with on a case-by-case basis.
  + Test for RAB on institutional level, determine using entire factual matrix. Fine line between tribunal efficiency and bias in using lead cases (Geza v Canada)
  + In Jaroslav v Canada, the Minister’s negative comments about Czech Republic refugee application did not raise a RAB b/c the IARB is independent of the Minister; IARB conducted a thorough analysis of the refugee claim and disposed of it in a fair and reasonable manner

**STANDARD OF REVIEW**

**Jurisdiction:** Administrative decision-makers do not enjoy unlimited power nor do they have final say on questions regarding the scope of their delegated authority

**Basic Substantive Review Question:** Did the decision-maker satisfy the requirements of substantive legality by rendering either a correct or a reasonable decision?

Pragmatic and Functional Approach

* SOR analysis developed from the P&FA developed in Pushpanathan (guilty of trafficking, sought refugee status)
  + **Privative clause: weighed against expertise as a factor**
  + **Expertise: lack of expertise outweighs a privative clause**
  + **Purpose of the act as a whole and provision in particular**
  + **Nature of the problem and level of deference**
* In Baker, held that the P&FA that the SOR for errors of law is a spectrum – with some decisions entitled to more deference than others. However, “a court must intervene where such a decision is outside the scope of the power accorded by Parliament.”

Standard of Review Analysis (Dunsmuir)

* **Step 1:** Look to past jurisprudence to see how the particular category of question was addressed (if satisfactorily) regarding level of deference owed
  + Statutory context and legal issue needs to be near identical (standard met in Agraira)
  + More recent cases may offer more agreement; however it may also be a real “dog’s breakfast”
  + If the legislature has specified an applicable SOR, then the courts must apply (i.e. BC ATA)
* **Step 2:** If not satisfactory, contextually analyze using the modern approach to statutory interpretation of the factors using the SOR Analysis:
  1. Privative clause
     + Presence = presumption of deference
       - Also presumptively forecloses JR on the basis of an outcome on substantive grounds unless the applicant can satisfy the legal burden of demonstrating why a provision, properly interpreted, permits it there is some legal reason why it cannot be given effect
     + Absence = does not equal presumption of correctness
     + Though not conclusive, all judges agree it is an important legislative signal
       - “more than just another ‘factor’ in the hopper of “pragmatism and functionality” (Dunsmuir)
  2. Purpose of tribunal from interpretation of enabling legislation
     + Must read the entire statute to understand the legislative scheme (see p. 32)
  3. Nature of the question
     + Deference owed on questions of fact or mixed fact
     + Deference owed on questions of law involving the interpretation of the home statute
     + Correctly applies all the legal principles and tests
  4. Expertise of the tribunal
     + Specialized or expert tribunal interpreting its enabling (home) or closely related statute
     + Assume expertise for following matters:
       - Domestic an international economic matters (National Corn Growers, Southam)
       - Financial matters
       - Technical maters
       - Highly political matters such as Ministers (Agraira, Lake, Suresh)
         * However, consider the Ministers portfolio – is this within it?
       - Labour boards
     + Democratic mandates afforded more deference – i.e. school boards and municipalities (Catalyst Paper)
  + NOTE: Factors are not exhaustive and are not a checklist.
* **Defeasible presumption of reasonableness applies** – particularly where the Tribunal:
  + Produces a reasonable outcome which is defensible in respect of the law
  + Constructs an interpretation of its statutory powers that falls within a range of competing interpretations
  + Arrives at a decision that demonstrates justification, transparency and intelligibility (Dunsmuir)
  + Is supported by adequate reasons (Baker)
* **Correctness applies only to questions of law if one of the exceptions applies:**
  + Onus on applicant requesting correctness to show decision rests on error in the determination of a legal issue

1. A constitutional issue (incl. division of poers and unwritten principles)
2. A question of general law that is “of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”
   * Binnie in AB Teachers offers a broader and more generic exception for questions of law that “raise matters of legal importance beyond administrative aspects of the statutory scheme under review” and do not lie “within the core function and expertise of the decision maker”
3. Drawing jurisdictional lines b/w two or more competing specialized tribunals
4. A “true” question of jurisdiction or *vires*
   * + Does the admin body actually have the jurisdiction over the subject matters, parties or remedies?
     + “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”
     + “True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be **presumed that the appropriate standard of review is reasonableness**.” (Rothstein in Alberta Teachers)

* Exam Application:
  + No access to jurisprudence outside of course content
  + Always go to Step 2. Will help make a more effective argument.

**What is Reasonableness?**

* Developed in Southam; interpreted in Khosa
* Court Asks: Does the decision fall within a range of reasonable interpretations and outcomes?
* In determining this question, the court must consider:
  + Objectives of the statute; power of the statute
  + Type of decision (law, mixed, fact)
  + Public policy or adjudicative matter b/w parties
  + Does the statute demand the DM to strike a proper balance (or achieve proportionality) b/w the adverse impact of a decision on the rights and interest of the applicant or are others directly affected?
    - weigh against the public purpose which is sought to be advanced (polycentricity)
* Per Iacobucci J in Southam, courts must carefully engage with the reasons of the tribunal to justify any disagreement
  + Where reasons are VERY important to establish reasonable decisions an doutcomes
* Per Dunsmuir, courts must construe what the legislature intended
  + To determine the range of reasonable outcomes appropriate under the statute
* To be found reasonable, the decision requires:
  + an outcome that is possible under the statute; outcomes that are beyond the bounds of the statute would be beyond the DMs jurisdiction
  + consideration of the appropriate factors under the statute; a failure to consider relevant factors or consideration of irrelevant factors may render the decision unreasonable

 see page 31 re NFLD Nurses

* + - No re-weighing of discretionary decisions is permitted (Suresh)
  + a DM that is authorized under the statute (true issue of jurisdiction)
* Spectrum of Reasonableness:
  + In Dunsmuir, the court is clear that “the move towards a single reasonableness standard does not pave the way for a more intrusive review by courts”
  + However, in Khosa, the court states that reasonableness is a single standard that takes its colour from the context
  + ML: Will inevitably devolve into a spectrum of deference according to the factors considered
* Rationale for Reasonableness:
  + **Deference is both an attitude of the court and requirement of the law of judicial review**
    - Imports respect for the DM process of adjudicative bodies with regard to both the facts and the law
  + “…, there will often be **no single right answer** to the questions that are under review against the standard of reasonableness” (Law Society of NB v Ryan)
* Supplementing the Reasons
  + Courts may intervene and supplement the reasons; must consider whether this would have a prejudicial effect on the parties, the tribunal or the public interest
    - Form of deference as respect
  + Alberta Teachers – used internal jurisprudence of the tribunal
    - “We agree with David Dyzenhaus where he states that the concept of ‘deference as respect’ requires of the courts ᾿not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.”
    - “When there is no duty to give reasons or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review. The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons”
  + Agraira – used implied reasoning of the Minister
    - Per Abella J in NFLD Nurses “…the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes”
    - In these circumstances, we may “consider the reasons that could be offered for the [Minister’s] decision when conducting a reasonableness review” of that decision”

**What is Correctness?**

* Applies only to question of law
* Court Asks: Was the decision maker correct?
* No deference owed to the reasoning process or the reasons
* No obligation under correctness review for the court to look at the reasons; no legal requirement
* Permits a substitution of the courts interpretation and imposition of the correct answer
* Court essentially conducts a *de novo* review

**What is jurisdiction?**

* Statutory delegated had no authority to act in the first place (narrow sense of jurisdiction) (Northrup Grumman)
  + SOR = correctness
* Subsequent loss of jurisdiction (i.e. bad faith, irrelevant considerations or some other substantive issue)
  + SOR analysis required
* Privative clauses traditional protected errors made within jurisdiction, but will not prevent a court from supervising a statutory delegated that goes beyond its jurisdiction (CUPE)
* If there is any doubt about characterising a matter as jurisdictional, presumption should be in favour of the statutory actor

**Aside:** Difference b/w Correctness & Reasonableness

* Correctness: Court essentially conducts a *de novo* review; court is able to review the entire case and supplement their own reasons and authority
* Reasonableness: Court is required to engage with the reasons and assess the reasonableness thereof – did they consider all the relevant factors? Per Suresh, cannot re-weigh the factors
* Reasonableness+: Court supplements minimal reasons based on “implied reasoning,” internal jurisprudence or based on other circumstances of the case (Alberta Teachers & Agraira)

**CASE SUMMARIES**

Cases that apply Correctness:

* Mossop v Canada (same sex family status; defined a question of general importance to the legal system)
* Northrup Grumman v Canada (American company lost military contract; true issue of jurisdiction)

Cases that apply PU:

* NB Liquor Corp v CUPE (accept interpretation of strike provision)
* Dissent in Mossop v Canada (LHD applied PU; took a broad and purposive approach to stat interp)
* Standard eliminated in Dunsmuir

Cases that apply Reasonableness:

* Introduced in Canada v Southam (Competition Tribunal re: newspapers in the Lower Mainland)
* Dissent in Mossop v Canada (LHD applied PU; but her analysis was a model of reasonableness review; took a purposie and contextual approach to stat interp)
* Law Society of NB v Ryan (lawyer lied to clients about progress and court awards; begins dialogue around a range of possible interpretation)
* Canada v Khosa (Indian permanent resident; exported on basis of serious criminal re: street racing causing death)
* Catalyst Paper v North Cowichan (municipal gov’ts owed more deference; range of deference; supplement reasons)
* Agraira v Canada (definition of national interest; court supplements based on implied reasoning)

**DISCRETIONARY DECISIONS**

Part of Substantive Review (Baker)

* Review of discretionary decisions no longer limited to traditional grounds; more general review available
  + Pulled into the existing legal framework; role of the court to review these decisions like other areas of law
* Considerable deference automatically applies b/c of the nature of discretionary decisions
  + Is that DM acting within the bounds of discretion conferred with the statute? With the CL? Constitution?
* For reference, the traditional grounds were:
  + *Bad faith*
  + Dictation/influence
  + Unlawful delegation of powers
  + *Fettering*
  + Improper purpose or motive
  + Unreasonableness/irrationality
  + Omission of relevant factors / consideration of irrelevant factors
* **Effect:**
  + Brings review of error of law (jurisdiction/*ultra vires*) and review of discretion together
  + Challenging to determine the limits of discretion – it is fact? Law? Or mixed fact and law?
* **Summary:**
  + Decisions involving public convenience and general policy are final and not reviewable in judicial proceedings
    - Re: legislative exemption
  + Decisions made by GIC pursuant to a statute are reviewable for jurisdictional error and procedural error only
* **Remedy:** Quashing (remedy) an Order in Council requires an “egregious case”

**CHARTER & ADMINISTRATIVE LAW**

Effect of the Charter

* Allows for judicial oversight of legislation; controversial form of JR b/c it permits judges to strike down laws on the grounds that they violate the Constitution
  + Critique: Largely anti-democratic and unaccountable exercise of public power by unelected judges
* Constrains parliamentary supremacy
* s. 1 is the saving provision; burden rests on government to justify infringement; only applies to “prescribed by law”

Application of the Charter, s. 32

* Applies to government – including non-government bodies that are entrusted with the implementation of a government policy or program
* Applies to all laws – i.e. rules or norms of general application
* Does not directly apply to discretionary decisions b/c they are not “prescribed by law” for the purposes of s. 1 or s. 52

Section 7, POFJ and Admin Law

* s. 7 applies to everyone physically present in Canada (Singh)
* POFJ guarantees due process when life, liberty or security of the person are engaged
* Admin law sets the minimum floor for POFJ – disclosure, participation, reasons (Suresh)

Charter and Substantive Review

* Current Administrative Law Approach
  + Lebel in Blencoe and Deschamps and Abella in Dissent in Multani v CSMB
  + Admin decisions involving the *Charter* should be decided using admin law principles alone because admin decisions and orders are not the same as norms or rules of general application.
  + Reserve the *Oakes* analysis for judicial scrutiny of offending legislation, not of executive or administrative action
* Dore: When an individualized, admin discretionary decision limits *charter* values, the appropriate framework for assessing its legality Is through the common law principles of substantive review found in admin law
* SOR is reasonableness with proportionality serving as the central criterion of reasonableness
* **Key Question:** Has the DM disproportionately and unreasonably limited a *Charter* right/value when exercising a statutory discretion?
  + Focus is on the outcome
* See page 40 for the methodologies of the DM and the reviewing court
* See page 41 for a discussion of what we don’t know and my thoughts on reasonableness re: *Charter*

**ABORIGINAL ADMINISTRATIVE LAW**

Constitutional Basis

* Constitution – incl. Canadian conceptions of politics, morality and values and unwritten constitutional principles
* *Royal Proclamation, 1763* – *Magna Carta* of Indian rights (origin of the honour of the Crown)
* Section 91(24) – Indians and Lands reserved for Indian
* Section 35 – recognizes and affirms existing Aboriginal and treaty rights

Honour of the Crown (Unwritten Principle)

* Converts a moral and political duty into an effective legal obligation (Haida Nation)
* Realize a large and liberal interpretation of Aboriginal rights
* Protect Aboriginal rights—proved and unproven—through legally controlled institutional processes
* Checks the power of the Crown and eliminates unstructured discretion
  + To ensure it complies with the ROL, statutes and constitutional principles and norms

Aboriginal Modes of Self-Government

* Has resulted in a re-distribution of sovereignty and a recognition of legal pluralism
  + Sovereignty and self-government (e.g. Nisga’a Agreement)
  + Self-management and self-administration (e.g. Band councils under the *Indian Act*)
  + Co-management and joint management (e.g. Impact Review Board (public); Impact Benefit Agreements (private); Reconciliation Agreements)
  + Participation in government (e.g. Nunavut)
* However, reconciling indigenous legal systems with the common law can be challenging

Aboriginal Administrative Law

* Like other statutory delegates, Aboriginal bodies are subject to judicial review
* Rothstein J states that “minimum standards of natural justice or PF must be met” (Sparvier v Cowessess; election redone)
  + **Minimum Req’ts**: an unbiased tribunal, notice and the opportunity to make representations
  + Cite for the court recognizing the challenges of importing Canadian-European conceptions of natural justice into indigenous legal systems
* How relevant is self-government as the intent and purpose of the administrative body? (CP v Matsqui; taxation scheme)
  + 44 …It is not unreasonable to conclude that **since the scheme is part of the policy of promoting Aboriginal self-government,** **issues should be resolved within the system** developed by Aboriginal peoples before recourse is taken to external institutions.

Duty to Consult Framework (see p. 47)

* Constitutional obligation that requires the Crown to consult with Aboriginal communities both before and after the proof or settlement of the Aboriginal or treaty right at stake
  + Honour of the Crown informs the duty; is always at stake in its dealings with Aboriginal people
* **Objective:** Reconcile pre-existing Aboriginal sovereignty with *de facto* Crown sovereignty: “…consultation is key to the achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation” (Mikisew)
* Applies to strategic or planning decisions that would be excluded from the duty of fairness under the legislative exemption
* Duty remains even in light of comprehensive treaties (Beckman v Little Salmon)
* Consultation is a forward looking concept (Rio Tinto v Carrier Sekani)
  + Applies only where current government conduct or decisions will adversely impact; prior and continuing breaches will only trigger the duty if the present decision has the potential to cause a novel adverse impact on a present claim or existing right
* Content of the duty is determined by:
  + A preliminary assessment of the strength of the rights claimed (where unproven) and;
  + The seriousness of the potential adverse impacts of the Crown action
* Similar req’ts as natural justice: “admin law is flexible enough to give full weight to the constitutional interest of the FN”
* Judicial review includes both process and substance – ML says its procedural fairness on a reasonableness standard
* Challenges:
  1. Identifying the appropriate Aboriginal consultation partners
  2. Identifying the requirements of meaningful consultation – may be lesser where the right is lesser
  3. Identify the scope of the duty – Carrier Sekani does not preclude consideration of cumulative development impacts where current Crown conduct is not clearly detached from the adverse effects of past Crown conduct