## The rule of law – see BIG CAN

***Canada (AG) v PHS (Insite) 2011 SCC:***

R: Example of *mandamus* remedy on the basis of ministerial arbitrariness:
[127] the Minister's refusal to grant Insite a s. 56 exemption was arbitrary and grossly disproportionate in its effects, and hence not in accordance with the principles of fundamental justice … [128] … The Minister cannot simply deny an application for a s. 56 exemption on the basis of policy *simpliciter…*

***Roncarelli v Duplessis* 1959 SCC**

R: Public authorities are always constrained by the unwritten constitutional principle of the rule of law. The exercise of public authority must be grounded in law.
**Rand J concurring**: "There is no such thing as absolute and untrammeled discretion"
**Cartwright J DISSENTING**: "non-judicial tribunals of the type called 'administrative' have invariably based their decisions and order… on policy and expediency. … I am forced to conclude that the Legislature intended the commission "to be a law unto itself."

***BC v Imperial Tobacco 2005 SCC***

R1: The principle of the rule of law articulated by the SCC:

(1) Law is supreme over private individuals and gov't officials = one law for all; (i.e. non-arbitrariness)
(2) Requires the creation and maintenance of a positive order of laws (i.e. law must exist in CL or legislative form)
(3) Requires the relationship between the State and individual to be regulated by law (i.e. officials' actions must be founded in law)
(4) Linked to the principles of judicial independence AND [new from the 2014 *Trial Lawyers'* judgment] access to justice

R2: Protection from unjust or unfair legislation "properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box."

***Manitoba Language Rights Reference 1985 SCC***

R: The rule of law requires the creation and maintenance of an actual order of positive laws to govern society which preserves and embodies the more general principle of normative order.

***Reference re: Secession of Quebec 1998 SCC***

R: There are four unwritten principles that animate the constitutional order, none of which can stand alone and none of which can be used to trump one another: (1) federalism, (2) democracy, (3) constitutionalism, and (4) the *rule of law.* These are the "lifeblood" of the constitution.

## Deference as respect

McLachlin wrote in *Alberta Hutterian Brethren* that "Governments should not be free to use a broad delegated authority to transform a limited-purpose licensing scheme into a *de facto* universal identification system beyond the reach of legislative oversight. … [H]ostility to the regulation-making process is out of step with this Court's jurisprudence and with the realities of the modern regulatory state."

The role of the courts can accordingly be understood in two conflicting ways:

(1) **provide an essential accountability function by policing the exercise of delegated powers to ensure that they are confined to terms and purposes** in their enabling statutes; or
(2) are conscious of the separation of powers and, given their lack of expertise in determining the merits of certain policy-making exercises, **are themselves under rule-of-law constraints to respect legislative and executive branches**.

The relationship between courts and other branches of govt now aspires to **respectful deference;** a joint effort in governance. An example of the continuing disagreements about this among the judiciary is *National Corn Growers.* While there is disagreement on the court within *National Corn Growers,* the overall skew is towards deference as respect. Lamer CJ in the pursuing case of *Cooper v Canada* then proceeds to demonstrate an

excellent example of *not* exhibiting deference as respect by holding that administrative agencies are not suited to the task of Charter interpretation.

***National Corn Growers 1990 SCC***

Gonthier's majority judgment reflects Raz's "active role of courts" model of interpreting law and demands public and unprincipled justifications of tribunal decisions.

Wilson J's concurrence: follows Fuller's "respectful deference" model which downplays the role of courts and promotes intergovernmental cooperation.

R: the majority and concurrence agree that privative clauses signal choice of SOR, and that they are a non-discretionary form of deference.

R1: the majority and concurrence equally agree that statutory provisions rarely yield a uniquely correct interpretation.

**Constitutional Implications: no deference as respect w/r/t *Charter***

***Cooper v Canada (HRC) 1996 SCC***

LaForest J for the majority: if an administrative body does not have explicit statutory authority to consider the constitutionality of provisions within its enabling statute, it does not have authority to do so.

Lamer CJ concurring: [13] Mere creatures of legislature, whose very existence can be terminated at the stroke of a legislative pen… are not suited to [the task of Charter interpretation]

McLachlin J (ASTW) DISSENTING: [70] The Charter is not some holy grail which only judicial initiates of the superior courts may touch.

**Delegating power**

**Delegated rule-making**: A binding form of law developed by the executive; the power to make regulations must be expressly statutorily granted. Such regulations, rules, OICs, directives, municipal by-laws etc. may be judicially reviewed for both (1) process and (2) substance, usually deferentially.

- Except for procedural fairness: if the decision to make the rule is "legislative and general" (*Inuit Tapirisat)* there is no judicial review, but if the rule is aimed at a single party (*Homex)* there is judicial review

While the benefits of delegation are manifold (e.g. expertise, time, information, efficiency), there are a number of risks w/ delegated rule making. For instance, the delegated rule make may not follow the wishes or expectations of the delegator. This is a fundamental **principal agent problem** on two levels – between (1) the executive and the legislative, and between (2) the gov't and the public.

The principal agent problem manifests in three different ways: (1) the agent may follow own views, (2) agent may seek to further its own interests instead of furthering public interests, or (3) the agent can "gut" the details of legislation with some broad legislative purpose.

There are four main approaches to controlling for delegation:

1. Structuring the discretion (broad vs narrow powers)
2. Legislative oversight (legislative reviews regulations/soft law)
3. Substantive judicial review (independent third-party monitoring)
4. Process requirements (e.g. requiring public input etc.)

***Enbridge v Ontario (Energy Boar)***

R: **Example of the courts taking a "substantive judicial review" approach to delegated rule/regulation making** – balances the benefits and risks of delegation by interpreting the statutory provision of "s. 45(2)(f) Content of notice must include … a description of the anticipated cots and benefits of the proposed rule" to mean that a cost-benefit analysis is required only for a rule overall, not each provision of a proposed rule.

## Remedies

Types of remedies:

| | Admin/Public Law | Constitutional Law | Civil Law | Criminal Law | "Non-Legal" |
|---|---|---|---|---|---|
| Tribunal remedies (authorized thru enabling statute) | • Declaratory order<br>• Enforce right/ duty/obligation<br>• Mandamus<br>• Ongoing seizin<br>• Quo warranto<br>• Request court to enforce order<br>• Internal appeal<br>• Reconsideration<br>• [*membership*] | • S. 52 non-application of inconsistent law<br>• S. 24 just & equitable remedy | • Costs<br>• Compensation<br>• Damages<br>• Discipline<br>• Fines<br>• Licenses<br>• Restitution | • Federal or provincial Crowns prosecute quasi-criminal offences<br>• Fines<br>• Imprisonment | • Change agent<br>• Conciliate/mediate<br>• Consultation<br>• Education<br>• Equitable remedies<br>• Expert<br>• Monitor<br>• Policy |
| Judicial public law remedies (subject to judicial discretion) | • Certiorari/quash<br>• Declaration<br>• Enforce right/ duty/obligation<br>• Habeas corpus<br>• Injunction<br>• Mandamus<br>• Quo warranto | • S. 52 declaration of invalidity/ delayed declaration of invalidity<br>• S. 24 just & equitable remedy | • Costs<br>• Compensation<br>• Contempt<br>• Damages<br>• Restitution | • Contempt<br>• Fines<br>• Imprisonment<br>• Prosecution | • Change agent<br>• Equitable<br>• Reference question |
| Non-court remedies | • Ombudspeople<br>• Information officers<br>• Auditor general<br>• Commission tasked w/ public inquiry (e.g. Truth & Reconciliation Commission)<br>• Representative for children and youth<br>• Media – going public or the threat of doing so can sometimes be the most effective remedy | | | | |

**Courts have inherent jurisdiction to review executive action via administrative law**

Judicial review is both: 1) an institutional procedure; and, 2) a remedy in itself.

- Unlike the judicial system, courts do not have inherent appellate jurisdiction over administrative tribunals: the enabling statute must provide a right of appeal. If no express right of appeal exists, you must apply for judicial review.
- Tensions between legislatures and courts are epitomized by:
  - privative clauses, both full and partial;
  - internal routes to appeal created by statute which generally must be used first before accessing judicial review as a remedy unless an argument exists that they are inadequate and you can 'leapfrog' to judicial review (***Harelkin***);
  - overarching procedural statutes like BC's Administrative Tribunals Act

**Step one of remedies is to always: READ THE STATUTE**

1. **The enabling statute sets out what remedies are within the jurisdiction of the administrative body—explicitly OR implicitly.**

There are two main ways by which a party to tribunal action can access the courts to challenge that action: (1) appeal, and (2) judicial review. Appeal is the norm; JR is less common and importantly *discretionary.*

2. **The enabling statute sets out the internal review process and whether it is a de novo review or more constrained in scope.**

- Administrative tribunals may possess the authority to craft novel, broad or 'non-legal' remedies.
  - Expertise and efficiency are two permanent values.
- When the remedial scope is broad, adjudicators become statutorily authorized 'change agents':

  - Example: ability to stay involved or remain 'seized' over time and so not become "functus officio" as regular courts do (*McKinnon*).
- Scope may also depend on the composition of the tribunal: what types of members are appointed?; what sort of expertise is reflected in the membership?
- A tribunal will step *outside* of its jurisdiction if it crafts a remedy beyond the ambit of its remedial jurisdiction set by its enabling statute.
- Tribunals are NOT bound by the doctrine of *stare decisis* (*Domtar*)
  - The logical extension of this holding is that conflicting or inconsistent decisions from administrative tribunals do not provide a stand-alone ground for judicial review. (*Domtar*)
- Decision-makers may change their minds or provide correction up until a final decision is made – must consult the statute to determine what counts as a final decision.
  - Look for reconsideration and rehearing powers.
- Enforcement powers must be granted by statute; otherwise, the tribunal must rely on the courts to
- enforce its orders (e.g. *McKinnon*).
- Tribunals may access Charter remedies if authorized by their home statute and if that jurisdiction has not been removed by overarching legislation (e.g. BC ATA)
- Tribunals, due to globalization, may be required to take into account international and transnational agreements and this may or may not limit their remedial options.

**3. The enabling statute may set out the parameters for a statutory appeal.**

- The scope of an appeal is confined to what the statute expressly permits: see, e.g., Federal Courts Act for the grounds to review decisions from federal boards, commissions and tribunals.
  - Does the statute provide a right of appeal to the courts from either the original decisionmaker or the appellate body? (courts have no inherent appellate jurisdiction over administrative tribunals)
  - Is an appeal available of right, or is leave required? If leave is required, who may grant it?
  - What is the scope of available appeal? Does the statute authorize *de novo appellate review*?
  - Is a stay of proceedings automatic, or must one apply for it? (stays of proceedings might be discretionary, depending of the rules between jurisdictions and tribunals)
    - Unless the tribunal orders a stay of proceedings—a power given via its enabling statute— an appeal does not result in the automatic suspension or staying of the decision/order.
- Analyze the tribunal structure and membership:
  - Relationship between scope of appeal and expertise of the administrative body.
  - Historical relationship between administrative body and the common law.
- Occasionally, a statute may provide a right of appeal directly to Cabinet (i.e., 'Governor-in-Council').

**4. The enabling statute may contain a privative clause signalling legislative intent about judicial review.**

- Judicial review is an exceptional remedy and depends on the inherent jurisdiction of the courts. It is also a discretionary remedy:
  - There is NO entitlement to JR in administrative law for anyone;
  - A court may refuse to grant the requested remedy or substitute another remedy that it considers more appropriate in the circumstances;
- Normally, you must obtain a final decision before you can access judicial review.

**Judicial review – 5 step test for availability**

**FIRST threshold questions**: whether the tribunal whose actions are being challenged is in fact a public body? (only public bodies can be subject to judicial review). Factors determining if a body is public include:

- The tribunal's functions and duties, Sources of power and funding, powers over public at large, nature of body and how members are appointed, constituting documents or procedures which indicate that at duty of fairness is owed, whether the gov't directly or indirectly controls the body, and whether gov't would have to "occupy the field" if the body were not already performing the functions it does.

A body or tribunal will be subject to public law and therefore administrative judicial review if it is "part of the machinery of government" (*McDonald v Anishinabek Police Service et al.,* 2006)

**SECOND threshold question**: does the party seeking to challenge administrative action have **standing?** Easy for parties to administrative action, but other persons may have collateral interest in the same matter.

**THIRD threshold question**: which court can the applicant apply to for judicial review? Both the provincial superior courts and the federal courts have judicial review jurisdiction. The choice of court typically corresponds with the source of the impugned authority's power – provincial or federal.

**FOURTH threshold question**: has the party missed any deadlines? Some statutes impose time limits w/in which a party must file. E.g. the *Federal Courts Act* - a judicial review application from a federal tribunal to the Federal Court must be made within 30 days of the time the underlying decision or order is first communicated.

**FIFTH threshold question**: has the party exhausted all other adequate means of recourse for challenging the tribunal's actions? (*Harelkin)*
This may include almost any of:

- Reconsideration by the same tribunal,
- Appeals to internal appellate tribunals,
- Other intra-agency mechanisms such as grievance arbitration, and
- Appeals to a court. BUT NOTE, appeal mechanisms provided for by statute will be inadequate where:
    - The appellate tribunal lacks statutory authority or is unwilling to address the issues raised by the appellant,
    - The appellate tribunal does not have statutory authority to grant the remedy the appellant requests,
    - The appeal must be based on the record before the original tribunal, but that record does not include evidence relevant to the applicant, or includes evidentiary errors that the appellate tribunal lacks authority to correct, OR
    - The alternative procedure is too inefficient or costly.

**A court also has the discretion to refuse to grant a remedy** even where one seems clearly warranted by the facts of a case. The original set of discretionary grounds for refusing relief are:

1. Adequate alternative remedies are available;
2. Premature, if judicial review applications are brought before tribunal proceedings have concluded;
3. Delay and acquiescence, even *if* statutory time limits for filing have been met;
4. Issues are moot;
5. Applicant does not come w/ clean hands.
6. the balance of convenience to the various parties (rising in salience since *Khosa*)

The remedies available on JR are typically prerogative writs, including:

- ***Certiorari*** is the most commonly– "Cause to be certified" - a superior court requires some inferior agency to provide it w/ the record of its proceedings for review of excess of jurisdiction
- ***Prohibition*** is used by an appellate court to prevent a lower court form exceeding its jurisdiction, or to prevent a non-judicial officer or entity from exercising a power (kind of a common law injunction)
- ***Mandamus*** *(*"we command") – used by superior court to compel a lower court or gov't agency to perform a duty it is mandated to perform. Often combined with *certiorari.*
    - Conditions for obtaining mandamus (*Insite)*
    - Must demonstrate clear right to have the thing sought done, in the way and by the person;
    - Duty must lie on the official at the time the relief is sought;
    - Duty must be "purely ministerial" in nature i.e. the officer must possess no discretion.
    - Demand for and refusal to perform the act sought
- ***Declaration*** is a judgement that determines the legal position of the parties or the law that applies to them – two types: (1) public law used to declare some gov't action ultra vires, and (2) private law. Declarations are not enforceable and cannot require anyone to take or refrain from taking action.
- ***Habeas corpus*** – "produce the body" – used to bring a person before the court, most often to ensure the person's imprisonment or detention is not illegal

- ***Quo warranto*** – "by what warrant/authority?" – used to inquire into what authority existed to justify acts by or powers claimed by a public office (rarely used and some provinces have abolished it by Hrstatute)

**5. The federal or provincial levels may have an overarching statute that controls access to the courts and judicial review: e.g., Federal Courts Act, Ontario's Statutory Powers Procedure Act.**

FCA s. 17(6) If an Act … confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter.

FCA s. 18.1(1) **–** An application for judicial review may be made by CDN AG or by anyone directly affected.

FCA s. 18.1(2)**–** An application for judicial review w/r/t a decision or order of a federal board, commission or other tribunal must be made w/in 30 days after the decision or order was first communicated, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

FCA s. 18.1(3)**–** on application for judicial review, the FC may (a) order a federal board/commission/tribunal to do any act or thing it has unlawfully failed to do or unreasonably delayed in doing; or (b) declare invalid or unlawful, quash, or set aside and refer back as it considers to be appropriate.

BC *Judicial Review Procedure Act* – eight step process:

1. Identify all relevant respondents
    - At same time, check to see if BC ATA applies to the tribunal
2. File the petition and affidavits on time in the appropriate court registry
    - 60 days from date of the decision
3. Serve copies to respondents including the Attorney General
    - AG may determine that a public interest element exists
4. Respondent must serve copies of response to other parties
    - 21 days from date Respondent is served with filed petition
5. Determine what the record is
    - Written or oral hearing recording, documents, correspondence
6. Petitioner obtains a hearing date from BCSC
    - File and serve notice of date at least 7 days before hearing
8. File petition record in court no later than 4 pm on the full day before hearing

The *BC ATA* applies to certain administrative bodies in BC and shapes judicial review for those bodies

## Novel remedies

When acting in their tribunal capacity, administrative tribunals often do, and should, take a broader perspective on a dispute than courts necessarily will. American scholar, Abram Chayes, described an emerging dichotomy between traditional conceptions of adjudication and an emerging judicial role in what he described as public law litigation. For example, see *McKinnon.*

***McKinnon v Ontario (Ministry of Correctional Services 2002 ONHRT***

R1: Administrative entities are imbued with their own "equity-like" powers and may make novel, fact-specific remedies.

R2: Because previous remedies for McKinnon's discrimination had not be made in good faith, the tribunal ordered an additional range of remedies, including:

- training for ministry and facility management;
- establishing a roster of external mediators to deal with discrimination complaints; and
- appointing, at the ministry's expense, an independent third-party consultant nominated by the Ontario Human Rights Commission (OHRC) to develop and oversee the delivery of training programs

ordered. The third-party consultant was to be nominated by the OHRC, to be paid for by the ministry, and to report to the tribunal.

## Enforcement of tribunal orders

Rarely, **a tribunal may seek to enforce its own orders** (e.g. the federal Competition Tribunal). Some other tribunals are also given authority to enforce monetary obligations; however, any enforcement powers must find their roots in the enabling statute of the tribunal. More commonly, the tribunal must make an application to court to enforce any order it makes.

A **party to an administrative decision** may also seek to have the order enforced (e.g. arbitration).

Many statutes provide for **quasi-criminal prosecution of persons who disobey** tribunal orders. The *Criminal Code* states at s. 127(1) that "everyone who … disobeys a lawful order made by a court of justice or by a person… authorized by any Act to make or give the order, other than an order for the payment of money, is … guilty of (a) indictable offence, or (b) an offence punishable on summary conviction."

Most administrative tribunals do not have the ability to make contempt orders on their own. **Therefore, the Criminal Code provisions should apply where no "punishment or other mode of proceeding" is explicitly set out in the tribunal's enabling statute**. This has been held not to violate the constitutional separation of powers, even when dealing with provincial tribunals, on the basis that the provincial tribunal is still making orders that are non-criminal.

## Challenging tribunal action case law

### *Domtar v Quebec 1993 SCC*

R1: Conflicting administrative interpretations DO NOT provide an independent basis for judicial review.
R2: Judicial review is a discretionary remedy in and of itself

### *McDonald v Anishinabek Police Services 2006*

R: If decision-maker fulfills a public function or if decision-making has public law consequences, THEN duty of fairness applies AND decision is subject to judicial review.

### *Harelkin v University of Regina 1979 SCC*

R: An applicant for judicial review must have first availed himself of all other adequate means of review.

### *Canada (AG) v PHS (Insite) 2011 SCC*

four-part test for mandamus remedy to be granted:

1. Must demonstrate clear legal right to have the thing sought done, in the manner, and by the person;
2. Duty must lie on the official at the time the relief is sought;
3. Duty must be "purely ministerial" in nature i.e. the officer must possession no discretionary powers;
4. Demand for and refusal to perform the act sought

### *Paradis Honey Ltd v Canada 2015 FCA*

R: The court develops a public law "maladministration/negligence" test akin to the private law tort framework for negligence (*Donoghue*):

(1) Establish that the public authority's action is unacceptance or indefensible in the administrative law sense;
   a. Use *Dunsmuir* reasonableness review to determine "reasonableness." If unreasonable, go to step 2:
   b. Monetary relief will still be subject to traditional remedial discretion
      i. Monetary relief should only be granted where the public authorities have a clear duty to fulfil, where there is significant maladministration to address, or where public law values must be vindicated. If there is a clear duty found in specific undertakings, specific reliance, or known vulnerabilities of specific persons, then courts can exercise their discretion to award damages.

R1: Although a public law maladministration claim for damages would be novel, such a claim would have a strong basis in Canadian law. The Constitution gives courts the power to grant relief against improper exercises of public power. Further, the SCC has already granted monetary relief against public authorities for improper public law decision-making (*Roncarelli v. Duplessis*).

***Budlakotic v Canada (CIC)* 2015 FCA**

**There are three distinct steps of judicial review to prevent a "jumble of issues" (para 27):**

1. **Preliminary objections (show stoppers):**
    - [56] Are there any recognized reasons why the judicial review or any issues in it should not be heard? (e.g. mootness, lack of jurisdiction over subject or remedial relief, issue estoppel, other forums or adequate alternative remedies)
    - Where they are well-founded, the reviewing court cannot hear all or some of the issues and will not proceed further on a particular matter or even the entire case
    - [57] Judicial review is meant to be a last resort when all other adequate, effective forums for relief have been exhausted (*Harelkin*)
        - This step can be relaxed if a case involves ROL concerns or if public law values favour immediate access to a reviewing court.
2. **Merits of Judicial Review**
    - What substantive or procedural grounds for review of an administrative decision are triggered?
    - Does this case involve other matters that might be properly considered the subject of judicial review under ss. 18 and 18.1 of the *Federal Courts Act?*
    - What is the standard of review of an appellate court such as FCA uses to overturn a decision about a preliminary objection made by a lower court such as FC?
        - The usual appellate standard of review for extricable legal issues is correctness (*Housen*, SCC 33)
3. **Remedies**
    - What are the legally available remedies in this case?
    - Remedies are discretionary and counsel may have to argue for the court for a particular remedy
    - In *Budlakoti*, the remedy sought = CDN citizenship; but this was refused - "the declaration … would achieve the same effect as a mandamus order against the Minister requiring him to recognize the appellant as a Canadian citizen."

## Duty of procedural fairness (modern test)

Laskin J in *Nicholson* established the CL duty of procedural fairness imposed onto administrative decisions. The duty lies on all public authorities and exists independently from statutes in the CL (*Nicholson, Knight).* In general, the duty of fairness requires two things, both of which are restatements of natural justice protections: (1) the right to be heard, and (2) the right to an independent and impartial hearing.

Lebel J in *Mission Institute v Khela* further clarified that the standard for determining whether a decision-making complied with the duty of fairness is correctness.

Abella J in *Newfoundland Nurses Union* held that the absence of reasons is a breach of procedural fairness (the adequacy of reasons is a matter for substantive review).

**PRINCIPLE ONE: THE RIGHT TO BE HEARD (*"audi alternam partem"):* two questions arise when judicial review proceedings are brought alleging breach of the DOF:**

1) **Has the *Cardinal v Kent* threshold for the application of the duty been met?**
   *The inquiry at this stage is whether an individual's rights, interests or privileges been affected by a (usually) final decision made by an administrative decision-maker/public official/statutory delegate?*
   a. The threshold for triggering the duty of procedural fairness was and remains quite low, requiring only that an individuals' "rights, privileges or interests" be at issue (*Nicholson)*
   b. A presumption exists that administrative decision-makers are "masters of their own procedures" unless the legislature indicates otherwise (Knight). A reviewing court will defer to the expertise that informs particular procedures, especially when discretion is present. (Khela), unless the decision-maker acts unfairly.
   c. Also apply the *McDonald v Anishinabek Police Service et al., 2006* test to see if truly a public authority: look to the tribunal's functions and duties, Sources of power and funding, powers over public at large, nature of body and how members are appointed, constituting documents or procedures which indicate that at duty of fairness is owed, whether the gov't directly or indirectly controls the body, and whether gov't would have to "occupy the field" if the body were not already performing the functions it does. A body or tribunal will be subject to public law and therefore administrative judicial review if it is "part of the machinery of government."

**Do any limits on the DOF apply?**

(1) **Preliminary decisions** – duty applies only to FINAL decisions
(2) **Legislative exemption** - *Reference re: CAP* (1) purely ministerial decisions, and (2) purely legislative decisions do not attract the DOF. *Inuit Tarpirisat* demonstrates that while cabinet and ministerial decisions are not subject to the legislative exemption *per se,* they can be characterized as *legislative in nature* and avoid the DOF.
   - Passing legislation is not subject to the DOF (*Wells v Newfoundland*). Administrative bodies performing legislative tasks are not "administrative acts" (*Knight)*
   - Multiple cases (*Martineau, Knight, Imperial Oi)* demonstrate that policy decisions may fall under the legislative exemption as well.
(3) **Subordinate Legislation** – Except circumstances where it appears bipolar rather than polycentric (*Homex v Wyoming*) Note: Bipolar means opposing parties, interests; Polycentric means balancing multiple interests.
(4) **Emergencies (***Cardinal v Kent*).
(5) **Statutory ousting –** the legislation may specifically oust procedural fairness or define the content of the duty.

**2) What does the DOF require in the relevant circumstances (*Baker)*?** Legislation may specify the content of the DOF. If an enabling statute ousts procedural content, the only way to challenge this is through a constitutional challenge to the statute itself (*Singh, Charkoui).* A court may also rule that an

enabling statute sets out only the minimum requirements for the DOF and supplement or expand these requirements as fit on a case by case basis.

a. Generally, the *Baker* framework applies and asks: "*Was the procedure used in this case fair considering all of the circumstances*?"
   i. Fairness (akin to correctness) is the appropriate standard (*Khela)*.
   ii. To answer this question, employ the *Baker* framework with its 5 criteria. The reviewing court must find a balance among an open list of factors/principles:
      1. **Nature of the decision** and the process followed
      2. **Nature of the statutory scheme** and the terms of review
         *a.* Enabling statute may impose procedural requirements; for instance, as discussed in *Khela,* s. 27 of the *Corrections and Conditional Release Act* required the decision maker in that case (the Warden) to disclose all the information considered or provide an evidentiary basis for withholding it.
      3. **Importance** of the decision to the individual(s) affected
      4. **Legitimate expectations** of the persons challenging the decision
         a. *Mavi* at para [68] describes the doctrine of legitimate expectations: "Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite … It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking"
      5. Respect **agency expertise** in determining and following own procedures.

b. **Where was DOF breached?** Elements of a fair procedure include:

- Pre-hearing: sufficient notice to all parties (*Cardinal, Mission Institute*), disclosure of relevant information, no delays etc;
  - If there is an unacceptable delay, could significantly prejudice (*Blencoe*)
- At hearing: paper or oral, right to counsel sometimes, relevant parties present, check rules re: admissible evidence, no bias or lack of impartiality, institutional independence;
  - Right to call evidence: the right to cross examination is not to be withheld on the basis of a judgment by the tribunal that it is of limited utility (*Innisfel v Vespra*)
  - Oral hearings: There are some circumstances in which an oral hearing is required:
    - Findings of witness credibility *(Singh*)
    - Improbable factual claim made in the context of a grade appeal (*Khan v Uni of Ottawa 1997*)
- Post-hearing: case decided by person who heard claimant, reasons, relevant changes in circumstances since first hearing may require a re-opening.
  - Reasons are most likely to be required where: significant consequences for the individual (*Cardinal)*, statutory right of appeal, or constitutional rights at stake (*Baker, Newfoundland Nurses*). L'H-D in *Baker* held that "it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision" – but this scope is limited; L'H-D spelled out two such circs: (1) if a particular decision has important significance for an individual, and (2) if a statutory appeal process exists.
  - When s. 7 rights are at issue, need responsive reasons (*Suresh)*
  - In *Newfoundland Nurses Union*, Abella J clarified that the absence of reasons is a breach of DOF. The adequacy of reasons is RATHER a matter for substantive review

3) **REMEDY =** The usual consequence of a denial of fairness is to render the decision invalid (see *Cardinal* at para 23: "the denial of a right to a fair hearing must always render a decision invalid")

**PRINCIPLE TWO: INDEPENDENCE AND NO BIAS (*"nemo judex in sua causa")***

The principle stands for the right to an independent, impartial and unbiased decision-maker:
- o Independence = institutional autonomy that aims to secure the conditions needed for impartiality;
- o Impartiality = ability to judge with an open mind;
- o Bias = perception of partiality toward a particular outcome in a decision-maker (tribunal or judge).

• Impartiality is the bridge between the individual and the institution.
• Look to the statute or the relevant procedural code to determine legislative intent regarding independence (*Ocean Port*).

The principle of independence, impartiality and lack of bias is unwritten and based in the Constitution Act, among other sources. Judicial independence is less contentious, being guaranteed through security of tenure, financial security, adjudicative independence (*Beauregard)* etc. Administrative independence is very different. Administrative tribunals, unlike the judiciary, are not separate from the Executive (*Ocean Port*) - they span "the constitutional divide between the executive and the judicial branches of government." Their primary function is to be policy-makers and implement the policies of the executive branch. Common law independence can be ousted by express or necessary statutory language but statute can likewise amplify the content of independence e.g. BC ATA.

**The *Baker* factors are useful in determining what level of fairness the legislature intended. The test for tribunal independence and apprehension of bias then comes from *Committee for justice and Liberty*:**

> "[T]he 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 …. 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?"

The test is applied flexibly with an eye to the operational context of the tribunal as well as the functions set out in legislation and in actual practice. Some flags to look for: **links between the administrative and executive (*Roncarelli*), multiple and/or overlapping functions, consistency of decision-making etc.**

- ONUS on the person alleging to raise issue before the ADM at the first available opportunity
- ONUS on the person alleging to adduce evidence to meet the reasonableness threshold of "more than mere suspicion"

**The rule against bias address 2 decision-making concerns:**

1. perceptions of individual bias (*Baker, Chrétien*);
   - Four grounds of individual bias exist at CL:
     1) A pecuniary of material interest – but note, only direct and certain financial interests count (*Energy Probe*), if the gain is no different than that rec'd by the average person it will not count, a statute may also authorize indirect pecuniary benefits.
     2) Personal relationships with parties in the dispute – includes parties, counsel, witnesses, and other administrative actors (*Pinochet, Brar*), but query whether the relationship is close enough to constitute a threat to impartiality
     3) Prior knowledge or information about the dispute (*Ocean Port*)
     4) An attitudinal proposition towards the outcome – i.e. a prior fixed view (*Chretien*). Note however that a more lenient test is the **closed mind test** which applies to legislative-like decision makers such as municipal councillors (*Newfoundland Telephone*)

2. perceptions of institutional bias. (*Consolidated Bathurst*).
   - "The requisite **level of institutional independence**…will depend on **(A)** the nature of the tribunal, [*More Judicial → More Independent*] **(B)** the interests at stake, [*More important*

*interest → More Independent*] and **(C)** other indices of independence such as oaths of office" (*CP v Matsqui* (citing *Valente* principles))

- There is a 2-part test (*Consolidated Bathhurst*) to determine if an apprehension of bias across a substantial number of cases exists with allegations of systemic institutional bias. (*Geza*)
    1) Step One: 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 reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?'
    2) Step Two: 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.
- See *Jaraslav* for examples of how a board can adjust to account for systemic bias: after *Geza,* the Board became wholly independent of the CIC, members are required to swear an oath of impartiality in carrying out duties, they also cannot be removed from office on the basis of how they decide cases (removing political motivations).

**STEPS TO RUN THROUGH ON EXAM:**

| Procedure rec'd | Applicable limitations? | Statutory scheme | Nature of decision &process | Legit. Expectations (*Mavi*) | Agency op & procedure | DOF met? | If no, what content? |
|---|---|---|---|---|---|---|---|

## REMEDIES AFTER DOF ANALYSIS

- Check the home or other relevant statutes regarding statutory rights of appeal (which affect the jurisdiction of a reviewing court).
- Judicial review occurs after the final decision is made and all reconsideration and appeal routes have been exhausted.
- ***Procedural fairness is a jurisdictional issue and breach of the duty of procedural fairness always renders the decision invalid. It is quashed (certiorari) and sent back to the decision maker with an order for fairer procedures (mandamus).***
- Therefore, the remedy is revised procedures and a reconsideration of the decision, but not the substantive outcome

## *Charter* intersection w/ procedural fairness

In addition to the DOF that applies at CL to a vast array of public entities, a DOF may also be owed under the Charter. The charter stipulates that "everyone has the right to life, liberty and security of person and the right not to be deprived thereof *except in accordance with the principles of fundamental justice* (s. 7). *Ocean Port* is often cited for the proposition that clear statutory requirements can oust common-law guarantees, this is only true in jurisdictions that do not have quasi-constitutional guarantees like the Bill of Rights.

Broadly, *Singh* lays out the application and threshold of the procedural fairness test for cases involving s. 7 of the *Charter. Charkoui* then lays out the content of the s. 7 principle of fundamental justice. *Khadr* serves to demonstrate how breaches and remedies work in this context.

***Recall also that the understanding of "government" is BIGGER in administrative law, and NARROWER in Charter law. e.g. Canadian Blood Services is gov't for the purposes of administrative law, but is a private corporation and not subject to the Charter. This results in tactical counsel decision re: what law to challenge.***

Challenging procedural fairness under s. 7 instead of procedural fairness at CL requires a distinction between the two (*Pritchard).*

**Duty to give reasons:** In *Suresh*, the Court held that the minister herself (not a delegated officer) must provide "responsive" reasons that demonstrate both that the individual is a danger to Canada and that there are no substantial grounds to believe he or she would be subject to torture > suggesting that cases where the s. 7 duty is invoked require more compelling reasons.

**Right to State-Funded Legal Counsel:** Where a decision impairs a s. 7 interest, the state must provide the individual with legal counsel i to satisfy the requirements of the principles of fundamental justice (*New Brunswick (Minister of Health and Community Services) v. G.(J.))*

**Undue Delay:** In *Blencoe v. British Columbia (Human Rights Commission)*, Bastarache J for the majority acknowledged the possibility that an undue delay in the resolution of a human rights complaint could infringe the security interest protected under s. 7.

**Ex Parte, in Camera Hearings:** Canada's *Immigration and Refugee Protection Act* permitted the detention of foreign nationals and permanent residents (not citizens) suspected of terrorism or of having an association with terrorist organizations. Detainees under the IRPA are not charged criminally and do not benefit from a presumption of innocence and other due process guarantees that permeate the criminal justice system. This scheme eventually gave rise to *Charkaoui v. Canada (Citizenship and Immigration.*

## Standard of Review (POST-*DUNSMUIR)*

**Jurisdiction:** Administrative decision-makers do not enjoy unlimited power (even if discretionary); nor do they have final say on questions regarding the scope of their delegated authority.

**Basic questions:** Did the decision-maker satisfy the requirements of substantive legality by rendering either a **correct** or a **reasonable** decision? Who has (relative) expertise regarding disputed statutory provisions?

The rule of law requires that all exercises of public authority find their source in law. Decision-making powers of administrative bodies have legal limits, derived from the enabling statute itself, the common law or the Constitution. Judicial review is how courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority.

The *Dunsmuir* court importantly noted at para 27 that: "judicial review is intimately connected with the preservation of the rule of law… Courts… must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures." Prior to *Dunsmuir*, judicial review involved three standards of review:

- Correctness (no deference);
- Reasonableness *simpliciter* (mid point);
- Patent unreasonableness (strict deference) (*Southam)*

The 1979 *CUPE* decision was a turning point in Canadian administrative law; up until *CUPE,* judicial review had allowed courts to replace any tribunal decision if they found that the tribunal had erred in determining the scope of its jurisdiction. In *CUPE,* Dickson J warned that courts should not always replace administrative decisions, leading the front of reasonableness review to come. Nevertheless, as the court in *Bibeault* affirmed, correctness is that appropriate standard for certain types of decisions.

The *Dunsmuir* court in 2008 concluded at para 34 that it was time to distil these into only two standards: correctness and reasonableness.

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions … 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.
>
> [50] … When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

**Jurisdiction**

Jurisdiction can be delegated explicitly or implicitly in a statute (*CUPE).* It is a question of law and a matter of statutory interpretation (*CUPE).*

The statutory delegate must interpret its authority (located in the home statute) in scope and in purpose so as not to assume a power that was not intended by the legislature (*Roncarelli*).

- the statutory delegate must act within constitutional boundaries (e.g., federalism, Charter);

- the statutory delegate must interpret laws correctly where it does not have expertise;
- the statutory delegate must not act outside of its delegated authority;
- the statutory delegate must comply with statutory requirements and cannot refuse to exercise jurisdiction;
- the statutory delegate must not sub-delegate its powers unless specifically authorized by the statute;
  o the statutory delegate must act fairly in the circumstances (*PF / Baker*).

Jurisdiction, narrowly construed, will be reviewed on a correctness standard (*Dunsmuir*).

- Reviewing courts ought to narrowly construe jurisdiction in order to avoid unnecessary intervention in a decision (*Alberta Teachers, Celgene*).
- Jurisdiction narrowly construed generally means authority over subject matter, parties, and/or remedies (*CUPE, Northrup Grumman*).
- If any doubt exists about characterizing a matter as jurisdictional, the presumption should be in favour of the statutory actor (*Canada (CHRT) v Canada (AG), McLean*).
- Privative clauses offer greater protection from judicial review because they are a legislative demand for deference regarding the statutory delegate's interpretation of its jurisdiction/scope of authority (*CUPE, Khosa*).

Jurisdiction engages the constitutional basis for judicial review: the rule of law. Superior courts are sometimes *directly* authorized to review decisions made by statutory delegates through a statutory right of appeal, or sometimes, there is indirect authority from the CL constitution and presumption that delegates have limited jurisdiction (*Roncarelli).* The legislature never intends for its delegates to act outside their defined scope (*Crevier).*

Defects and errors may prevent a statutory body from acquiring jurisdiction and being found ultra vires. This means the statutory delegate had no authority to act in the first place (*Northrop Grumman*). Other types of errors occur after initial jurisdiction was acquired—e.g., bad faith or considering irrelevant considerations. Errors here will then lead to a subsequent loss of jurisdiction (*Baker, Dunsmuir*). Privative clauses traditionally protected errors made within jurisdiction, unless patently unreasonable (*CUPE*).

**Determining the appropriate standard of review**

*Dunsmuir* sets forth a two-step methodology to select the appropriate standard. It current presumes reasonableness standard, with an ability to rebut this presumption. Of course, if a given statute expressly states an applicable standard of review, that standard will apply (e.g. BC ATA).

1. **Look to past jurisprudence to see how particular category of question was addressed – if satisfactorily – regarding level of deference i.e. look to precedent.**
    1. Note: statutory context and particular issue need to be nearly identical w/ precedent (e.g. *Agraira* and *Kanthasamy*)
    2. In *CHRT v Canada (AG)* the precedent was considered unsatisfactory
    3. Per *Shaw v Phipps,* if a statute enacted pre-Dunsmuir indicates that the SOR should be "patent unreasonableness" – the court should apply the highest level of deference available, as this was the intention at the time of enactment.

2. **If no precedent, or unsatisfactory precedent, contextually analyze using the modern approach to statutory interpretation (Rizzo Shoes*)* and the non-exhaustive factors in the SOR analysis (formerly the P&FA from Pushpanathan*)* = THE WEIGHING STEP**

Dunsmuir paras 63-64: Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future. [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including:

1. **the presence or absence of a privative clause;**

- A PRIVATIVE CLAUSE is highly significant (Dunsmuir, Khosa)
- Full privative clause (ouster clause) = exclusive jurisdiction + finality of decision + no appeal + no JR.

- A presumption of reasonableness exists on a question of law if a full privative clause is present.
    - Some judges see privative clauses as determinatively indicating reasonableness review and that its absence indicates legislative intent to select the correctness standard (Rothstein J in Khosa).
    - Other judges think that "a privative clause [should not be treated] as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality" and that the existence of a privative clause presumptively forecloses judicial review on correctness unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why the outcome cannot be given effect. (Binnie J in *Dunsmuir*). So far, the latter view has carried the day.
- Where NO privative clause exists, further guidance is provided on how to select the standard of review such as the nature of the question (law or fact or discretion) and the expertise of the tribunal.
- If the decision maker does not possess ample expertise, a PC will not protect the decision

**2. The expertise of the tribunal.**

- The most important step per *Southam,* but *Dunsmuir* muddles this
- The court in *Pushpanathan* developed a three-step test to evaluate expertise:
    1. The court must characterize the expertise of the tribunal in question;
    2. It must consider its own expertise relative to that of the tribunal; and
    3. It must identify the nature of the specific issues before the administrative decision maker relative to this expertise
- Higher relative expertise attaches to administrative bodies that deal with the following:
    1. domestic and international economic matters (National Corn Growers, Southam);
    2. financial matters (McLean);
    3. technical matters (Celgene);
    4. highly political matters often involving Ministers (Agraira, Lake,) or
    5. Cabinet/Governor in Council (CNR v Canada (AG)); and, labour boards and adjudicators (CUPE, Alberta Teachers).
    6. Similar deference will be accorded to ADMs of a democratic pedigree such as school boards and municipalities (Chamberlain, Catalyst Paper). This may include Indigenous DMs.
- Look to whether the tribunal itself has any special procedures for dispute resolution

**3. the purpose of the tribunal as determined by interpretation of enabling legislation; AND**

- *NOTE: Purpose and expertise often overlap*
- Legislative scheme in its entirely using the modern approach to statutory interpretation *Driedger's Modern Principle*: Today there is only one principle or approach, namely, the 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.
- "where the statute or provision can be described as polycentric … [engages a balancing of multiple interest, constituencies, and factors or contains a significant policy element, or articulates the legal standards in vague and open-textured language] … more judicial restraint is warranted"
    - A provision w/ a statutory appeal mechanism warrants more searching review
    - Assess whether rights/entitlements are protected and/or affected
    - Attend to language that is vague, open-textured, or grants discretion

**4. the nature of the question at issue**

1) Questions of law = less deference, (more deference if combined w/ expertise and/or privative clause)
    - more deference will also be owed if interpreting home statute (*Celgene)*
2) Questions of mixed law and fact = medium deference (*Southam, Pushpanathon)*
3) Questions of fact = most deference
    - Characterization of a matter as question of law or fact is not so simple
    - Legal questions tend to have precedential value that could impact subsequent cases

**Factors 1-4 are not exhaustive, nor are they a checklist**

PRESUMPTIONS OF CORRECTNESS/REASONABLENESS:

| **REASONABLENESS** | **CORRECTNESS** |
|---|---|
| ➢ a specialized or expert tribunal<br>➢ interprets its enabling or home statute or closely related statutes<br>➢ on a question of fact or mixed fact and law, or on a question of law involving interpretation of the home statute, or exercising statutory discretion; (*Southam*)<br>➢ correctly applies all legal principles or tests;<br>➢ to construct an interpretation that falls within the range of possible acceptable interpretations;<br>➢ resulting in a decision that demonstrates justification, transparency and intelligibility usually, but not always, through the provision of adequate reasons (which courts can supplement);<br>➢ to produce a reasonable outcome which is defensible in respect of the facts and law. >>> here the reviewing court recognizes the decision-maker's margin of appreciation within the range of acceptable and rational solutions;<br>➢ Onus rests on the applicant to show that the interpretation and the outcome are both unreasonable;<br>➢ the onus rests on the applicant to rebut the presumption and have correctness selected and applied.<br><br>*Dunsmuir* also clearly indicates that questions of discretion "generally attract a standard of reasonableness" and that "deference will usually apply automatically" to that kind of decision >>> SEE BELOW SECTION ON DISCRETIONARY DECISIONS<br><br>Reasonableness does not float on a spectrum according to the *Dunsmuir* majority. Alternatively, reasonableness is a single standard that takes its colour from the context (*Khosa* majority, closer to Binnie J in *Dunsmuir*).<br>➢ Decisions that attract a reasonableness standard are often polycentric balancing decisions (*Celgene, CNR v Canada (AG)*).<br>➢ They may also have a significant policy dimension (*Agraira, McLean*). | The chief rationale for correctness review is to ensure consistency in the interpretation and application of fundamental and/or system-wide legal concepts/principles/values (*Domtar, Mossop, MLQ*).<br><br>There are three defined categories of correctness review questions:<br>1. constitutional questions (e.g. *Westcoast Energy* as cited in *Dunsmuir*),<br>  1. the constitution, division of powers, unwritten principles [but remember the effect of *Doré*]; e.g., tribunal determines constitutionality of a provision in a statute;<br>2. jurisdictional questions (e.g. *Regina Police Association* as cite in *Dunsmuir*), consisting of:<br>  1. the drawing of jurisdictional lines between two or more competing specialized tribunals (*Figliola*); AND<br>  2. "true" questions of jurisdiction i.e. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter."> "jurisdiction" ought to be narrowly construed to avoid unnecessary intervention (*Dunsmuir, Alberta Teachers, Celgene*). Moreover, narrow construction of jurisdiction means authority over subject matter, parties and/or remedies (*CUPE, Northrup*)<br>3. questions of law of "central importance to the legal system ... and outside the ... specialized area of expertise"<br>  1. e.g., CL concepts (such as "solicitor client privilege") or civil law as well as international law (such as "crime against humanity") and interpreting foundational concepts like "state neutrality" [unless expert tribunal in the interpretation and application of such rules w/r/t a specific statutory context—e.g., statutory limitations periods/costs];<br>  2. Moldaver J from *McLean*: The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22). |

**CONCLUDE: IN LIGHT OF THE ABOVE ANALYSIS, I BELIEVE THE STANDARD OF REVIEW SHOULD BE xxxx.**

**APPLICATION OF REASONABLENESS STANDARD**

No re-weighing of relevant factors in discretionary decisions is permitted (*Suresh,* but now reconsider this because of *Baker* and *Doré –* in *Baker,* at para 62, the court makes its conclusion after "weighing all [the above described] factors.").

1. the alternate situation took place in *Agraira*, which was an exceedingly deferential decision – the court first supplemented reasons for the minister's decision, then after presuming that such reasons must have been considered, they affirmed the *Suresh* principle and held that because "the Minister stated in his reasons, he had "reviewed and considered" all the factors …. it is not open to the Court to set the decision aside on the basis that it is unreasonable."
2. In *Lake v Canada SC*C: the Minister is in the" best position to determine whether the factors weigh in favour or against extradition" (para 41)
3. *Khosa:* Fish J dissenting: would have invalidated the decision of the IAB b/c it was based on a factor that could not reasonably be said to "outweigh, on a balance of probabilities – all of the evidence" in the applicant's favour (but the majority disagreed, holding that reweighing was not the function of a reviewing court)
4. *Nemeth v Canada 2010 SCC*: agreed that the statute set out mandatory grounds for refusing surrender for extradition that had to "be considered as a whole." However, the court found that the minister "failed to give sufficient weight or scope to Canada's non-refoulement obligations."

- Acknowledgement of this re-weighing reality helps us to understand decisions where judges disagree – the majority decision-makers in *Suresh, Agraira, Lake* and *Khosa* all deferred to the prohibition against re-weighing; however, the court in *Baker, Nemeth* and Fish J dissenting in *Khosa* are less deferential.

**Note the importance of REASONS in establishing reasonable decisions** (*Baker*).

One of the questions left unanswered by *Dunsmuir* was: how does the standard of reasonableness cohere with the duty to give reasons? In *Newfoundland Nurses Union,* Abella J clarified that the absence of reasons is a breach of procedural fairness. The adequacy of reasons is a matter for substantive review. The adequacy of reasons is not a standalone basis for judicial review of the remedy of quashing a decision. Abella J further held that a reviewing court need not undertake a discrete "reasons" analysis – the reasons must be read together w/ the outcome and serve the purpose of showing whether the result falls w/in a range of possible outcomes.

- BUT "deference as respect" means attention to reasons offered or could be offered (*Lake, Newfoundland Nurses, Alberta Teachers, Agraira, McLean*).
- "… even if the reasons … given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them…" *Newfoundland Nurses Union* at para 12
- *Alberta Teachers' Association* at para 54: deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided …. When there is no duty to give reasons (e.g …. *Mavi* …) 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."
- *Kanthasamy* at para 112: "…a "do as we say, not what we do" approach to reasonableness review … fails to heed the admonition in *Newfoundland Nurses* — that reviewing courts must be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fatal (para. 17). As is the case with every other court, this Court has no licence to find an officer's decision unreasonable simply because it considers the result unpalatable and would itself have come to a different result."
- Reasonableness means the administrative decision-maker holds "interpretive upper hand" *(McLean*).

Reasons may also be considered so deficient that they do not "count" as reasons e.g. in *Lafontaine (Village)* where the municipality denied a religious group's application to purchase land by saying simply: "Upon careful consideration, the municipal council of Lafontaine has decided not to take action in respect of your applications. The municipal council of Lafontaine is not required to provide you with a justification and we therefore have no intention of giving reasons for the council's decision."

Some administrative decisions do not require reasons at all – see *Mavi,* wherein the administrative decision maker, the government of Ontario, was obliged to collect debt from immigrants' sponsoring family members without formal reasons – "the existence of the debt [was], in the context of [that] particular program, reason enough to proceed." (para 5)

**IN SUM, when applying the reasonableness standard to a given fact pattern, you must look for**

1. An outcome that it possible under the statute;
2. Consideration of the appropriate factors under the statute
3. A DM that is authorized under the statute (has jurisdiction).

**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 purposive and contextual approach to stat interp)
- *Law Society of NB v Ryan* (begins dialogue around a range of possible interpretation)
- *Canada v Khosa* (Indian permanent resident; deported on basis of serious criminal re: street race causing death)
- *Catalyst Paper v North Cowichan* (municipal gov'ts owed deference; range of deference; supplement reasons)
- *Agraira v Canada* (definition of national interest; court supplements based on implied reasoning)

**APPLICATION OF CORRECTNESS STANDARD**

No deference is owed to the reasoning process. From the outset, the reviewing court asks whether the tribunal's **decision** was correct. It is effectively a *de novo* reviewing process.

The reviewing court is not obliged to consider the tribunal's reasons (*Northrup Grumman*). Correctness permits substitution of court's interpretation and imposition of the correct answer. BUT correctness review is now less frequent than reasonableness review (*McLean*). In many cases, it will not be necessary to consider all four factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

Though it is not a checklist and not all need be considered (*Dunsmuir),* go through all in an exam.

**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**)

## Traditional grounds of review for discretionary decisions

*Dunsmuir* clearly indicates that **questions of discretion "generally attract a standard of reasonableness**" and that "deference will usually apply automatically" to that kind of decision.

Statutory Interpretation: How to recognize discretion

1. Authorization: **may** vs. shall
2. Delegate broad powers often through **general or vague language**
    - DM may do anything that is necessary/advisable/expedient to fulfill the power
    - Decision-maker empowered to act for the public good
3. Objective vs. **subjective** grant of power such as:
    - Appropriate and/or equitable remedies in the circumstances
    - On a balance of probabilities
    - Good government
    - In the Minister's opinion
    - For the proper purpose
    - In the public interest
    - Reasonable/reasonably
    - Reasonable grounds to believe
    - Relevant considerations
    - Satisfaction

**Traditional common law grounds of review for abuse of discretion**

1. Bad faith
    - E.g. *Roncarelli:* Rand J in deciding the case held also that "'[d]iscretion' necessarily implies good faith in discharging public duty." (para 140)
2. Acting under dictation/influence
    - E.g. *Roncarelli:*
3. Unlawful delegation of powers
    - e.g. *Roncarelli: Thorne's Hardware*
4. Fettering
    - Per Hinkson CJ in *TWU* at para 97: Fettering of discretion occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative body binds itself to policy or to the views of others.
    - E.g. *TWU:* Hinkson found that the Law Society of British Columbia Benchers incorrectly fettered their discretion by binding themselves to a 'fixed blanket policy set by LSBC members in the form of a non-binding vote (at para 120).
    - E.g. *Kanthasamy*: the majority decision (Justice Abella) found that the Immigration Officer had unreasonably fettered her discretion by avoiding the "requisite analysis" of s.25(1) of the Immigration and Refugee Protection Act ("IRPA").
    - E.g. *Ishaq* 2015 FC*:* in determining whether the citizenship oath policy of no facial coverings effectively fettered any discretion held by citizenship judges, the FC found that it did because the policy contained no permissive language, and to the contrary, including mandatory language. Accordingly, the FC found the Policy to be inconsistent with the discretionary duty given to citizenship judges by the Regulations and is therefore invalid.
5. Improper/unauthorized purpose or motive
    - E.g. *Roncarelli:*
6. Unreasonable/irrational/illogical decision-making
    - Courts occasionally invoke the notion of "unreasonableness" to reinforce an argument already made on the basis of one of the specific grounds of review. Unreasonableness is rarely invoked as a separate ground of review b/c unreasonableness expressed in the context of discretion is usually understood in the *Wednesbury* sense of "something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

7. Omission of relevant factors
8. Consideration of irrelevant factors
    - E.g. *Roncarelli*: The fact that a DM is convinced he is acting in what he conceives to be "the best interest" of the populace is an irrelevant consideration in decision-making.

*Baker* then brought the traditional common law approach to reviewing discretion into the modern standard of review framework under reasonableness review.

## Judicial review of discretionary decisions affecting Charter rights – proportionality analysis (DORE)

There is inconsistency in how Charter cases are reviewed, as noted in *Dore.* This inconsistency takes shape in differing views of how and whether to conduct a s. 1 analysis of an administrative decision that infringes a protected right.

- Should only the legislation that authorizes the decision be subject to s. 1?
- Should the decision be subject to solely admin law analysis if justifiable under s. 1?
- Should both the law and decision be subject to s. 1?
- Should courts and litigants employ an administrative law analysis of the decision that takes into consideration Charter values and requirements?

The fourth approach took favour in *Dore.* But all approaches have been endorsed at some point in the jurisprudence. The basic question in *Dore* became: Has the decision-maker disproportionately and unreasonably limited a Charter right/value when exercising statutory discretion?

**Before diving into *Dore* analysis, it is important to consider the application of the Charter and its differences from administrative law:**

- The Charter applies to the legislatures and governments of Canada, the provinces and the territories (*Constitution Act s.32*).
- The Charter may also apply to a non-government body that is entrusted with the specific implementation of a government policy or program (e.g., a hospital or university) (*Eldridge*).
- The Charter directly applies to all laws. Laws are rules or norms of general application (*Multani)* such as statutes and regulations
- The Charter does not apply directly to discretionary decisions b/c they are not considered to be "prescribed by law" for the purposes of s. 1 of the Charter

The choice to opt for judicial review between administrative law and *Charter* law involves a number of considerations, including:

(1) whether or not the authority is expressly or indirectly provided for in the statute;
(2) the nature of the right (interest/privilege);
(3) application/reach of law;
(4) justiciability;
(5) deference; and,
(6) preferred remedy.

Background to *Dore,* as highlighted in *Dore:*

- [24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including Charter values (see *Chamberlain*).
- [25] in *Slaight Communications* … Lamer J in his concurring reasons said that the Charter applied to a labour adjudicator's decision and used the s. 1 framework develop in *R v Oakes* … But while he applied the Oakes framework, he notably and presciently observed that "[t]he precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases"
- [26] … the approach taken in *Slaight* can only be properly understood in its context … when Lamer J. held that discretionary administrative decisions implicating Charter values should be reviewed under the *Oakes* analysis, he did so in the context of the perceived inability of administrative law to deal with Charter infringements in the exercise of discretion.

- [28] The scope of the review of discretionary administrative decisions that provided the backdrop for the decision in *Slaight* was altered by … *Baker v. Canada* … In that case, L'Heureux-Dubé J. concluded that administrative decision-makers were required to take into account fundamental Canadian values, including those in the Charter, when exercising their discretion.
- [30] … weighed together with this Court's subsequent decisions, we see a completely revised relationship between the Charter, the courts, and administrative law than the one first encountered in *Slaight*. In *Dunsmuir* … the Court held that judicial review should be guided by a policy of deference, … And in *R. v. Conway, 2010 SCC 22*, … the Court found that administrative tribunals with the power to decide questions of law have the authority to apply the Charter and grant Charter remedies that are linked to matters properly before them.
- [33] The last decision of this Court to use the full s. 1 Oakes approach to determine whether the exercise of statutory discretion complied with the Charter was *Multani.* The academic commentary that followed was consistently critical. In brief, it generally argued that the use of a strict s. 1 analysis reduced administrative law to having a formal role in controlling the exercise of discretion.
- [43] … there is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness *(Dunsmuir*, at para. 58). It is not at all clear … however … that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of Charter values in making a discretionary decision.
- [54] … as McLachlin C.J. noted in *Catalyst*, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" (para. 18) … Even where Charter values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant Charter values on the specific facts of the case.
- [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances *Charter* values with the statutory objectives.
    - *Lake:* the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the prima facie infringement of mobility rights under s. 6(1) (para. 27).
    - *Pinet:* the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).

It is also germane to note that McLachlin CJ likely foresaw the development of the *Dore* test. In the 1996 decision of *Cooper v Canada (CHRT)*, the then-justice vehemently dissented in holding that "[the] Charter is not some holy grail which only judicial initiates of the court may touch … tribunals … 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" (para 70).

***Dore*** **notably developed the proportionality test for administrative law (**akin to *Oakes* test for Charter law) for review of discretionary decisions that affect Charter rights/values. *Dore's* fundamental standard of review question is: *Has the decision-maker disproportionately and unreasonably limited a Charter right/value when exercising statutory discretion? Dore* developed two frameworks to address this question: one for the administrative decision maker, and another for the reviewing court.

**The Administrative Decision Maker's Methodology:**

How should an ADM apply *Charter* values in the exercise of a statutory discretion?

1. the DM should first consider the statutory objectives and balance the *Charter* value with stat. objectives;
2. the DM should ask how the *Charter* value at issue will best be protected in light of the statutory objectives;
3. the DM must balance the severity of the interference of the Charter protection with the statutory objectives;
4. the DM chooses the outcome which "falls within a range of possible, acceptable outcomes," is explained by reasons exhibiting "justification, transparency and intelligibility," and which indicates that the decision reflects a proportionate balancing of the Charter protections at bar.

**THE REVIEWING COURT'S METHODOLOGY:**

1. **Know that the proper framework to determine compliance with the *Charter* is administrative law proportionality review: balance *Charter* values with statutory objectives (*Dore* at para 55).**

STEP ONE: establish that a Charter right has been affected by an admin decision – the DM must correctly identify the Charter right/value

- A *Charter* right/value must be affected by an individual discretionary decision
- The onus is on the applicant to show that the DM's interpretation and outcome reached are both unreasonable b/c they disproportionately affect a Charter right/value
  - **Charter rights**: enshrined in the *Charter*
    - S. 2(a) freedom of conscience and religion
    - S. 2(b) freedom of thought, belief, expression, press
    - S. 2(c) freedom of peaceful assembly
    - S. 2(d) freedom of association
    - S. 3 right to vote
    - S. 6 right to enter, remain and live in Canada (subject to some restrictions)
    - S. 7 right to life, liberty and security of person and right not be deprived therefore except in accordance w/ the principles of fundamental justice
    - S. 8 right to be secure against unreasonable search or seizure
    - S. 9 right not to be arbitrarily detained or imprisoned
    - S. 15 right to be equal before and under the law
  - **Charter values**: According to Peter Hogg, the concept of "Charter values" existing outside or beyond the interpretation of specific Charter rights can be traced to *Dolphin Delivery Ltd*., where the Supreme Court ruled that common law principles ought to be consistent with the "fundamental values enshrined in the Constitution"
  - McLachlin CJ in *Oakes* held that "[h]uman dignity, equality, liberty, respect for the autonomy of the person, and the enhancement of democracy are among the values that underlie the Charter.

2. **Standard of review for discretionary decisions affecting *Charter* rights/values is reasonableness (contextually applied)**

STEP TWO: if applicant is successful, the reviewing court asks: "did the DM proportionately balance the Charter rights/values in this factual and statutory context?" Apply reasonableness standard of review contextually.

- Past jurisprudence (if satisfactory) may indicate how much of deference was owed in an analogous case
- Court must recognize that the ADM is in best position to determine impact of the decision on *Charter* values
- ADM has skills to recognize that *Charter* values are fundamental and can weigh/balance them in relation to specific facts and statutory purposes (para 53)

3. **Consider the factors from the SOR analysis to assist with the determination of what is reasonable and proportionate AND the reasons given**

**STEP 2A:** Use the modern approach to interpret the statutory content and objective by first considering the DM's reasons. Consider relevant factors:

- Privative clause
- Purpose of tribunal from interpretation of enabling legislation
- Nature of the question
- Expertise of the specialized tribunal

In the interpretive exercise both the general presumption of reasonableness review and the principle of deference continue to apply to:

- a specialized or expert tribunal interpreting its enabling statute that correctly applies all legal principles to construct an interpretation falling w/in the range of possible acceptable interpretations and resulting in a decision that demonstrates **justification, transparency and intelligibility,** usually but not always through adequate reasons.

**4. Consider if the outcome <u>disproportionately harms *Charter* value</u> ("is the outcome unreasonable?")**

**STEP 2B**: Examine the reasons (if given) for evidence of (1) balancing, (2) consideration of less intrusive means and (3) justification of effects. Apply principle of deference which instructs reviewing courts to provide a margin of appreciate to DMs balancing charter values and statutory objectives (perfection not required).
**STEP 2C:** Conclude whether the DM produced a reasonable outcome defensible w/r/t the facts and law.

*Dore* at para [56] … the decision-maker should ask how the Charter value at issue will best be protected in view of the statutory objectives … As this Court recognized in *RJR-MacDonald Inc. v. Canada* … "courts must accord some leeway to the legislator" … and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes."

**The notion of "proportionality" is at the heart of both *Oakes* Charter review and the *Dore* analysis.** Aharon Barak lays out four components of the legal conception of **proportionality:**

1. identification of a proper purpose;
2. articulation of a rational connection;
3. specification of the necessary means to achieve the purpose; and,
4. a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right such that the harms cannot outweigh the benefits (this is what he calls proportionality 'strictu sensu')

**<u>Unsolved post-*Dore* problems:</u>**

We only have two data points for the *Dore* analysis to date – *Dore* itself and *Loyola.* There are accordingly many unresolved questions. **The most important question that arises post-*Doré*** may be: where do Charter values come from? At first glance, this question is straightforward - the Charter itself. But does every Charter right give rise to a corresponding value? Moreover, must values derive only from one or more particular rights, or can they flow from underlying Charter principles not set out in specific rights such as human dignity?