**REMEMBER:**

* 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, go through each one and identify its **weight** in the overall analysis

**CAN SUMMARY:**

## PRELIMINARY PROCESS

**READ THE STATUTE!!!!!!**

1. **REMEDY –** What type of remedy does your client want?
	1. Available remedies from the decision-maker are ***dictated by statute*** (*Inuit Tapirisat*)(*McKinnon v Ontario*)
	2. For discretionary orders, is there any chance of *Mandamus* (*Canada (AG) v PHS Community Services*)
	3. Consider whether JR is appropriate– private law or constitutional options may be more appropriate
		1. Cannot run a ‘collateral attack’ for private law remedy and JR (*Telezone*)
2. **PUBLIC BODY? –** Is the decision-maker a public body?
	1. Apply the Public Functions Test (*McDonald v Anishinabek*)
		1. Exercising public function?
		2. Exercising prerogative powers?
		3. **Criteria**: **(1)** Source of powers **(2)** functions/duties **(3)** Implied devolution of power **(4)** Nature of body’s members/how appointed **(5)** How funded? **(6)** Nature of Board’s decision? **(7)** Power over public **(8)** Direct/Indirect Gov’t Control
3. **EXHAUSTED APPEALS? –** Has your client exhausted all other adequate means of recourse for challenging the decision-maker’s action? (*Harelkin*)
	1. Does the statute provide for a right of appeal?
	2. What is the scope of the appeal that the statute permits?
	3. Is it by right or do you need leave of the court?
	4. Is there a stay of the original decision-makers decision?
	5. ***\*\*\*Exceptional Circumstances*** can warrant bypassing administrative system
		1. **(1)** Appeal procedures, **(2)** Composition of the Appeal tribunal, **(3)** More likely to “re-try” the case? **(4)** Burden of previous finding, **(5)** Powers/Manners of exercising by non-professional body, **(6)** Efficiency
		2. (*CP v Matsqui*) [Aboriginal tribunal lacked independence 🡪 CP allowed to bypass]
4. **JURISDICTION –** Which court will we file our claim in?
	1. Relevant b/c federal courts have access to the *Canadian Bill of Rights* in procedural fairness cases
	2. Also affects the jurisdiction – re: *Sparvier v Cowessess Band*; provincial superior court w/out jurisdiction
5. **DISCRETIONARY JR –** Will we qualify for the discretionary remedy of JR? May be denied if:
	1. Our issue has been resolved in another case
	2. Lack standing
	3. Outside of limitations
	4. “Unclean hands” (*Homex v Wyoming*)
	5. Could have, but did not raise the issue being appealed at tribunal (*Alberta Teachers*- cannot gut deference)
	6. **Note:** Conflicting interpretations of a statute do not provide basis for independent JR (*Domtar*)
6. **SCOPE OF THE ISSUE –** What is my client’s issue? Did the decision-maker:
	1. Breach a requirement of **Procedural Fairness**?
	2. Demonstrate a **lack of Impartiality or Bias**?(**RAB test**)
	3. Step outside of the statutory grant of jurisdiction by a misuse of power or a misinterpretation
		1. Acting beyond their statutory mandate (issue of pure jurisdiction) (*CUPE*- high threshold)
		2. Considering a *Charter* or Constitutional issue w/ out jurisdiction (re: *Conway* and *Cooper*)
	4. Abuse discretionary powers (**SOR** **for Discretionary Decisions**) (*Dunsmuir; Doré (Charter)*)
	5. Make an incorrect or unreasonable decision (**Standard of Review**)
7. **IDENTIFY: (A)** Sphere of State Activity, **(B)** Minister’s Department, **(C)** Decision Maker(s)
8. **Apply Appropriate Framework** (below)

## DUTY OF FAIRNESS

**General Comments**

* Engage with the facts
* Need to look at **procedures** in cases of procedural fairness
	+ Why did the courts think this decision maker acted invalidly in this exercise of discretion?
* The rules must be applied in context 🡪 ***Analogize***

# **Procedural Fairness Approach:**

1. **Preliminary Assessment**: (Above)
	1. Scope of my clients issue
	2. Decision-maker performs a public function
	3. Likelihood of JR as discretionary remedy
2. **DUTY OF FAIRNESS APPLICABILITY:** Is this a decision that ought to ***attract the duty of fairness***?
	1. General duty of fairness applies to administrative decisions (*Nicholson v Haldimand Police*)
	2. **Threshold Test** for Procedural Fairness (*Cardinal v Kent)*

Duty of procedural fairness applies to: (a) ***every public authority*** (b) **making an administrative decision** which is (c) **not of a legislature nature** and (d) which affects the ***rights, privileges OR interests*** of an individual”

1. **ASSESS LIMITATIONS:** Is the issue exempt from or limited by anything?
	1. **(1)** Preliminary decisions – Duty applies to final decisions only
	2. **(2)** Legislative Exemption – **(1)** purely legislative decisions (*Reference Re CAP*) **(2)** Cabinet and ministerial decisions which are legislative in nature (*Inuit Tapirisat*) **(3)** Policy or “purely ministerial” decisions (*CP v Matsqui*)
		1. Passing legislation is NOT subject to Fairness (*Wells v Newfoundland*); Admin bodies performing legislative tasks is not the same as “administrative acts” (*Knight v Indian Head*)
	3. **(3)** 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*)
	4. **(4)** 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.
	5. **(5)** Emergencies (*Cardinal v Kent*)
	6. **(6)** Statutory ‘Ousting’ – Statute can oust procedural fairness or define the content of the duty
2. **CONTEXTUALIZE DUTY –** Was the procedure in this case fair considering all of the circumstances?

*Baker*: The **purpose** **of participatory rights** is to ensure Admin decisions are **(1)** made using a *fair and open* procedure, **(2a)** *appropriate* to the decision being made, and **(2b)** its statutory, institutional and social *context*, and **(3)** provide an opportunity for those affected to *provide their views*

🡪 (1) Apply *Baker* factors, (2) **WEIGH**, (3) Balance, (4) Determine level of PF required

1. ***Nature of the decision*** and the process followed
	1. Where the nature of the decision will contextualize the other factors (*Canada v Mavi;* Parliament concerned with shifting costs to public regime🡪 interpreted Crown discretion minimally)
2. ***Nature of the statutory scheme*** and the terms of review
	1. Enabling statute may impose procedural requirements (*Mission Institute v Khela*)
3. ***Importance*** of the decision to the individual(s) affected
4. ***Legitimate expectations*** that a certain procedure will be followed/result will ensue (doctrine in *Canada v Mavi*)
5. ***Respect agency expertise*** in determining and following their own procedures (especially when explicitly allowed)
6. **WHERE WAS PF BREACHED? –** Elements of a fair procedure:
	1. Notice of hearing (*Cardinal v Kent; Mission Institute v Khela*)
	2. Know the case to be met/disclosure (related to full answer and defence) (*Suresh*)
	3. Timeliness and delay (*Blencoe v BC*)
	4. Written submissions or oral hearing
		1. Fundamental justice requires oral hearing where credibility is at issue (Wilson J in *Singh*)
	5. Right to counsel in some (rare) circumstances
	6. Right to call evidence and cross-examine witnesses
	7. Provision of reasons (*Newfoundland Nurses; Nicholson* [entitled to *some* reasons])
	8. Impartial decision-maker (no bias)
7. **REMEDY** 🡪 Quash the decision and send back for re-determination with reasons
8. **STANDARD OF REVIEW** = Fairness (*Khela*)

# **RELEVANT QUESTIONS: *Audi Alteram Partem***

1. **STATUTORY PROCEDURES –** What procedures (if any), are specified in the statute? (*Khela*)
	1. Is the body judicial (? Quasi-judicial? (*Singh*) Or is relatively informative? (*Khela*- no consulting)
	2. 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*

1. **SUFFICIENT NOTICE –** Was notice sufficient?
	1. Does it comply with procedural code and/or statute? (*Khela* (disclosure)*; Cardinal* (continuing detention))
	2. Did it go to the right party? In a reasonable amount of time?
	3. Does it meet the CL requirement to let the party know what is at stake in the hearing?
	4. Was she given a description of the process either in the notice or via some public means (e.g. website)?
2. **FINAL DECISION –** Is the decision final?
	1. Preliminary decisions generally do not trigger the duty. The less final the decision, the weaker the content.
	2. Is credibility at issue with significant import to the individual? (*Singh*)
3. **LEGITIMATE EXPECTATIONS –** What were legitimate expectations about procedures that will/might be used?
	1. Are procedures specified in the statute, regulations or guidelines?
	2. Did the decision-maker follow the procedures? (*Baker*)
	3. What are the regular practices of the decision-maker?
	4. Are there any legal interpretive presumptions (principles, international law) that may be relied upon?
	5. Have there been relevant changes in circumstances since the first hearing? If so, these may require a re-hearing or a re-opening?
4. **KNOW THE CASE TO BE MET –** Does the claimant know the case against her? (*Suresh*)
	1. Has all of the relevant information been disclosed? (*Singh; Khela; Cardinal*)
	2. Are there circumstances present that would limit disclosure? confidentiality, national security? (*Charkaoui*)
	3. Did the claimant have an opportunity to answer the case against her and be heard by the DM?
	4. Case must be decided by the person(s) who heard her on the facts/relevant matters before them
5. **RIGHT TO BE HEARD –** Who was heard by the decision-maker? (*Cardinal*; serious rights = right to present case)
	1. If there is a duty to consult widely, have all relevant parties been heard? (*Haida Nation*)
6. **DELAY –** Must have: **(a)** Unacceptable Delay, **(b)** Significant Prejudice (*Blencoe v BC*)
7. **REASONS – Are reasons required?**

# **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?** (*Baker*) Duty of PF requires *written explanation for a decision* when:
	+ The decision has ***important significance*** for the individual (*Cardinal*) 🡪 Ties in with **Notice**- Know WHY!
		- When s. 7 rights are at issue; Need ***RESPONSIVE REASONS*** from the DM (Minister) (*Suresh*)
	+ There is a ***statutory right of appeal***
		- Difficult to assess the decision w/out arguments; required for the proper administration of justice
	+ Or in other circumstances (determined on a ***case by case*** basis)
* **Integral to both procedure** (provision of reasons) **and substance** (adequacy of reasons)
	+ However, only a requirement that “*some form of reasons* should be required”; it is NOT a general duty
* **Absence of Reasons** (where required) 🡪 **Procedural Fairness**
	+ Low threshold for provisions of reasons (*Newfoundland Nurses*).Assessed on a standard of fairness (akin to correctness); some deference will be shown
	+ Deference as respect compels the courts to *supplement reasons* before subverting (*Alberta Teachers*)
* **Adequacy of Reasons** (where required) 🡪 **Substantive Review** (*Newfoundland Nurses; Dunsmuir*)
* **(1)** Exhibit justification, transparency and intelligibility, **(2)** Parties Understand why decision was made, **(3)** Facilitate appeal process, **(4)** Show tribunal grappled with issues, **(5)** Show outcome is w/I reasonable range
* **Inadequate:** **(1)** Bare/Opaque conclusions, **(2)** No supporting info, **(3)** lack evidence, **(4)** glaring inconsistencies, **(5)** Irrelevant considerations, **(6)** Minimal reasons effectively immunizing from review (*Lafontaine Village*)

## INDEPENDENCE, IMPARTIALITY AND BIAS- *Nemo judex in sua causa*

***APPLY BAKER FIRST!!!!***

# **REASONABLE APPREHENSION OF BIAS TEST** – (*Committee for Justice & Liberty [dissent]; CP v Matsqui*)

1. The apprehension of bias must **(1)** be a reasonable one, **(2a)** held by reasonable and right-minded persons, **(2b)** applying themselves to the question and **(2c)** obtaining thereon the required information. In the words of the Court of Appeal, **that test is:** **(3)** “what would an **(A)** informed person, **(B)** viewing the matter realistically and practically—and **(C)** having thought the matter through—conclude. **(4)** Would he think that it is ***more likely than not*** that [the decision-maker], whether consciously or unconsciously, ***would not decide fairly***?”
2. Where the:
	1. ONUS lies on the person alleging to raise the issue before the decision-maker at the ***first available opportunity***
	2. ONUS lies on the person alleging to adduce evidence to meet the reasonableness threshold of “more than mere suspicion” 🡪 **Grounds for RAB must be substantial**
	3. PROOF is on a balance of probabilities

# **LEVEL OF INDEPENDENCE:** How much independence is needed? (*Ocean Port; CP v Matsqui*)

1. “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))
	1. CL independence may be ousted by express statutory language
	2. “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*)
	3. Tribunals must still be independent, but not to same level as the Courts (*Ocean Port; Sask Labour; Keen*)
		1. Security of tenure, financial security and administrative control 🡪 All invite LOWER Independence
		2. Even tribunals engaging in processes similar to judiciary will not have the same guarantee;
		3. Permissible scope for political decisions on administrative boards (*Saskatchewan Labour*)
		4. Admin tribunals ‘span the constitutional divide’ 🡪 Primary function= implement policies (*Keen*)
2. Contextually apply the *Baker* framework to determine the what level of fairness the legislature intended
	1. Nature of the decision and the process followed
	2. Nature of the statutory scheme and the terms of review
	3. Importance of the decision to the individual(s) affected
	4. Legitimate expectations of the persons challenging the decision
	5. Respect agency expertise in determining and following their own procedures
3. **Common Problems creating RAB**:
	1. (1) Links with the Executive
	2. (2) Consistency of decisions and processes
	3. (3) Assessment of expertise (from statute; not assessed practically)
	4. (4) Multiple and/or overlapping functions

🡪 **Locate Admin Body** **along the** ***Independence, Impartiality & Bias* spectrum** according to its nature, mandate & function [More Adjudicative? In the middle? Or legislative?; Important right vs. not so important?]

# **OPTION 1: Independence** = ***Institutional Relations*** (Ocean Port)

🡪 Bodies that span the “constitutional divide b/w the executive and the judicial branches of gov’t” (*Ocean Port*)

1. **Test for *Tribunal* Independence:** Whether a reasonable, well-informed person having thought the matter through would conclude that an admin DM is **(A)** sufficiently free of factors **(B)** that ***could*** interfere with his or her ability to **(C)** make impartial judgments (*Ocean Port*)
2. The freedom to decide according to one’s conscience and opinions, **not the absence of influence** (*IWA v Consolidated Bathurst*; full board meetings)
3. Deference means that the requisite degree of independence should be determined by the legislature BUT go back to the **SPECTRUM**

# **OPTION 2: Bias** = ***Individual Judgment***

1. **FIRST AVAILABLE OCCASION –** Allegation of perceived bias MUST be brought to the attention of the DM by the party alleging it ***on the first available occasion***
2. **PERCEPTION –** Focus on the perception of bias held by a reasonable, well-informed and not overly sensitive
	1. Ground for RAB must be a ***substantial, real likelihood*** or probability of bias
		1. Threshold is high; onus rest on the complainant
	2. Standard varies according to context 🡪 apply Baker to determine legislative intent
3. **INDIVIDUAL BIAS** = individual tribunal member (*Baker*)
	1. ***Pecuniary or Material interest*** – only direct and certain financial interests count (*Energy Probe*)
	2. ***Personal Relationships*** with those involved in the dispute (*Pinochet, Brar*)
		1. 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)
	3. ***Prior Knowledge*** or information about the matter in dispute
		1. 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)
	4. ***Attitudinal Predisposition*** towards the outcome (i.e. a prior or fixed view) (*Chretien v Canada*)
		1. 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
		2. Flexible standard depend on the nature and function of the DM; most lenient is “closed-mind” test
	5. 🡪 “***Closed-Mind” Test***: This test is more lenient to the DM and applies to more “legislative-like” DM’s
		1. **Assessed at Pre-Hearing Stage:** Prove **(1)** There has been a pre-judgment of the matter, *to the extent that* **(2)** Any representations at variance with this view would be futile. (*NFLD Telephone*)
			1. Must come from an expression of ***final opinion***
		2. **Post-hearing:** Apply normal RAB.
4. **INSTITUTIONAL BIAS** = body as a whole

🡪Challenge particular institutional practices that affect independence (*Consolidated Bathurst*)

* 1. **Test for Systemic Bias** – (*Geza v Canada*)Two-part test to determine whether a substantial number of cases have been affected by systemic bias:
		1. **(1)** Having regard for a number of factors including, *but not limited to*, **(a)** the potential for conflict between the **(i)** interests of tribunal members and **(ii)** those of the parties who appear before them, **(b)** will there be a RAB in the mind of a fully informed person in **(c)** a **substantial number** of cases?
		2. **(2)** If **NO** 🡪 Allegations of an apprehension of bias **cannot** be brought on a systemic level, but must be dealt with on a case-by-case basis.
		3. Test for RAB on institutional level, determine using ***entire factual matrix***. Fine line between tribunal efficiency and bias in using lead cases
			1. Sometimes efficiency will trump potential institutional bias
1. **REMEDY –** Quash the decision and send back to rehearing by a differently constituted panel

## CHARTER & ADMINISTRATIVE LAW

# **Effect and Applications of the Charter**

1. Allows for judicial oversight of legislation; controversial b/c unelected judges strike down laws as unconstitutional
2. Constrains parliamentary supremacy
3. s. 1 is the saving provision; burden rests on government to justify infringement; only applies to “*prescribed by law*”
4. Applies to government – including non-government bodies that implement a government policy or program
5. **Applies *directly* to all laws** – ***NOT DIRECTLY*** to Discretionary decisions for purposes of s. 1 or s. 52

# **Charter and Procedural Fairness: Section 7, POFJ and Admin Law**

1. s. 7 applies to everyone physically present in Canada (*Singh*)
2. POFJ guarantees due process when life, liberty or security rights are engaged (**even if statute excludes** (*Singh*))
	1. (Ex: Prison, Refugee cases) Analogies 🡪 (*Cardinal; Khela; Singh; Suresh; Charkaoui; Khadr*)
3. When statute provides no guidance 🡪 Apply Admin CL req’ts as ‘floor’- disclosure, participation, reasons (*Suresh*)
4. **Content:** s. 7 Min. Procedural Requirements: **(1)** Right to a Fair Hearing; **(2)** Independent; **(3)** Impartial DM; **(4)** Decision on facts and law; **(5)** Know the case put against you; **(6)** Full Answer & Defence (*Charkaoui*)
5. Officials acting abroad in their official capacity are subject to the *Charter* (*Khadr*)

# **Charter and Substantive Review (Agency Jurisdiction)**

1. ADMIN Tribunals can consider constitutionality when empowered to consider questions of law (*Nova Scotia v* *Martin*)
2. **Test:** **(1)** Explicit Jurisdiction? If no, **(2)** Implied jurisdiction to consider Q’s of law? **(a)** Necessary for its mandate; **(b)** Interaction with other elements of Admin system; **(c)** Adjudicative Nature? **(d)** Practicality Concerns
	1. If **YES** 🡪 **Presumption**. Rebuttable by pointing to explicit withdrawing of ability to consider constitution/*Charter*
3. Tribunals may grant s. 24 remedies ***when consistent with their enabling legislation*** (*R v Conway*)
	1. **(1)** Ability to decide Q’s of law? (*Express/Implied? Not clearly withdrawn?)* **(4)** Able to grant *particular* remedy? **(5)** Would s. 24 remedy fulfill statutory **purpose** and tribunal’s **function**?

# **Charter and Substantive Review (Discretionary Decisions)**

1. Current Administrative Law Approach to *Charter* Intersections
	1. Lebel in *Blencoe* and Deschamps and Abella in Dissent in *Multani v CSMB*: Use ADMIN principles
		1. Decisions and Orders (Use Admin Law) are NOT the same as Rules or Regulations (Use *Oakes*)
2. *Doré*: When an individualized, admin ***discretionary decision*** limits *Charter* values 🡪 Assess under CL principles of **Administrative Law Substantive Review**
3. SOR is Reasonableness with Proportionality serving as the central criterion of reasonableness
4. **Key Question:** Has the DM ***disproportionately*** and ***unreasonably*** limited a *Charter* right/value when exercising a statutory discretion? Focus is on the outcome 🡪 ***Is it proportional?***

# **Methodology – Reviewing Admin DM Discretionary Decision affecting *Charter* value (*Doré v Barreau du Quebec*)**

🡪Framework: Legislation conferring *Imprecise Discretion* 🡪 Admin Law Proportionality Review (*Slaight* dissent; ***Doré***)

🡪SOR= Reasonableness (Informed by Proportionality) (*Multani*) 🡪 **NEVER Correctness!** (DM in best position)

🡪Consider *Dunsmuir* SOR analysis to assist with determining Reasonableness/Proportionality

1. SOR Analysis to **contextualize proportionality review** (*Dunsmuir* factors inform level of deference for balancing)
2. **Identify** *Charter* values (**note:** these are broader than just the rights)
3. Did DM **balance** *Charter* value with statutory objective? ***Reasons*** (*Multani*)
4. Did DM ask ‘how *Charter* **right**/value will be **best protected** in light of the statutory objective? (*Lake*; Even applied Admin law to *Charter* **right** that was infringed by a discretionary decision at the ‘extreme legislative end’)
5. Did DM engage in **proportionality analysis** 🡪 Balance: (**A**) Severity of Infringement with (**B**)Statutory Objective
6. Did DM choose outcome, which “**falls within a range of possible, acceptable outcomes**” and is explained by reasons exhibiting “**justification, transparency, and intelligibility**”? (*Dunsmuir*)

## 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. ***Questions of jurisdiction are assessed on CORRECTNESS***

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

# **PRAGMATIC & FUNCTIONAL APPROACH:**

* SOR analysis developed from the P&FA developed in *Pushpanathan*
	+ (1) **Privative clause:** Strongly suggest deference (*CUPE*)
		- Weighed against expertise as a factor
	+ (2) **Expertise:**
		- Lack of expertise outweighs a privative clause (*Southam*)
	+ (3) **Purpose of the act as a whole and provision in particular**
	+ (4) **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 ANALSYSIS:** (***Dunsmuir***)

* **Step 1:** ***Past Jurisprudence***
* 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:** ***Pragmatic & Functional Approach – WEIGH!!*** (*Pushpanathan*)
* 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
			* Compare Binnie J in *Dunsmuir* vs. Rothstein J in *Khosa*
		- 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)** ***Expertise of the tribunal***
		- Specialized or expert tribunal interpreting its enabling (home) or closely related statute
		- Assume expertise for following matters:
			* Domestic and 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 get more deference 🡪 school boards and municipalities (*Catalyst Paper*)
	+ **(3)** ***Purpose of tribunal***
		- Must read the entire statute to understand the legislative scheme and the tribunal’s purpose
	+ **(4)** ***Nature of the question***
		- Deference owed on questions of fact or mixed fact & law (*Southam; Pushpanathan*)
		- Deference owed on questions of law involving the interpretation of the home statute (*Celgene*)
		- Correctly applies all the legal principles and tests
	+ NOTE: Factors are not exhaustive and are not a checklist.

# **APPLYING THE RIGHT STANDARD:**

1. **Presumption of Reasonableness**– particularly where the Tribunal:
	1. Produces a reasonable outcome which is defensible in respect of the law
	2. Constructs an interpretation of its statutory powers that falls within a range of competing interpretations
	3. Arrives at a decision that demonstrates justification, transparency and intelligibility (*Dunsmuir*)
	4. Is supported by adequate reasons (*Baker*)
2. **Correctness applies only to questions of law if one of the following exceptions applies:**

🡪 Onus on applicant requesting correctness to show decision rests on error in the determination of a legal issue

* 1. (1) ***Constitutional issue*** (incl. division of powers and unwritten principles) **Policy:** **What about *Doré***?
	2. (2) ***Question of*** ***General Law*** that is “**(a)** ***of central importance to the legal system*** as a whole **AND**

**(b)** Outside the adjudicator’s specialized area of expertise”

* + 1. Binnie in *Alberta 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”
	1. (3) ***Drawing Jurisdictional Lines*** b/w two or more competing specialized tribunals
	2. (4) ***“True” question of Jurisdiction*** or *vires* (*CUPE; Alberta Teachers*)
		1. Does the admin body actually have the jurisdiction over the subject matters, parties or remedies?
		2. “Where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”
		3. “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*)

# **“REASONABLENESS” REVIEW:**

**🡪** *“Does the decision fall within a range of possible, acceptable outcomes defensible in respects of the facts & the law?”* (*Dunsmuir*)

1. **Presumptive Standard when:** (*Alberta Teachers*)
	1. **Specialized** or expert tribunal
	2. Interpreting its **enabling or home statute** (or closely related statutes)
	3. On a **question of fact or mixed** fact and law or (in some cases) law (*Southam*)
	4. Or exercising **broad statutory discretion**
	5. **Correctly applies all legal principles** or tests
	6. To construct an interpretation of its statutory powers that falls within range of possible acceptable interpretations
	7. Resulting in a decision that demonstrates **justification, transparency and intelligibility** usually, but not always, through the provision of reasons
	8. And produces a **reasonable outcome** which is defensible in respect of the facts and law.

🡪 **NOTE** the importance of **REASONS** in establishing reasonable decision and outcomes.

1. **Reasonableness requires:** (Developed in *Southam*, interpreted in *Khosa*)

**🡪Unreasonable**: A decision that is not supported by any reasons that can stand up to a somewhat probing examination (*Southam*)

 🡪 **(A)** Flaw in the reasoning process; **(B)** Inclusion of Irrelevant factors; **(C)** Failure to include mandated factor

* 1. ***Outcome that is possible*** under the statute; outcomes that are beyond the bounds of the statute would be beyond the DMs jurisdiction;
	2. ***Consideration of the appropriate factors*** under the statute
		1. A failure to consider relevant factors or consideration of irrelevant factors may render the decision unreasonable
		2. No re-weighing of discretionary decisions (*Suresh*)
	3. ***DM that is authorized*** under the statute (has jurisdiction)
1. **To determine Reasonableness, Courts must consider:**
	1. (1) ***Objectives of the statute***; power of the statute
	2. (2) ***Type*** of decision (law, mixed, fact)
	3. (3) ***Public policy*** vs. ***adjudicative matter*** b/w parties
	4. (4) 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?
		1. Weigh against the public purpose which is sought to be advanced (**polycentricity**)

**NOTE:** Per Iacobucci J in *Southam*, courts must carefully engage with the reasons of the tribunal to justify any disagreement

* + Reasons are VERY important to establish reasonable decisions and outcomes

**NOTE:** Per *Dunsmuir*, courts must construe what the legislature intended

* + Reasonableness is a contextual inquiry (*Catalyst Paper*)
1. **Spectrum of Reasonableness:**
	1. 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”
	2. However, in *Khosa*, the court states reasonableness is a single standard & *takes its colour from context*
	3. ML: Will inevitably devolve into a spectrum of deference according to the factors considered
2. **Rationale for Reasonableness:**
3. **Deference is both an attitude of the court and requirement of the law of judicial review**
4. Respect for the DM process of adjudicative bodies with regard to both the facts and the law
5. “… 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*)
6. *Mossop v Canada (AG)*: This case had 5 different judgments: Two said SOR= Correctness, CHRT misinterpreted; One said SOR= Patent Unreasonableness, Two said CHRT ***was*** Correct.
	* 🡪**Need an in-between ground!!!!**
7. **Supplementing the Reasons**
8. 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
	* 1. Form of deference as respect
9. *Alberta Teachers* – used internal jurisprudence of the tribunal
	* 1. “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.”**
		2. If **(A)** no duty to give reasons, OR **(B)** when only *limited* reasons are required 🡪 Can consider the reasons that ***COULD*** be offered for the decision when conducting a reasonableness review.
			1. 🡪 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”
10. *Agraira* – used implied reasoning of the Minister
	* 1. 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”
		2. 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”
11. **Reasonableness in Practice:**
	1. *Canada (CIC) v Khosa*: Deference is not only owed in the presence of a Privative Clause 🡪 *Consider ALL factors*
	2. *Celgene Corp v Canada (AG)*: *Polycentric decisions* often assessed on Reasonableness Standard
		1. Parties cannot “contract out” of the Reasonableness standard
	3. *Catalyst Paper Corp v North Cowichan*: *Municipalities receive high deference/discretion* 🡪 quasi-legislative
		1. 🡪 Bylaw will only be set aside if it is one no reasonable body informed by these factors could have taken
	4. *CNR v Canada (AG)*: Reasonableness applies to *adjudicative decisions by the GIC*.
	5. *McLean v BC (SC)*: Lack of consistency is not standalone ground for JR; Home statute interpretations= deference
12. **Standard of Review & Reasons:**
	1. *Newfoundland Nurses*: **Slippage #1:** Are the reasons provided so poor as to not even qualify as reasons?
	2. *Alberta Teachers*: **Slippage #2:** Reasons are deficient 🡪 Will court seek to supplement before subverting?
		1. If no duty to give reasons
		2. , or only limited reasons required 🡪 Consider reasons that COULD be offered

# **“CORRECTNESS” REVIEW:** (*Khosa*)

1. Applies only to ***Questions of Law*** (See Factors above for Situations)
2. Court Asks: *Was the decision maker correct?*
	1. No deference owed to the reasoning process or the reasons
	2. No obligation under correctness review for the court to look at the reasons; no legal requirement
	3. Permits a substitution of the courts interpretation and imposition of the correct answer
3. Court essentially conducts a ***de novo* review**
4. **MARGINALIZED:** *Canada (HRT) v Canada (AG)*: If past jurisprudence is **unsatisfactory** 🡪 P&FA to decide

# **DIFFERENCE- Correctness & Reasonableness Review**

1. **Correctness:** Court essentially conducts a **de novo review**; court is able to review the entire case and supplement their own reasons and authority
2. **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
3. **Reasonableness+:** Court supplements minimal reasons based on “***implied reasoning***,” internal jurisprudence or based on other circumstances of the case (*Alberta Teachers* & *Agraira*)

# **“JURISDICTION”**

**🡪Courts ought to *narrowly* construe jurisdiction so as to avoid unnecessary intervention** (*Alberta Teach; CUPE*)

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

# **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 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)

# **CASES that apply Patent Unreasonableness:**

* *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*

## REVIEW OF DISCRETIONARY DECISIONS

**Words to look for:** (1) **Authorization:** (“*May*” vs. “*Shall*”), (2) **General or Vague Language** (“*May do anything that is necessary*” (2) **Objective vs. Subjective** Grants of power (“*On a balance of probabilities*” “*For the proper purpose*”)

**Part of Substantive Review** (*Baker*)

1. Review of discretionary decisions **no longer limited to traditional grounds**; more general review available
	1. Pulled into the existing legal framework; role of the court to review these decisions like other areas of law with the *Pushpanathan* factors.
2. ***BAKER***:***REASONABLENESS Standard* will apply!** Considerable deference automatically applies b/c of the nature of discretionary decisions, but decision ***must be exercised in accordance with***:
	1. (1) Statutory boundaries (informs values, too🡪 *Baker* H&C)
	2. (2) Rule of Law
	3. (3) Principles of Administrative Law
	4. (4) Fundamental *values* of Canadian society, and
	5. (5) Fundamental values of the *Charter*

🡪 In *Baker*, Minister **(1)** failed to consider Int’l Law, **(2)** Did not act with H&C, **(3)** Failed to appropriately weigh

1. **Traditional Grounds** (for reference):
	1. ***Bad faith***
	2. Dictation/influence
	3. Unlawful delegation of powers
	4. ***Fettering***
	5. Improper purpose or motive
	6. Unreasonableness/irrationality
	7. Omission of relevant factors / consideration of irrelevant factors
2. **Effect:**
	1. Brings review of error of law (jurisdiction/*ultra vires*) and review of discretion together
		1. 🡪Courts **do not re-weigh**, but rather (1) ensure the relevant factors were considered, and (2) the proper weight was assigned (*Suresh*)
		2. 🡪 Creates Issues of Re-weighing and deference… **This is essentially re-weighing (Policy)**
	2. Challenging to determine the limits of discretion – it is fact? Law? Or mixed fact and law?
		1. 🡪 No unconstrained discretion; common law/ROL provides boundaries (*Roncarelli*)
3. **Examples:**
	1. **Bad Faith, Improper Purpose, Unreasonable Grounds** (*Thorne’s Hardware*)
		1. Bad faith is a ***High Threshold*** 🡪 Prove fraud, corruption, or malevolence
			1. Must have real proof
	2. **Fettering** (*Thamotharem*) 🡪 Compare with *Mavi* (guidelines consistent w/ stat. req’s and legit expect)
		1. Fettering turns a discretionary decision into one that is not.
		2. 🡪“Soft law” guidelines that unduly influence statutory discretion
		3. To prove fettering, must prove the “soft law” has ***transformed into a rule*** (likely need examples)
4. **Note:**
	1. Decisions involving public convenience and general policy are final and not reviewable in judicial proceedings (*Thorne’s Hardware*) 🡪 Legislative exemption
	2. Decisions made by GIC pursuant to a statute are reviewable for jurisdictional error and procedural error only (*Thorne’s Hardware*)
	3. **Fettering:** Discretionary decisions are allowed to be influenced by ***flexible*** soft law
	4. **Remedy:** Quashing (remedy) an Order in Council requires an “egregious case”

# ***Doré v Barreau du Québec* Framework**

🡪Discretionary Decisions made by Admin DM’s are reviewable under Admin law (SOR Analysis) (*Doré*)

1. Administrative Discretionary Decision is NOT LIKE A LAW 🡪 **(1)***Particular to specific facts*; **(2)** *Decision*; **(3)***Discretion*
2. **Key Question:** *Has DM Disproportionately & Unreasonably limited a Charter right/value when exercising discretion?*
3. **Apply *Charter* values to Decision: (1)** Balance Value with Statutory Objective, **(2)** How is it *best protected* in light of Statutory Objective? **(3)** Engage in Proportionality Analysis **(4)** Choose outcome which “falls within a range of possible, acceptable outcomes” and is “explained by reasons exhibiting justification, transparency and intelligibility.
4. **Review Discretionary Decision:** **(1)** Assess on *Admin Law Proportionality Review*, **(2)** SOR= Reasonableness, **(3)** Consider *Dunsmuir* SOR factors to determine what is Reasonable/Proportional, **(4)** Does outcome *disproportionately* harm *Charter* value?

## ABORIGINAL ADMINISTRATIVE LAW

# **Constitutional Basis**

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

# **Honour of the Crown (Unwritten Principle)**

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

# **Aboriginal Modes of Self-Government**

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

# **Aboriginal Administrative Law**

1. Like other statutory delegates, Aboriginal bodies are subject to judicial review

🡪 “… ***[A] council of a band, elected pursuant to customary Indian law***, is a federal board in the same manner as would be the case had it been elected pursuant to a federal statute such as the *Indian Act*, then an appeal tribunal, elected pursuant to customary Indian law would, by similar logic, be a federal board.” (*Sparvier*)

1. Rothstein J states that “minimum standards of natural justice or PF must be met” (*Sparvier v Cowessess*)
	1. **Minimum Req’ts**: **(1)** an unbiased tribunal, **(2)** notice and **(3)** the opportunity to make representations
	2. Challenges of importing Canadian-European conceptions of natural justice into indigenous legal systems
		1. How relevant is self-government as the intent and purpose of the administrative body? (*CP v* *Matsqui; taxation scheme*)
	3. 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.
2. **Overall:** Promoting Aboriginal self-governance requires recognizing unique practices, challenges. Still, must meet minimum standards of PF (*Sparvier*). PF Breaches cannot be justified by need for self-governance (*CP v Matsqui*)

# **Duty to Consult Framework**

🡪 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

* HOTC informs the duty 🡪 **always** at stake in its dealings with Aboriginal people, linked to POGG
* **Objective:** Reconcile pre-existing Aboriginal sovereignty with *de facto* Crown sovereignty: consultation is key to achieving objectives of modern law of treaty and aboriginal rights, namely reconciliation (*Mikisew*)

**Stage 1:** *When it applies*

1. ***The Trigger***
	1. Crown has knowledge (real or constructive) of potential Aboriginal right/title
	2. Low threshold for knowledge + Credible Aboriginal claim
	3. Actual Knowledge= claim filed in court or advance negotiations, or if treaty right impacted (*Mikisew Cree*)
	4. Constructive Knowledge= Know or reasonably ought to know that lands were traditionally occupied and reasonably anticipate actions would impact on rights
2. ***Decision to Act***
	1. Crown (1) Contemplates action, (2) Decides to act
	2. Not confined to government exercise of statutory powers (*Huy-Ay-Aht First Nations*)
	3. Only ***potential impact*** necessary, not immediate
3. ***Potential Adverse Effect***
	1. Conduct may *potentially* adversely affect an aboriginal right or claim
	2. DTC is a POSITIVE obligation on government (*Halfway River*)
	3. Must be **new impact**, not historic or continuing (*Carrier Sekani*)
	4. 🡪 Onus on CLAIMANT to show causal relationship between conduct and adverse impact

**Stage 2:** *Scope of the Duty*

1. ***Determine the SCOPE of the Duty***
	1. Proportionate with **(A)** *Strength of the Aboriginal Claim*, **(B)** *Potential Impact*, **(C)** *Contextual Factors* [public interest, etc.]
	2. **Spectrum:**
		1. HIGH: **(1)** Title proven or strong case, **(2)** Important right, and/or **(3)** Substantial Infringement
		2. 🡪**Deep Consultation, Maximum Responsiveness**
		3. LOW: **(1)** Weak title claim, **(2)** Surrendered/private land, and/or **(3)** Minor impact/limiting
		4. **🡪Minimum Consultation**

**Stage 3:** *Consultation*

1. Consultations should be **(A)** Meaningful, but only needs to be **(B)** Adequate
2. **Crown Burden:** Identify relevant Aboriginal and Non-Aboriginal parties
3. **Aboriginal Claimant Burden:** Must **(a)** *assert* rights and **(b)** specify nature of **(c)** potential infringements

**Stage 4:** *Accommodation*

1. Accommodation ***may*** be required
2. DM must demonstrate that aboriginal interests were considered (reasons)
3. DM balances competing interests (proportionality analysis)
4. *May* require modification of decision or policy in order to minimize impact on aboriginal peoples
	1. \***Similar to *Doré***

**Standard of Review:** Process 🡪Reasonableness. If government misconstrues seriousness of the claim 🡪Correctness

* 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 **(A)** ***if the present decision has the potential*** to cause a **(B)** ***novel adverse impact*** on **(C)** a ***present claim or existing right***
* DTC should ***consider past impacts*** of Crown action when *current* decisions affect current/future rights (*West Moberly FN*)
* Challenges:
	+ Identifying the appropriate Aboriginal consultation partners
	+ Identifying the requirements of meaningful consultation – may be lesser where the right is lesser
	+ 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

## BC Administrative Tribunals Act

🡪Does NOT apply to all BC Tribunals.

🡪Members appointed based on merit (**Experts 🡪 Deference**)

🡪Some general duties for ATA Tribunals

🡪**Controversy:** *Standards of Review*

**Privative Clause Definition:** Provisions in the tribunal’s enabling Act that give the tribunal exclusive and final jurisdiction to (a) inquire into, (b) hear, (c) decide certain matters and questions, and provide that a decision of the tribunal in respect of the matters within its jurisdiction is (d) final and binding and (e) not open to review in any court.

# **Section 58: Standard of Review WITH Privative Clause**

1. **Privative Clause** 🡪 Tribunal is considered **Expert** for all matters over which it has exclusive jurisdiction

2. **Standard of Review:** (A) Finding of fact or law = ***Patent Unreasonableness***, (B) Q’s of Natural Justice/PF = ***Fairness***, (C) For all other matters 🡪 ***Correctness***

# **Section 59: Standard of Review WITHOUT Privative Clause**

1. **Standard of Review:** For all decisions *except* Findings of fact, Discretion, Rules of Natural Justice/PF 🡪 ***Correctness***

2. **Finding of Fact:** Court can only set aside finding of fact if (a) there is **no evidence** in support, or (b) if in light of all the evidence the finding is ***Unreasonable***

3. **Discretionary Decisions**: Only set aside if it is ***Patently Unreasonably***

🡪 (a) Exercised ***Arbitrarily***, or in (b) ***Bad Faith***, for (c) an ***Improper Purpose***, (d) based on entirely/predominantly ***Irrelevant Factors***, (e) fails to take into account ***Statutory Requirements***

4. **Questions of Natural Justice & Procedural Fairness:** ***Fairness***, considering all the circumstances.

# **Relationship between Common Law and ATA on Patent Unreasonableness**

*Khosa*: Binnie J- PU lives on in BC, but will be calibrated according to the common law; Rothstein J- PU has been codified in BC 🡪 it is law

* CL cannot overrule ATA 🡪 Applies where ATA doesn’t (***Where is that***?)
* Patent Unreasonableness accords **highest possible deference**
	+ Courts must not undertake its own reasoning analysis
	+ Courts must not **re-weigh** evidence, second guess conclusions, substitute different findings of fact, or conclude evidence is insufficient to support result
* **Patent Unreasonableness:** “Openly, evidently unreasonable or clearly irrational.” A decision based on **NO** evidence is PU, but a decision based on insufficient evidence is NOT. (*Law Society of NB v Ryan*)
	+ High degree of deference regarding reasons offered or reasons that *could be* offered in support.