**\*\*\*ADMINISTRATIVE LAW – LISTON – WINTER 2015 – HEATHER BURLEY C.A.N.\*\*\***

**RULE OF LAW – Unwritten CL, Con principle (binding, normative; guides judgment/discretion; possesses *weight*)**

**Summation of principle of RoL**

***BC v Imperial Tobacco*, 2005**

**ROL** cannot be strike down leg; ltd in terms of substantive utility (no guarantee of fair civ trial, no req’t that leg be prosp’ve)

1. **Law supreme** over priv indiv’s, gov off’ls (gov must ex power non-arb’ly/law’y; leg enables/constrains powers of gov)
2. Requires creation/maintenance of **positive order of laws** (law must exist in legislative or CL form)
3. Requires **rlnsp** b/t State and indiv to be **reg’d by law** (officials’ actions must be legally founded in order to be valid)

***Re: Residential Tenancies*** – Con basis of RoL; provs can’t create AT to replace sup cts; jud’l f’n can’t be dominant one

***Crevier*** – No gov can oust supervisory jrdx of Cts (i.e. set up ATs to usurp s. 96 jrdx), = against **RoL**; **PC = *def***(signal from leg.)

***Baker*** – Deference to ministers b/c of expertise but mass imp DM’ing, need accountability mechanism (JR)

**Non-Arbitrariness (legality) = Core of RoL**

***Canada (AG) v PHS*, 2011 (*Insite*)**

-Min’s dcn to refuse exemption = **arbitrary**; law itself ok, not against s. 7 (not blanket prohibition, allows exemption), but *dcn* arbitrary, undermines purpose, disproportionate; Remedy = mandamus (order Min to grant exemption) 🡪 rare

-**Discretion must be ex’d in acc’ce w/ POFJ** (*Roncarelli*)

**Unwritten Principles**

***Ref re: Secession of QC*, 1998** – UPs of Con = **RoL, fed’m, democracy & prot’n of minorities** (overlap)

***Roncarelli v Duplessis*, 1949** – UPs as **constraint** on exercise of exec power; stat interp; constraining public power

-Majority: Duplessis acted disproportionately, outside scope of jrdx (not bsd on his appreciation, determined by law)

-Rand J (concurring): unchecked admin arbitrariness = disintegration of **RoL** as fund’l postulate of Con structure; **no such thing as absolute/untrammeled discretion**; no leg’ve enactment w/o express lang can convey unltd arb power exercisable for any purpose

**Deference as Respect** (Dyzenhaus)

***National Corn Growers*, 1990** – Judicial interpretations and disagreements; Issue: can corn be imported/‘dumped’ into Canada?

-Statute had **PC (deference)**, gave Import Trib **discretion**; was it **PU** for trib to consider GATT (pot’l increase in import, material injury to Cdn) in interpreting its own *SIMA*? NO

* Gonthier (majority): Ass’t of reasonableness of trib’ interp of its ES can’t be reached *w/o* considering underlying *reasoning*; courts should review trib’s **interp/conclusions** re: ES if they appear to be PU (//**modern reasonableness rev**)
* Wilson (dissenting): Court should review only trib’s interp of ES if it appears to be PU
* Gonthier: **PCs** are non-discretionary form of **deference** requiring restraint; Wilson: Agrees
* Wilson: **PCs signify choice of SOR**; Gonthier: Agrees

**Constraining the *Charter***

***Cooper v Canada*, 1996 – Constitutional implications (Note: Overruled by *NS v Martin*)**

-As forced to retire as pilots at 60 pursuant to coll. agrmt, alleged age discrim, filed complaints w/ CHRC

-Con Q of **home statute** (*CHRA*) – Who should **consider its constitutionality**? CHRT or are they incompetent?

-Lamer: “Mere creatures of legislature”, whose members usually serve *at pleasure* of gov, whose dcns may at times be properly gov’d by g’lines est’d by Exec, are NOT suited to task of interpreting *Charter*

-La Forest(majority; middle ground): **AT’s ES must explicitly or implicitly grant jurisdiction to interpret/apply *Charter***

-McLachlin/L’H-D (dissenting): *Charter* is not some holy grail, it belongs to the people; more have rts determined by ATs than by courts; for Charter to be meaningful, must find expression in dcns of ATs

-**If legislature conferred AT power to decide Qs of law, must extend to Charter and to Q of Con validity of its ES**

* Note: Dissent adopted in *Martin*
* **BC *ATA*** may determine **AT’s jurisd over Con Qs** (s. 44) or Con Qs re: Charter (s. 45); BCHRT *cannot* consider Charter

**REMEDIES**

\*\*ATs do *not* have “general jrdx” 🡪 cannot grant remedies unless statute lets them:

**\*\*READ THE STATUTE!! 🡪 Enabling Statute** sets out**:**

* **Remedies** w/in jurisdiction of AT *explicitly* or *implicitly*; AT outside its jrdx if it crafts rem beyond scope set by its ES
  + **Admin**: AT may be able to make **declaratory order** for enforcement of oblig/duty, **mandamus**, **quo warranto**, ongoing seizing, internal **appeal**, **certiorari** (quash), send back for reconsid (w/ diff panel if indep issue)
  + **Con**: AT may **refuse to apply provisions** in ES by virtue of **s. 52** (non-app of law inconsistent w/ Con) or award just/equitable remedies under **s. 24(1)**
  + **Civil**: AT may order costs, compensation, **damages**, fines, or restitution
  + **Non-legal**: AT may order **mediation**, consultation, education, monitoring, policy changes, or equitable remedies
* **Internal review process** and whether it is *de novo* review or more constrained
* Parameters for **statutory appeal**
  + E.g. From *Baker* of statutory appeal:
    - *Immigration Act* has provision allowing JR of dcn w/ leave req’t from FCTD
    - FCTD judgment can only be appealed if FCTD certifies “serious Q of gen imp’ce” for FCA to consider
    - FCA renders jdgmt re: serious Q; SCC exercises discretion whether to give leave for review from FCA
* **Privative clause** signaling legislative intent about JR
* Fed or prov level(s) may have overarching statute controlling **access to courts/JR** (e.g. *Fed Courts Act*)
* **Non-court remedies**: Commissions of inquiry, ombudsperson, rep for child & youth, media, etc.

***Federal Courts Act*** – make available prerog writs against public actors only (*not* against private individuals) – PWs = *public* rem

**-S. 15(1)**: FC can sit any time, any where in Canada (non-sedentary)

**-Ss. 17-26**: FCs have jurisdiction against Crown, fed boards, commissions, tribunals, etc.

**-S. 18(1)**: FC has exclusive **orig’l jurisd** to issue injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of pro warranto, or grant declaratory relief, *against any fed bd, comm or other AT* and to hear/determine any app

**BC *JR Procedure Act*, s. 11**: No **time limits** for app for JR (then go to ES, see if it specifies limit) 🡪 simplifies JR

**BC *ATA***: Applies to certain admin bodies in BC, shapes JR for those bodies; no AT can consider Con/*Charter* issues

-**Interaction b/t *JRPA* and *ATA***

* Determine if AT subj to *ATA* 🡪 if **NOT**subj to *ATA*, JR proceeds acc’g to CL and/or any req’ts of *JRPA*
* If *ATA* applies, check diff LPs, what SOR applies, Con jurisd, other relevant matters (e.g. ss. 58-59: what happens if ES has PC – correctness std; if no PC, apply PU SOR (even though gone @ CL, PU codified in *ATA*)

**Prerog writs** are **public** law rem’s, **DISCRETIONARY** (rsns for refusal: adeq alt rem; delay; mootness; lack of stdg/clean hands)

|  |  |  |
| --- | --- | --- |
| **Name** | **Translation** | **Effect** |
| **Certiorari** | Cause to be certified | **Quash**/invalidate order or decision |
| **Prohibition** | Prohibit | Prevent unlawful assumption of jurisd or halt prcdings where unlawful jurisd being ex’d (*before* dcn made, //injunction) |
| **Mandamus (*PHS*)** | We command | **Order** duty to be performed but NOT tell AT how to decide |
| **Certiorari + Mandamus** | The most common admin law remedy | **Send back** (w/ directions) for reconsideration |
| **Declaration** | Statement of legal position or status | Public law = declare action *ultra vires* (outside jurisdiction); Not enforceable but usually obeyed |
| **Habeus Corpus** | Produce the body | Ensure detention is not arbitrary (e.g. immigration, ment inst) |
| **Quo warranto** | By what authority? | Challenge basis of authority used to justify acts; very rare |

***Mandamus*** 🡪 Conditions for obtaining *mandamus* **(*PHS*)**

1. Demo clear **legal right** to have thing sought done in manner, by person 🡪 *PHS* (Yes, viol of s. 7 *only in acc’ce w/ POFJ*)
2. **Duty must lie on official** at time of relief sought 🡪 *PHS* (Yes, exemption, power in acc’ce w/ Charter)
3. Duty must be **“purely ministerial”** in nature 🡪 *PHS* (No? Circumscribe? Only 1 answer possible…)
   * *PHS* could = jud’l activism, *could* have sent back (but politics compelled dcn); (vs. def to min discr’n in *Khadr*)
   * Officer must possess **NO discretionary powers** in matter (that would = court subbing opinion re: right A)
4. Demand for/refusal to perform act sought 🡪 *PHS* (Yes, demand for ex’n denied); *McDonald* (demand for PF refused)

**Novel and in/effective remedies; Enforcement of Remedies**

***McKinnon v Ontario (Min of Corr’l Serv)*, 2001 CHRR –** ON *HRC*; racism in prison workplace; 1988-2011, $2M

-Q: Whether remedies carried out *in* ***good faith*** w/ view of making them effective – NO, revision orders nec to address failure

-Remedies granted were **“novel”**: **prospective, open-ended, subject to ongoing revision/elaboration** (e.g. training prog, anti discrim policies, apptmt of indep 3P consultant to oversee, recommendations, paid leaves of absence, etc.)

-AT remained **seized** of the matter (retained jurisdiction) until *entire* series of orders implemented and complainant’s remedial right was met w/ full compliance and substantial conformity

-**Enforcement powers must be granted by statute, o/w AT must rely on courts to enforce its orders** (rare that AT can enforce)

**Remedy of JR/Contingent nature of JR remedies**

***Domtar Inc v Quebec*, 1993 – Discretionary nature of JR**; Do conflicting dcns by ATs give rise to JR?

-**ATs are NOT bound by doctrine of precedent, operate by flex rule of *consistency***

-*AIAOD*: employee w/ emplymt injury gets 90% net salary for days would have worked for 14 days; plant closure 3 days later

-CALP said employer to pay despite plant closure (not PU), Labour Court said no (RD re: employer’s obligs) (*also* not PU)

-QCCA said correct instability via JR to cure conflict/inconsistency 🡪 SCC says NO

-**Courts do not have monopoly on ROL** (need for certainty in law, consis of DM’ing don’t justify broad interv’n on ROL gds)

-**Inconsistent/conflicting interp’s by different adm bodies is NOT indep ground for JR**, b/c (L’H-D)…

* **Intent** of Legislator Reason – admits several poss constructions of same provision
* **Jurisdiction** Reason – expertise/deference vs. consistency/predictability (if not PU, still defer)
* Risk of **Arbitrariness** Reason – if sup cts ex rev for inconsis 🡪 appellate; distort JR, arbitr’ss will become *result*
* Instit’l **Pluralism** Reason – who is in best position to rule; court subbing opinion eliminates DM autonomy, expertise
* **ROL** Reason – for JR, principle must be qualified
* **Policy** Reason – Lack of unanimity is price to pay for DM’ing freedom/indep given to members of ATs

**AVAILABILITY OF JR**

* **JR = exceptional remedy, about inherent jrdx of s. 96 courts to review Exec action via admin action; last resort**
* **Court have no inherent appellate jrdx over ATs – statute must provide RoA; if no express right, proceed by JR**
* **Authority for JR is *discretionary*** (*Domtar*: existence of conflict in dcns of AT not indep basis for JR)

**Public Function Test (JR Threshold Test)**

***McDonald v Anishinabek Police Service* 2006 CCEL** **– is DM a public actor?**

**-Only public bodies are subject to JR in admin law** (not ltd to bodies created by stat, extends to those created by ex of PP)

-FN Const w/ APS had sex misconduct claims against him during training, emplmt cond’l on course, expelled from grounds

-Is admin body ex’g **public function** or does dcn have **public law conseq’s**? 🡪 If yes, DOF applies and dcn subject to JR

* **Are chief’s actions public and thus subj to admin law/JR/DOF?** 🡪 Non prerog power but body may still be ex’g gov function, use **criteria**:
  + The tribunal’s fuctions, duties and source of its powers and funding
  + Whether gov action created body or if but for body gov would occupy area: implied devolution of power
  + Extent of gov’s direct/indirect control over body
  + Power over public at large (vs. only ppl who consensually submit to its jurisdiction)
  + Nature of body’s members and how they are appointed
  + Nature of board’s decisions – what kinds of actions does it take? DO they seriously affect indiv rts/interests?
  + Do constituting docs/its procedures indicate DOF owed
  + Does rlnsp to other stat schemes/parts of gov = body woven into gov
* If answer YES to factors, body fulfilling gov function, is **subject to JR**

1. **Prerog writs** available to supervise gen machinery of gov even if not constituted by stat power
2. **IF** DM fulfills **public function** or if DM’ing has public law conseq’s
3. **THEN DOF applies *and* dcn subj to JR** (gets to rev procedures in McD’s dism’l, if errors, court can remedy)

**All Adequate means of recourse exhausted**

***Harelkin v University of Regina*, 1979** - **must exhaust all internal appeal routes before proceeding to JR**

-Student was asked to discontinue studies, unclear if due to GPA or MH, skipped Senate tried to go straight for JR

-Majority (Beetz): Courts should not use discretion to promote delay/expenditure unless there s no other way to protect right

-Req’t for JR: **Have exhausted all means of recourse**; FACTORS in to consider in deciding to ex JR:

* Proc on appeal; comp of Senate; powers/ex by non pro body; more likely to “re-try” case, burden of prev fdgs
* Efficiency, expediency, costs 🡪 protect **procedure, efficiency 🡪 JR should serve public law purposes**

-Dissent (Dickson): More sympathetic to H, concerned re: *capacity* of Senate (rem = ?); factors = delay, nature of error, capacity of remedial body, RoA to courts vs. stat trib or admin officials, alt’ve rem, convenience, adequacy

\*Once all internal routes are exhausted there are **2 routes for accessing court**

* Statutory Right of Appeal
* Judicial Review

\***Reasons to refuse JR**: Adequate alt remedies (claim premature), claim’t caused undue delay, mootness, lack of stdg/clean hands

**Private remedies & concurrent jurisdiction**

***Canada (AG) v TeleZone Inc*, 2010** – limits *Grenier* principle (first invalidate/quash, THEN claim $)

-Service provider Ks, to be 6, only 4, T not one of them, filed breach of K, neg, UE, comp (didn’t challenge dcn itself)

-Tactical dcn not to challenge dcn itself (public law rem = quashing/send back, high bar of unreasonableness) – priv law 🡪 $$

-AG said claim was **collateral attack** on dcn (barred: s. 18 of *FCA*) – said T had to first get dcn quashed, THEN claim $ (*Grenier*)

-**AtJ and JR**: AtJ requires redress via procedures that minimize unnec’y cost/complexity, that claimant be able to pursue chosen rem *directly*, to greatest extent *w/o proc’l detours* (purpose of JR = quash invalid dcn, why go through that if you want priv rem?)

-Parliament didn’t intend FC to have excl jurisd for JR, and esp not re: priv law rem’s – up to T where they want to pursue matter

* **May pursue priv law rem in Prov Sup Cts which have *concurrent jrdx* w/ FCs for fed authorities**
* **If seeking priv remedy and happy to let fed admin dcn stand, no principled rsn to have to go through JR before**
* **Parties do *not* need to seek JR before they can bring priv law act’n for dmgs (no viol of rule agst collateral attacks)**

-Nature of JR (priv vs pub functions)

* Priv law directed at righting wrong via compensation
* Pub law principles directed at legality, rsnblnss, fairness, good gov’ce, RoL, adh’ce to Con, efficiency
* Discretionary nature of supervisory jurisd in pub law reflects this diff orientation

**Remedies: Access to JR Decision flow chart 🡪 Challenging Admin Action**

* Are you **barred** from prcdg b/c of **standing, mootness, justiciability, limit’ns, delay, unclean hands**, etc.?
  + If yes 🡪 The end
  + If no:
* Is DM exercising **private or public function**?
  + **Private** 🡪 Is there conn’ to public auth’y or ex of some pub function?
    - If no 🡪 JR not available
    - If **yes** 🡪 Is **decision final**? (ATs can change their mind up to final dcn)
      * If no 🡪 Obtain final decision (usually)
      * If **yes** 🡪 Have you **exhausted all internal & external adequate remedial routes?**
        + If no 🡪 exhaust them (normally)
        + If **yes** 🡪 is it fed or prov authority?

Select level: check applicable **stat procedures**, acts, rules of court

Apply: **Dcn to grant JR at discretion of court**

* + **PUBLIC** 🡪 Is **decision final**?
    - If no 🡪 Obtain final decision (usually)
    - If **yes** 🡪 Have you exhausted **all adequate internal/external remedial routes for challenging dcn**?
      * If no 🡪 exhaust them (normally)
      * If **yes** 🡪 is it fed or prov authority?
        + Select level: check applicable **stat procedures**, acts, rules of court

Is there a **stat right of appeal?** (Appellate courts have no inherent appellate jrdx over ATs, must be granted in ES: *Medora v Dental Society*)

As of right or leave req’d? Is stay of prdgs auto or must apply?

Apply: **Dcn to** **grant JR at discretion of court**

* + Caution 🡪 Even if DM ex’s pub function, examine to see if it operates at considerable remove and therefore is not part of machinery of gov

**PROCEDURAL FAIRNESS**

The **DOF** entitles individuals affected by admin decision to:

1. **The *right* to be heard (*duty* to hear other side)** AND
2. **The *right* to an impartial and independent hearing (*duty* to be impartial/unbiased)**

* **Fairness = CL concept**, may be limited/**ousted by legislation**, subject only to *Charter* compliance, courts require specific legislative direction before concluding this occurred
* If statute silent, courts presume **legislature intended** proc’l protection to apply (CL DOF supplements existing stat duties, fills gaps where none exist)
* Content of DOF informed by **context** of dcn (duty may be satisfied by diff protections in diff contexts)
* S. 7 of *Charter* provides **Con basis** for proc’l protection, but this right applies in narrower range of circs than DOF

**Two Qs arise when JR app brought alleging breach of DOF**

1. Has **threshold test** been met? (Determines if DOF is owed – DOPF on every pub auth making dcn aff’g RIPs: *Cardinal*)
2. If so, what is **content** of DOF? (Determines what DOF requires in circumstances – 5 factors weighed: *Baker*)

* Dcns re: threshold/content of DOF made on **Correctness std** (if not, subst’ve dcn remade in acc’ce w/ appropr proc’s)
  + Remedy = quashing (usually *certiorari* + *mandamus* 🡪 quash/send back w/ direction re: PF owed)
* Order quashing dcn for breach of DOF does not in theory affect substantive decision made subsequently; only means dcn must be remade w/ approp proc’l protection in place
  + BUT, success on app for JR on DOF grounds gives app another chance to get preferred subst’ve outcome

**1. DUTY TO HEAR THE OTHER SIDE 🡪 *Audi alteram partem* principle**

**BACKGROUND –** Prior to *Nicholson*, DOF applied only when nature of body was quasi/judicial

***Nicholson v Haldimand Norfolk (Regional) Police Commissioners*, 1979** – beginning of modern era/modern CL dev’t

-PO dismissed w/o notice, no hearing, no RoA (18ms short of gaining stat rts); argued he was owed PF

-Laskin (majority): Can’t claim same proc’l protections as constable but should be treated **fairly**, not arbitrarily

-Martland (dissenting): No duty to explain, no breach of any legal duty (just matter of courtesy)

-**As general CL principle, DOPF lies on every public authority making an admin decision (that affects rights, privileges or interests of individual: *Cardinal*);** procedurally unfair/arbitrary dcns by gov lack force of law and are reviewable by courts

* Legislative exemption: DOF does NOT apply to dcns of legislative nature: *Re Canada Assistance Plan (BC)*
* Policy exemptions also exempt (political in nature, subject to political accountability): *Martineau v Matsqui*

-Includes/requires 3 common components in PF cases: **Notice, Need for fair hearing/Reasons, Opp to state case/make reps**

***Cardinal v Kent Institution*, 1985** – **Threshold Test;** hostage taking at prison🡪admin seg (rem sought = *hc* release to gen pop)

-**At CL there is DOPF upon every pub auth’y making admin dcn NOT of leg’ve nat, affects rights, priv’s, or intrsts of indiv**

-DOF may be suspended/abridged in event of **emergency** 🡪 no req’t of prior Notice or Opp to be heard req’d by DOPF b/c of emerg circs of case (Director had DOPF in ex’g auth’y under Regs but content less in emerg) 🡪 see below Exceptions

-BUT, b/c of serious effect of dcn on As, PF req’d Dir inform them of reasons for dcn, give them opp to make reps re: reasons (not enough to say they knew of dcn, entitled to know *why*)

* **Denial of right to fair hearing must *always* render dcn invalid** (RtFR = indep, unqual’d right) regardless of whether reviewing court concludes hearing would have resulted in diff decision

-Existence of **general duty** to act fairly on part of public DM body depends on consideration/existence of 3 factors:

1. Nature of decision to be made by admin body
2. Relationship existing b/t that body and individual
3. Effect of decision on individual’s rights

***Kane*** 🡪 In interpreting **K of employment**, it will be **presumed that parties intended PF to apply**; will take explicit or clearly implicit provision to contrary to override this presumption

**EXCEPTIONS/LIMITATIONS TO DOF – only applies to DM’g process, *final* dcns** (*usu* NOT investig’s, prelim dcn, etc.)

**The DOF does *NOT* apply to:**

* **Leg’ve dcns** or f’ns 🡪 Underlying rationale = govs elected to make policy dcns, must be allowed to do so, provided they comply w/ relevant Con req’ts; **Exc:** DtC/A incl strat DM’g, clearly policy BUT rt ltd to DtC *bands* not indivs: ***Haida***)
* ***Re: Canada Assistance Plan (BC)***: Rules governing PF do NOT apply to body exercising purely leg’ve f’ns
* ***Authorson***: DOPF does not apply to leg’ve dcns/functions due to separation of powers principle
* **Cabinet/ministerial decisions** if they can be characterized as legislative in nature:
  + ***Canada (AG) v Inuit Tapirisat***: Cabinet/ministerial dcns that are leg’ve will be exempt from DOPF
    - While DOPF need not be express, it will not be implied in every case; Q of construing stat scheme as whole to see if legislator intended principle to apply
    - Here discretion of GiC complete provided he observes jurisd’l boundaries imposed by statute – no need to give reasons, hold hearing, etc and it is NOT function of Court to decide if appeal desirable, only if req’ts of statute satisfied
    - Rs tried to characterize GiC as quasi-adjudicative in nature to get PF (want disclosure, right to respond)
      * NO: Estey J says this is leg’ve action in purest form (public policy – no PF)
    - Line b/t leg’ve and admin functions not always easy to draw but where Exec branch has been assigned function previously performed by legislature and where subj matter NOT indiv concern/right unique to petitioner, diff considerations may arise
    - Note: In this case, Cabinet treated as though it were Parliament or legislature
      * Quasi judicial in form but legislative in content (vs. *Homex*) – how ex’g powers = what matters
  + ***Re: Canada Assistance Plan (BC)***: Purely min’l dcn on broad gds of pub policy will typically afford indiv NO proc’l protection (incl LE) and any attack upon such a dcn will have to be founded upon abuse of discretion; similarly, pub bodies ex’g leg. functions may not be subj to judicial supervision
    - Note: In this case, purely ministerial decisions were treated as if made by Parliament/legislature
    - Sopinka: no PF available to prov of BC; gov not bound by undertaking of predecessor, cannot restraint sov of Parl, can’t restrain Exec from introducing legislation
  + In pursuing policy agendas through leg’n, Cabinet will not be subj to DOF (*Ref re CAP*, *Wells v Nfld*)
* **Subordinate Legislation** – made pursuant to exec auth, democ’c accountability minimal (less concern re: jud’l interf’ce)
  + **Exception to Exception**: ***Homex Realty v Wyoming (Village)***: **Passage of municipal bylaw IS subject to DOF** b/c it was clear that motivation for its passing was ongoing dispute w/ developer – village not permitted to couch actions in form designed to oust app of DOF; substance more imp than form where leg’ve exemption concerned
    - Legislative in form but quasi judicial in content/function (vs. *Inuit*) 🡪 DOF applies (how ex’g powers)
    - **Munic bylaw may be subj to DOPF in circs if it appears bipolar rather than polycentric**
  + **GiC Orders and Regs**: ***Cdn Soc of Imm Consultants***: Where impugned enactments are authorized by statute/validly came into force, rules of PF will not apply (pol’l nature of leg & pol DM’ing; POLYCENTRIC) unless it is an egregious case (abuse of discretion, bad faith, etc.) warranting court intervention to uphold ROL; **DOF doesn’t apply to polycentric policy dcns** (even though aimed at 1 body, NOT indiv, still leg’ve in nature)
* **Policy Decisions and Decisions general in nature**
  + ***Wells v Newfoundland***: New leg’n eliminated W’s position; gov can K him out of job but can’t legislate out dmgs – **policy dcn not amenable to JR but can’t avoid K**; W entitled to $ for breach of K (F’d by intro of leg)
    - Leg’ve DM’ing (passing of 1° leg) not subj to DOF; Leg’s subj to Con req’ts for valid lawmaking but w/in those boundaries they can do as they see fit (subj to review only by electorate)
    - **Wisdom/value of leg’ve dcns subj only to rev by electorate** (no PF owed, but still have priv law rem)
  + ***Martineau v Matsqui***, ***Imperial Oil***: Policy or “purely min’l” dcn on broad gds of pub policy will typically afford indiv no procedural protection (political in nature, subject to political accountability):
* **Public office holder employed under K**
  + ***Knight v Indian Head School Division No 19***: **DOF does NOT apply to pub off holders employed under K** 🡪 must negotiate PF in K (none in law; not stat’y, not ex of pub power when dismissing)
    - Majority (L’H-D): Dismissal proc cannot be arbitrary, only put to legit use; pub has interest in proper use of delegated power by public bodies; general CL right to PF exists autonomously of any statute and may be implied by court; **every admin body is “master of its own procedure”**
    - **PF applies to final dcns made by pub auth’s w/ stat or prerog powers (Notice + reasons + hearing)**
      * If “at pleasure office”, employer can terminate for mere displeasure
      * Gov empl’rs must still abide by stat and CL notice stds for term’n that are *w/o cause*
      * Reinstatement not remedy unless specified in K; **no DOF unless specified in K**
    - Many admin bodies req’d to assume duties trad’lly performed by leg; distinction b/t “dcns of leg and gen nature” and “acts of more admin and specific nature”
    - Dissent – picked up in *Dunsmuir*
  + ***Dunsmuir***: Where pub employee empl’d under K of emplmt, regardless of status as pub off holder, applicable law gov’g dismissal is **law of K**, not gen principles arising out of public law (overrules *Knight*: where pub emp empld under K, regardless, K governs; only applies where there is public office); re-inst’t not rem unless in K
* **Emergencies**
  + ***Cardinal v Kent Institution***: When there is emerg situation, you may legit’ly not provide PF; b/c of special nature and exigencies of process of prison admin, should not be unduly burdned by unrsnbl proc’l req’ts (in this case, no req’t of prior notice or opp to be heard req’d before dcn to impose seg)

**CONTENT OF DOF – *BAKER***

-*Baker* marks shift from NJ to FAIRNESS as contextually understood min “floor” of duty (Ct may go to max as in *Singh*)

-PF = **participatory** right entailing:

* Open and appropriate procedure
* Opp to put views and E forward fully
* Governed by principles of democracy and ROL

-**SOR in PF = *Fairness***; **admin bodies masters of own procedures = principle of deference**

-**PF = jurisdictional**, viol’n can be quashed for stepping outside jrdx; procedures need only be **adequate, not optimal**

**1.THRESHOLD:** There is gen CL principle (DOPF) lying on every **public authority making admin dcn** not of leg’ve nature, which affect *rights, privileges or interests* of indiv that trigger judicial consideration of DOPF: ***Cardinal*** (Le Dain J)

* **Basic components**: Notice, make reps, need for fair hearing (*Cardinal*, rearticulated in *Sparvier*)
* **Check statute**: Can provide for, remove, or be silent on PF 🡪 can use CL to *add* in, but not take away (e.g. if statute removes PF & is valid stat regime, then will prevail over CL) (*Ocean Port* – allowed for sub delegation of power, less PF)

**2.CONTENT:** DOPF applies to H&C dcn; what is *content* of DOPF? *NOTE*: Breach of DOPF not protected by PC, = jrdx’l, quash

\*Fundamental Q = in circs did person have mngful opp to present case fully/fairly? What particip’y rights were rcvd? More due?

\*\***Look to STATUTE:** Does it ***remove, provide for, or be silent*** on PF?

***BAKER* FACTORS: 5 factors to be** ***weighed/balanced*** to determine content of duty of PF once *Cardinal* threshold met:

1. **Nature** of decision, process followed (consider process, function, nature of AT)

* Admin, discretionary, reg’y, polycentric; mixed fact/law as in *Baker* 🡪 **less PF** (more def to DM, its procedures)
* Adjud’ve/jud’l, crim, indiv; disputes b/t parties; where *Rts* (vs. Is or Ps) involved (// Cts) (*Knight*) 🡪 **more PF**

1. Nature of **statutory scheme** and terms of review

* Exemption/exception to stat scheme, as in *Baker* 🡪 **Less PF** (already asking for special treatment)
* No stat appeal procedures (i.e. closer to final)/dcn determ’ve 🡪 **More PF**; existence of appeal favours rsns req’t
* Prelim vs. final dcn 🡪 more PF for 2nd/final level of proceedings (if imp rts at stake, may attach to prelim)
  + The less final the decision, the less PF owed
* Proc’l safeguards elsewhere in act/regs 🡪 More PF (leg intent to provide increased PF)

1. **Importance** of decision to individual(s) affected (*considered a significant factor* – esp if CHARTER rt involved)

* Greater imp’ce 🡪 more PF (employment: *Blencoe*, *Kane*; SOP: *Suresh/Singh*; rep: *Blencoe*; Children: *Baker*)
* Balanced against intrsts of DM and def toward selected proc.; highly discretionary? 🡪weighs agst indiv intrst
* If **s. 7** LLSOP engaged (*right*), applies even if stat ousted CL (*Singh*), cred’y issue w/ serious import 🡪 more PF

1. **Legitimate expectations** of person challenging dcn (e.g. may arise out of conduct of pub off’ls via reps, promises, undertakings, or out of past practice/current policy: *Mavi*;guidelines re: proc.; BIOC princ – ratified but not incorp’d)

* Enhanced *procedural* protection only; doesn’t get you much PF, usually just *more* procedure
* ***Canada (AG) v Mavi***, 2011: (Binnie) Where gov officials make reps to indiv re: admin process that gov will follow, and reps give rise to LEs that are **clear, unambig, unqual’d**, gov may be held to word if reps proc’l in nature, do not conflict w/ DM’s stat duty (only for procedure, *not* outcome); proof of reliance not req’d
* ***Ref re: CAP***: Was there **LE** that fed gov would not intro amending leg w/o consulting prov? Could feds amend w/o consent of prov of BC (*process* leading to dcn – consultation may be legally enforceable)?
  + Where **gov off makes reps** w/o scope of auth to indiv re: admin process that gov will follow and reps giving rise to **LE** are **clear, unambiguous and unqual’d**, gov may be held to its word as long as reps **proc’l in nature**, do not conflict w/ DM’s stat duty
  + Doctrine of **LE does *not* create substantive rights**; but DOPF didn’t apply in this case (leg’ve exemp)
  + Sopinka: **Consent is right to substance that “controls” or FETTERS dcn, cannot enforce using PF**

1. **Respect for agency** **expertise** in determining/following agency’s own procedures (e.g. 1000s dcns/year =very expert)
   * + Statute confers ability/jurisdiction to determine own procedure 🡪 Less PF (more respect/def for DM’s choice)
     + AT has expertise in determining appropriate procedures 🡪 Less PF (*Kent*)
     + Polycentricity, efficiency concerns 🡪 min rsns req’t; rsns more likely req’d if: signif conseq’s, stat RoA, Con rts
     + DM will have sup knowl of its needs and needs of comm’y it serves

* General Rule: Leg intends DOF to apply unless clear stat lang/nec implication demands contrary; READ STATUTE, check overarching prov codes setting out procedures (BC *ATA*)
* Note: PF was owed, but content low/met in *Baker*

**COMPONENTS OF DOF 🡪 Basic minimums: Notice, fair hrg, opp to make reps** (*Nicholson*, reaffirmed in *Sparvier*)

-***Baker***🡪 Affected persons should have opp to present case fully/fairly, have dcns aff’g rights, intrsts, priv’s made using fair, impartial, open process, approp to stat, inst’l and soc’l context of dcns

-***Mavi*** 🡪 Content of DOF varies w/ circs; overarching req’t is fairness; (also LE re: gov off reps re: procedure)

**Notice**

-Gen rule: Notice must be adeq in all circs to afford rsnbl opp to present E/argmts, respond to E/argmts of opposition

-Ongoing duty (arises prior to dcn, continues throughout DM’g, must be kept apprised of rel issues during hrg: *Matsqui*)

* Who proposes to make dcn; what is its nature; when/where/why/how will dcn be made?
* Was notice provided timely in sense that it provided adequate time to respond?
* Did N provide sufficient info to allow informed response?

**Disclosure**

-DOF satisfied if party has sufficient info to make informed submissions re: partic matter at issue (entitlement)

-Duty to disclose can be adapted/ltd by needs and/or rights of partic auth’s/indiv’s: info can be vetted by court to determine relevance and materiality (*Suresh*); may be disclosed only to counsel, w/ limiting instructions re: dissem’n, or court can recommend special advocate (as in *Charkaoui*)

-*Stinchcombe* principles of crim disclosure do NOT apply in admin context, but must still know case to be met (*May v Ferndale*)

**Oral Hearings**

-Often requested, seldom req’d unless cred at issue; context-spec; usu not nec to reach inf’d dcn; good rsns NOT to grant ($, delay)

-***Singh v Minister of Employment and Immigration*** (1985), ***Agraira***

* OHs not always req’d; but, where **credibility** at issue, fundamental justice requires OH
* Interests protected under s. 7 so imp that OH gen’lly req’d when they are engaged; PF is a POFJ
* E/o in s. 7 includes ANY person physically present in Canada, including non-citizens

**Right to Counsel**

-***BC (AG) v Christie***:There is no general Constitutional RtC in admin proceedings

- ***New Brunswick v G(J)***: Where depriv of L,L, SOP at stake, POFJ may req counsel in admin context; may be subj to lmt’ns

**Right to call E and C-E Ws**

-Normally part of right to OH, BUT right is not absolute; parties must be afforded rsnbl opp to present their case

-E.g. BC *ATA s*. 38(2) provides right to C-E while permitting ATs to limit exam’n and C-E to what they consider sufficient in circs

**Timeliness and Delay**

-***Blencoe v BC (HRC)***: In some circs, delay in admin process may rise to level of depriv of lib or SOP under s. 7, which would result in viol if depriv not in acc’ce w/ POFJ 🡪 **Delay may result in breach of PF; remedy = order for expedited process** (mandamus, rather than order a stay)

**Duty to give reasons**

-***Baker*** est’d ltd scope duty: rsns req’d if dcn has imp signif to indiv or if stat appeal process exists (justification); discretion for cts

-***Catalyst Paper*** 🡪 Municipal bylaws do NOT require rsns b/c rsns are political debate

**REASONS REQUIREMENT**

***Newfoundland Nurses’*** 🡪 Rsns part of PF (presence/absence) and substantive review (adequacy)

* + DOPF does *not* require, as gen rule, reasons; but if provided, must be *sufficient* (rsn’ss analysis); low threshold for rsns
  + When stat contains RoA, need to know reasons; inadequate rsns don’t help w/ internal (or external if JR) review – need *something* to appeal; rsns must be read together w/ outcome, show if result falls w/in range of poss outcomes

*When does DOF* ***require that AT give reasons*** *for decisions?*

* Check **statute**/proc’l code for rsns req’t (if rsn req’d by statute, demand them!)
* If none given, no stat req’t, go to CL, apply *Baker* factors to determine **content** of DOPF
* If duty to give rsns exists and rsns nec, NO DEFERENCE owed to AT in choice not to give rsns (DOPF = fairness)
* **SOR = *Fairness*** (like correctness): *Khela*
* **Remedy = Quash** dcn (like any breach of PF), send back for re-determ’n w/ reasons (strategic: is this what you want??)
* Reasons further public conf, account’y & transparency in DM’ing; satisfy princ’s of democ, ROL, acc’y, good/resp gov

***Mission Institute v Khela***, 2014 – **SOR for PF = FAIRNESS** (not “correctness”)

-Transfer of fed inmate from med to max on emerg/invol basis after stabbing/intel; K got ltd doc’n re: transfer, makes *hc* app

-Issue: Can BC sup Ct review/examine rsnbl’ss of dcn or must it be done in Fed Ct on JR? SCC does NOT examine rsnbl’ss

* Sup Cts are entitled to review inmate transf dcn for rsn’ss on app for *hc* w/ certiorari in aid, may also rev transf dcn for PF

-PF: what did he receive as PF?

* **Reasons** (sheet w/ warden’s dcn/summary)
* Chance to **respond** (ask for secur. rpt, how W made dcn; opp to challenge dcn in writing)
* Got doc entitled to **notice**

-Was PF received enough?

* Threshold met: Indiv right affected (freedom/liberty) – no need to engage w/ case law, it’s fed prison, = pub auth
* Content, applying *Baker*:

1. Nature of decision: Dcn non-adj’ve (low PF), involves discretion (low), emerg dcn (low)
2. Stat scheme: Entitled to make reps, DM must give *all* info considered, dcn final, exemptions for discl; discretionary (deference); provides for *more* PF than CL
3. LEs: Grounded in statute; K entitled to have court enforce req’ts on warden if she did not abide – did she?
4. Agency Expertise: Lots of discretion in procedure; warden = expert

-K owed high PF, cond’ns on DM in stat NOT met 🡪 dcn unfair/unlawful; DM ordered to improve proc’s; rem = *hc*,return to med

-**SOR** for **PF** = ***Fairness*** (LeBel J) 🡪 Warden entitled to ***margin of deference*** (ALWAYS apply *Baker* FW even if RC didn’t)

**2. DUTY TO BE IMPARTIAL/INDEP/UNBIASED 🡪 *Nemo judex in sua causa* principle** (see also: *Sparvier, Matsqui*)

**Independence, impartiality, bias (*nemo judex in sua causa*) –** not as strict for ATs as for JI (*Ocean Port*)

* + **Indep**: Inst’l autonomy, aims to secure conditions needed for achvg impart’y (inst’l relations)
  + **Impart’y**: Abil to make dcns w/o improp infl/J w/ open mind (state of mind/att to issues/parties)
  + **Bias**: Rsnbl perc of part’y (undue pref); percep of partiality twd partic outcome in DM (trib or J) (indiv subj jgmt)
* Look to **statute** or relevant **procedural code** to determine leg intent re: independence!
  + **RAB**: Would informed person viewing matter realistically/practically having thought matter through conclude (*Matsqui*)
  + **Discretion**: Law does not dictate specific outcome; DM has *choice of options* w/in stat boundaries; granted by statute; discretionary DM’ing must be made within bounds of jrdx conferred by statute, in acc’ce w/ RoL, principles of admin law and fund’l values of Cdn society, principles of *Charter*; accorded **deference**
  + As matter of practice bias must be brought to attn. ASAP (if you sit on it, could be denied JR)
  + 3 Obj’ve structural conditions necessary to guarantee **independence** (*Valente* principles):
* **Sec’y of tenure** – Tenure (only for cause) vs. “at pleasure” (gov not legally prevented from firing for dcns: *Keen*)
* **$ Security** – Gov pays Js but can’t alter pay for arbitrary rsns (disagrmt w/ dcn); Js have fixed salary under Con
* **Admin (or inst’l) control** – Budget alloc’ns; div of resp’y b/t judiciary/branches; admin control inst’l (vs. indiv)

***Canadian Pacific Ltd v Matsqui Indian Band*** – **Judicial vs. Admin Independence**

-Q: Whether apptmt to FN tax AT gave rise to RAB b/c band mem’s apptd w/o $ sec’y/sec of tenure, exempt from tax scheme but benefit from levying higher taxes

-**CL Test for RAB**: What would informed person, viewing matter realistically/practically having thought matter through conclude?

-RAB test/*Valente* principles must be applied in light of **functions** performed by AT at issue; **Req lev of inst’l indep depends on nature of AT, interests at stake and other indices of indep such as oaths of office**; grounds for RAB must be **substantial**

**\*\*Generally ATs do *not* attract Charter or quasi-Con guarantees of indep** (*Matsqui, SK Bd Labour*)

|  |  |
| --- | --- |
| **Lamer CJC** | **Sopinka J** (ends up as SCC view eventually) |
| Princ’s of NJ apply to Band tribs, are flexible | Agrees |
| Context of abo self-gov does NOT change force of princ’s; members of ATs perform adj’ve f’ns not unlike court | Disagrees; different approach to stat interp |
| Trib mem’s appear to lack suff indep as struct’l cond (mem’s apptd by those who oppose claim); struct raises RAB on its face | Defer app of test until have oper’l knowl (context imp); cannot apply princ’s (no facts on ground yet) |
| Discretionary apptmt by Band Chief w/o prot’n from arb dism’l | --- |
| No security of tenure | --- |
| No security of remuneration | --- |
| Allegations of lack of impartiality/bias are speculative | Agrees |
| ATs not adequate alternative remedy | ATs ARE adequate alternative remedy |

***Ocean Port***, 2001 –Do **“At pleasure” apptmts provide enough tribunal indep?** (Second wave re: indep; AT w/ adj’ve f’n)

-Std of indep much lower for admin context than jud’l (Con distinct’n b/t courts and tribs); no Con guar of AT indep even if adj’ve

-**AT exercising adjudic’ve function does NOT require same lev of indep as court** (cannot use unwrttn princ of JI to argue this)

-Consider: APAs problematic if DM to ex power w/o fear of reprisal –sets bar high for counsel (easy to argue RAIB, hard to prove)

- **No freestanding Con guarantee of AT indep (BRIGHT LINE)** to guar SoT; **Intent of legislature** to prevail (re: level of indep)

* Jud Indep protects jud’y from inter’ce *by Exec*; vs. ATs – not intended to be sep from Exec!
* ATs created *for purpose of implementing Exec policies*; f’n/status as ext’n of Exec = **° of indep TBD by legislature**
* AT indep: Goal just to ↓ inapprop intrf’ce/infl (not to protect from interference from Exec as w/ Jud Indep)

-Stat presumptions:

* If **stat silent**, courts infer leg intended PF, will **import PF** safeguards demanded by CL
* If **PF clearly ousted** by express stat lang (as CL princ, it can be), **statute will prevail**, unless Con challenge made

\*\*NOTE: Adj’ve ATs span Con divide; *seems* rational to give them some ° of indep in acc’ce w/ their exp’se

\*\*Up to P/leg to create ESs fostering indep DM’g when leg’g for various ATs; *OP* impl’y enc’s leg PMs to consider f’n of AT (in some circs, use of jud’l cond’ns of indep may be useful – PMs should be open to this)

**BC *ATA* & Tribunal Independence** 🡪 Guarantees AT indep in unique way for AT w/ adj’ve f’n, re: security of tenure

**-S. 2(1):** Chair of trib may be apptd by appt’g auth after merit-bsd process to hold office for initial term of 3-5yrs

**-S. 2(2):** Chair may be reappointed by AA for add’l terms of up to 5yrs

**-S. 3(1):** Mem other than chair may be apptd by AA after MBP/consult w/ chair to hold off for initial term of 2-4yrs

**-S. 3(2):** Mem may be re-apptd by AA as mem of trib for add’l terms of up to 5yrs

**-S. 8:** Appointing Auth may terminate apptmt of chair, vice chair or mem *for cause* (novel across Canada)

***Keen*** 2009 🡪APAs valid for ATs; Gov not prev’d from removing mem’s of ATs for dcns they make; no Con guar of AT indep

***SK Fed of Labour v Sask***, 2010 SKCA – Challenge to APAs (new SK gov, GiC replaced Labour Bd)

-Board is adjudicative; BUT, apptms/structure of admin bodies subj to political pressure, can counter what’s in statute w/o going to leg 🡪 Court doesn’t get involved (could jeopardize their indep) – There is permissible scope for political interference

-Leg presumed cognizant of existing CL, presumed (unless clearly stated o/w) not to legislate in derogation of pre-ex’g CL princ’s

-Very little indep guarantees re: apptmt/structure of admin bodies (even if AT very close to adjudicative)

-**When stat authorizes low PF, stat must be followed** (thrshld for proving lack of indep high)**, CL can’t oust 🡪**APPLY on exam

**Test for Individual RAB** (vs. close-minded test for policy-mkg/invst’y functions – diff E burden) – **same as for indep**

***Committee For Justice and Liberty v National Energy Board***, 1978

**Would a reasonable, well-informed person, having thought matter through, conclude that ADM is sufficiently free of factors that could interfere w/ ability to make impartial judgements?** (Recall *Baker* throughout)

* Not whether bias *actually* exists but rather whether RP would *perceive* it in DM’ing
* Onus lies on person alleging to raise issue before DM at *first available opp* and to adduce E to meet reasonableness threshold of “more than mere suspicion” (closer to smoking gun really!); **Proof on Bal/P** –**strong presump of impart’y**
* **Std for bias varies w/ context – nature/scope of DM’g proc derives content of PF, incl impartiality (balance *Baker*)**

**Four CL grounds exist to determine whether indiv DM has exhibited BIAS** (could be on any/all these grounds)**:**

1. Pecuniary or **material interest**

* Only direct/certain $ interests count (*Energy Probe*); if gain insignif/no diff than that rcvd by a/o, doesn’t count
* Statute may authorize *indirect* pecuniary interest (*Burnbrae Farms*); non pecun mat’l interest (e.g. house in *Obichon*)

1. **Personal relationship** w/ those involved in dispute (e.g. *Pinochet*)

* Incl parties, Ls, Ws, admin actors; is rlnsp close/current enough to pose threat to imp’y? Nec? Trib/cult context (abo)
* High E threshold, presumpt of impartiality hard to overcome (*Brar v Coll of Vets of BC*)

1. **Prior knowledge** or info about matter in dispute

* Mediation privilege may be directed by statute; stat could authorize multiple overlapping functions that may oust CL
* Courts focus on nat/extent of DM’s prior involvement (*Wewakykum*: Binnie as ex MoJ OK, not in litig in mat’l way)

1. **Attitudinal predisposition** towards outcome, i.e. prior, fixed view (*Chrétien, Nfld Telephone*)

* Test ***flex***, ranges in app from strict (courts, trib hrgs) to flex (Comm of Inq) to lenient (leg/policy invest’ve f’ns) depending on nature/function of DM; **highly fact dependent/contextual** (content, tone, body language)
* **Open Mind Test:** For more adj’ve ATs; for hearing/final stage; more *strict* test re: RAB
* **Closed Mind Test:** More leg’ve; more *lenien*t std; applies to pre-hrg comments, leg’ve DMs, municip’s
* **Multi-functional body may have varying stds dep on function** (more freedom re: fixed view @ invest/pol-mkg than at adj’ve stage if no Con contraventions: *Nfld Telephone*)
* Comments in dcn showing predisp’n twd outcome in spec case may give rise to RAB (*AB Teachers*)
* Exception: Municip’s🡪 *Old St Boniface*: b/c of nature/f’n of mun council, test for RAB is that councilor be DW’d for bias ONLY if est’d in fact that s/he had such **closed mind** on matter, any rep futile (leg’ve f’ns: low PF scrutiny)

**Open/Closed Mind Test**

***Nfld Telephone Co***, 1992 🡪 **strict RAB test** app’ble to cts/tribs for hearings and policy; same lev of neutrality as Js not req’d

**-Party alleging DQ’ing bias must establish prejudgment of matter in fact to extent that any reps at variance w/ view adopted would be futile** (statements by indiv mems of Council while may well give rise to RAB will not satisfy test *unless* court concludes they are expression of final opinion on matter which cannot be dislodged)

-Cory J on Composition and Function:

* Admin body may perform invest’ns, policy-mking AND adjudic’n **functions**: **variable stds of RAB dep on function**
* **Composition** can/should reflect society, *not just experts*; assume they will strive to be fair/think w/o bias; **opinion ≠ bias**
* **Spectrum**: Bodies may be afforded more freedom to hold fixed view during investigative or PM state than at adj’ve stage so long as there are no Con contrav’ns 🡪 @ invest’ve stage “closed mind” test applicable; @ hrg, higher RAB std applies
* **Std of impartiality expected of DM flexible depending on role/function of DM** (e.g. publ inq in middle: *Chrétien*)

***Chrétien v Canada***, 2008 FC – **Public Inquiries and DOF: Individual Bias 🡪 flex RAB** (rep at stake: easier E std, more obj’ve)

-Example of **personal bias** 🡪 attitudinal predisposition toward an outcome; in assessing std for RAB test, court should pay attn. to context/forum of DM’ing (publ inq’s are b/t leg’ve and jud’l function); Commisser prejudged @ invest’n, sufficient E for RAB

- **RAB test *not* subjective** 🡪 doesn’t matter if DM doesn’t think they’re biased, Q is how it *appears* to RP

**Institutional Bias**

***IWA v Consolidated Bathurst***, 1990 – **Full Board Meetings** (whether FBM re: policy before final dcn = breach of DOF – NO)

**-Use RAB Test (CL test same as for indep) for challenges to partic *inst’l* pract’s aff’g DOF** (bias from inst’l pract not person)

-Board statutorily entitled to determine own practice/proc (jrdx-conferring clause) + PC (= def b/c of expertise )

-FBM called by panel to discuss draft rsns of 3-mem panel; FBM incl mem’s of panel (both FT and PT), no minutes (**no record**), no vote, vol’t att’ce, dcn not binding on other panels, parties not notified or present (**no notice or opp to respond**)

-Gonthier J: **Test for indep = Freedom to decide acc’g to one’s conscience/opinions**, NOT absence of influence (pressure? NO)

-**FBM does NOT compromise indep of indiv mem and does NOT violate PF** (no E of infl/pressure, fettering, or that factual issues re-opened, consult = vol’y/not imposed) – N + opp to respond only nec if new grounds raised (o/w respect DM’s proc)

-Generally, use of FBMs will NOT breach principles of NJ if:

**1)** Discussions ltd to **law/policy**, NOT factual issues, and **2)** Parties given **opp to respond to any new grounds** arising from mtg

-Approp checks/bal’s for FBMs incl: not keeping minutes/att’ce, no vote, no req’t of consensus, att’ce vol’y:  app of sys press

***Geza v Canada (Min CIC)***, 2006 FCA – **Lead Cases –** use of 1 ref claim to make full E rec for all, mng lrg influx of Roma claims

-**2-part test for determining institutional RAB** (**systemic bias in substantial # of cases** – speculative in nature):

1. Considering # of factors incl but not ltd to: pot’l for conflict b/t intrsts of trib and mem’s and those of parties who appear before them, **will there be RAB in mind of fully informed person in** ***substantial # of cases***
2. If NO, alleg’s of RAB cannot be brought on inst’l lev; must be dealt w/ case-by-case re: *one* inst’l instance (**indiv**)

-Campbell J **(FC)**: E did *not* prove that perceived  in acc’ce rates was direct result of LC 🡪 even if direct result could be est’d, would not support alleg’n of RAB 🡪 if IRB mem’s approp’ly cite LC in deciding on merits of partic claim, no complaint; if they apply LC inapprop’ly, this does not contrib to fdg of RAB, it is simply erroneous DM’ing subj to JR

-Evans JA **(FCA)**: No ‘smoking gun’ but entire factual matrix would lead RP to find hearing panel biased, not acting indep, set aside dcn, remitted to Board diff’ly constituted for redeterm’n (not role of court to engage in systemic remedies)

-**Boundary b/t AT efficiency and bias, indicates RAB can arise from tot’y of E, as opposed to single, determinative fact**

**\*\*Multifunctionality: Overlapping functions (pros & J) gen not prob if sanctioned by stat in conf’y w/ Con (*Régie*)**

**CHARTER INTERSECTIONS**

**S. 7 POFJ and PF**

**Constitutional Sources of PF and scope of s. 7**

***Canadian Bill of Rights*, 1960**

-Quasi-Con; s. 1(a) recognizes indiv rt to LLSOP, enjymnt of prop, rt not to be deprived thereof exc by due proc of law (🡪 s.7)

-Every law in Canada supposed to conform to BOR (s. 2)

***Charter*, 1982**

-Con doc; ROL (preamble); s. 1 guarantees/rsnbl limits/justified in F&DS; s. 7 pulls in CL understanding of fairness, LLSOP

-Ss. 8-14: rights against 8: USS, 9: AD/I, 12: C&UT/P; 10: rts on arrest/det; application in s. 32 (Charter to gov, CL to pub auth’s)

**Application and Threshold: Source and scope/content of s. 7**

***Singh v Minister of Employment and Immigration***, 1985 – **Right** vs. **privilege** (cit’s have *r*t to stay in Canada, for non-cit, = priv)

-Leg’n specifically denied OH, but one was req’d by s. 7 🡪 if stat is explicit it stands, unless successful Charter argmt can be made

* **Charter can overcome clear legislation usually insurmountable obstacle to relief at CL**

-Content of s. 7: OHs not always req’d, but **where** **credibility at issue**, **fundamental justice requires OH (PARTICIPATION)**

-Proc’l flaws: In form, prcdgs non-adv’l but in reality Min “waiting in wings”; onus on claimant to prove Min wrong on Bal/P but eff’ve challenge imposs since IAB will reject app for redeterm if more than likely it won’t succeed (imposs to reconcile w/ s. 7)

-Interests protected under s. 7 are so imp that OH generally required when those intrsts engaged; PF = POFJ

-Wilson J: Judicial minimalism (not activism) – if PF *not* excluded by statute, we use CL (can’t import CL in face of stat direction)

* “Everyone” = everyone (i.e. e/o physically present in Canada) 🡪 s. 7 applies to ‘everyone’
* High watermark but **utilitarian considerations cannot outweigh rights!**

-3 Js 🡪viol of 2(e) PF in *BOR*; 3 Js 🡪viol of s. 7; new proc req’d to assess cred’y, OH req’d; limit not just’d; IRB created as rem

**CL Framework and Content**

***Suresh v Canada (Minister of Citizenship and Immigration)***, 2002 – Deportation to torture; s. 7 and PF

-Min procedures req’d in context of person facing deportation to torture under s. 53(1)(b): **disclosure, participation, and reasons**

**-Where *Baker* FW applied in s. 7 claim, may generate subst’ve duty to give rsns as POFJ 🡪 has to be PF*, even if stat ousts***

-Remedy: Proc declared unCon in this case – remedy = order for reconsideration w/ proper procedures

**Principle: Be informed of case to be met**

* Includes CIC memos upon which Minister’s decision is based
* Subj to priv or other valid rsns for  discl (if written by IHC = loophole for gov, classify as such, don’t have to disclose)

**Principle: Opportunity to respond to case presented to Minister**

* Person must be provided w/ materials being used against him/her; then affected individual provides written submissions in response (but no entitlement to OH, vs. *Singh*)
* Min must consider these submissions along w/ others (legal duty)

**Principle: Opportunity to challenge Minister’s info re: validity of decision**

* Present E showing presence not detr’l to Canada despite E of assoc w/ terrorist org
* Present E re: risk of torture; present E/submissions re: value of written ass’ces from foreign gov that it will not torture

**Duty: Give reasons**

* Min must provide *responsive* written rsns (Charter gets you more) that must articulate clearly why person considered danger to Canada’s security (subj to priv or other valid legal limits)
* Must be from person making dcn: Minister (vs. *Baker*: delegate)

**Section 1:**

* Valid obj’s do not alone justify infringements; limits not connected to obj nor proportionate to harm
* BUT extraordinary circs will justify deportation to torture (the “Suresh exception”)

**Right to State Funded Legal Counsel**

***G(J)*** 🡪 NB min of health sought to extend custody order, held that forced sep’n would have “serious/profound effect” on mom’s psych integrity/stigmatize her, **engaging her right to SOP**; POFJ req’d fair hrg which in this case **req’d C to provide legal aid** to parent (s. 7 infringement not easily saved under s. 1 b/c of signif of rts)

* Overarching POFJ: Before state can detain ppl for signif prds of time, must accord them fair judicial process

**Undue Delay**

-***Blencoe***:UD in resol of HR cmplnt could infringe s. 7 sec intrsts (stigma/imprmnt of psych integ of alleged O🡪high threshold

-***Wareham***: more lib appr to delay/AoP: features of welfare elig’y proc discourage apps, demoralize, cumul eff in ODSP proc = cause of delay; overall proc = infringement of POFJ

***Charkaoui v Canada (Citizenship and Immigration)***, 2007 – **S. 7 Analysis and Content**

-**Parliament need not create *perfect* proc’s**; Deference owed in assessing leg’ve choices in s. 1 (threshold met here, s. 7 violated)

-Reasonableness of security certificate based on *ep* and *ic* hrgs (PR inadm on gds of secur) – final, no JR

* *Ex parte* and *in camera* hrg w/ no discl (**s. 7** engaged: he could face det’n (lib), removal would threaten sec’y)

-Although security concern imp, scheme puts too much weight on it to detriment of fairness – need *tailored* disclosure

-Remedy = new proc’s but delayed decl of inval’y (o/w free bunch immed!) – Prlmt has 1yr to amend (Bill C-31 Spec Advocates) 🡪 person himself doesn’t get to know, but Spec Adv will know enough to make case

***Canada (Prime Minister) v Khadr***, 2010 – **Breach & Remedies** – Cdn ctzn overseas, affected by conduct of Cdn state off’ls

-K @ Gitmo, subj to torture by US off’ls, Cdns knew this when Q’ing him but still passed on info = viol’n of s. 7 rights?

-**Cdn off’ls acting in capacity as gov off’s *outside* Canada – Charter is attached to them and their duties under it**

* Canada responsible for pot’l s. 7 viola by agents’ actions, = sufficient connection

-No stat involved, rather ex of **prerog power** – courts can review but only narrow power (**deference**: PP = height of exec auth’y)

* FC, FCA ordered fed gov to request K’s repat’n as (s. 24) rem for breach of s. 7; SCC says no, for exec not court to decide
* SCC: Remedy: **under s. 52** (declaration of s. 7 violation) NOT s. 24 🡪 leave it to gov discretion as to how to respond) b/c not challenging legislation (so no *Oakes*) but rather prerogative power

**S. 7 POFJ/PF Decision Tree:**

* **Is this gov or body ess’lly fulfilling gov function? (***Cardinal***)**
  + No 🡪 Cannot review
  + **Yes** **🡪 Is gov action prescribed by law? (Go to statute)**
    - No 🡪 Cannot review
    - **Yes** 🡪 **Does gov action affect person?**
      * No 🡪 Cannot review (corp’s gen’lly don’t benefit from s. 7 prot exc in crim prcdgs)
      * **Yes** 🡪 **Does gov action appear to limit/infringe LLSOP incl non-citizen?**
        + No 🡪 End of review
        + **Yes** 🡪 **Is limit/infringement in acc’ce w/ POFJ?**

Yes 🡪 End of review

**No** 🡪 **How does procedure violate POFJ?**

**Can infrgmt be justified under s. 1?**

Yes 🡪 End of review (rare)

**No** 🡪 **What is appropriate remedy?**

**S. 52**: Decl that stat prov/admin dcn invalid

Is there rsn decl should be delayed?

**S. 24**: Approp and just in circs

And/or: **prerog writs**

BUT: Are there exc’l fctrs justifying rem **denial**?

**SUBSTANTIVE REVIEW**

**JURISDICTION = “law declared”;** may be protected by **PC**

**1)** Legal auth/power

**2)** Gen gov power to ex auth over ppl/things

**3)** Issues/areas over which stat auth has power usu conferred by statute

**4)** Scope of Ct’s inherent power to decide case/grant remedy

***Bell***

-**Prelim Q Doctrine**: Black man wanted TO rental, was told it was full, white GF told later it’s available, complaint to ONHRC, invest’n/can’t resolve, referred to Board of Inq 🡪 Issue: “self contained dwelling” not defined in statute, needs to be interpreted, decide if it applies to Bell 🡪 raises **jrdx** issue (define interp as prelim matter)

-SCC: ascertaining mng of “SCD unit” was ***prelim* to Q** of whether landlord had engaged in discrim contrary to HRC

-Even where PC present, court does not simply decide ADM asked wrong initial Q, moving out of jrdx into courts (interp of law)

***Metropolitan Life***

-**Asking the Wrong Question Doctrine** 🡪 if wrong Q, then outside your jrdx; LRB lost jrdx b/c of faulty rsng

***CUPE v New Brunswick Liquor Corp***, 1979 🡪 changed path of admin law for SOR – **Shift towards** **Curial Deference**

-Strike, CUPE complained liquor corp replaced striking employees w/ mngmt prohibited by Act, employers complained picketing union members also prohibited by Act, seeks JR; ruling for CUPE; 2 forms of **PC** in Act – very strong

-Multiple **interpretations** of “employees”; recog spec’zd nat of ATs, need for def; no single interp correct

-Dickson: **Old-style Jrdx** – what is/not jrdx’l often difficult to determine (Cts should be careful); spec’d nat of ATs, need for def

-**Jurisdiction re-cast:** More robust embrace of principle of deference: look at how Board interprets its jrdx, defer to agency’s interp/ability to interpret own statute 🡪 interp of lang in prov lies at heart of **specialized jrdx** of Board, Bd not required to be “correct” in its interp, in fact entitled to err and any such error protected from review by PC (allowed to ‘ask wrong Q’)

* **Privative clause protects admin body errors w/in their jrdx (unless PU) – interp is ex of jrdx = what leg intended**
* **Court should only interfere, by labeling as jrdx’l error, an interp of a provision that is so PU that it’s construction cannot be rationally supported by leg** 🡪 Curial Deference 🡪 short of PU? Cts should not interfere w/ dcn of ADM

***Pexim*** 1994 🡪 Shift from language of jrdx/PC to expertise/def for choosing SOR, clarified in *Southam*

-Even where no PC and is stat RoA, spec’n of duties req’s def to dcns w/in AT’s **expertise**

***Canada (Director of Investigation and Research) v Southam Inc***, 1997 – Creation of **3rd SOR**; imp’ce of **characterization**

-Comp Trib (special); purpose of Act = prevent monopolies, enc comp in market; Q = does S acquiring NPs in lower mainland raise monopoly concerns? Order to divest, 40 days of **hrgs**, 140pg **rsns**; S appeals (says =Q of fact, Rs say Q of law; SOR=?)

-**No PC**, there is stat RoA, membership of comp trib – experts, partly in law (4 FC TJs), econ, commerce

-**Iacobucci J:** **Expertise** drives decision: b/c of expertise (in law and other areas) needs std less intrusive than correctness 🡪 **reasonableness** ***simpliciter*** created/applied to comp trib (even if no PC**, expertise 🡪 def**; shift away from PC as main indicator)

* Qs of law = Q re: what is correct legal test
* Q of fact = Qs re: what took place b/t parties
* Qs of mixed law/fact = Qs re: whether facts satisfy legal tests

-**Factors suggesting deference**

1. Presence of **PC**, indic leg intent to confer final DM auth on ADM; granting excl jrdx, ousting ct prcdgs to set aside (full)
2. **Qs of mixed F/L**, esp those bsd on **balancing interests** – courts should be reluctant to re-examine/re-weigh E
3. Field **expertise** of ADM **(*most important*)** – Courts may be req’d to defer to skill/jdgmt of ADM; here **purpose of Act** was *policy based* (econ) and served better by experts (w/ econ jdgmt, app of comp is matter of trib’s expertise)

-**Factors suggesting more exacting review** (less deference)

1. Existence of **stat RoA** from decisions of ADM – indicative of leg intent not to confer final DM auth on ADM
2. Presence of **Js in an ADM** – suggests dcn is more adjudicative in nature

-**Unreasonable dcn =** not supp’d by any rsns that can stand up to “somewhat probing exam”; defect in E fdn (assump w/ no basis in E) or log’l process by which conclusiosn are sought to be drawn (contrad’n in premises or in invalid inf); vs. PU defect on face

-**PATENTLY Unreasonable:** Diff = immediacy/obviousness of defect (apparent on face of trib’s rsns)

*🡨 🡨 🡨 More Deference* 🡨 🡨 🡨 🡪 🡪 🡪 *More Scrutiny* 🡪 🡪 🡪

**PATENTLY UNREASONABLE REASONABLENESS CORRECTNESS**

**Legislative Signals re: DEFERENCE**

|  |  |
| --- | --- |
| **More Deference** | **Less Deference** |
| **PC** granting excl jrdx, decl of finality, ousting ct prcdgs to set outcome aside (full) | **No PC** (BUT expertise counts for a lot now) |
| **Finality clause** stating dcn final, binding on trib | **Stat RoA** (BUT scope may be broad or ltd) |
| **Prohibition** on jud’l prcdgs to set aside result | What if there is stat RoA but also leave req’t? |
| Restrict access to/scope of JR through **leave req’t** |  |

***Pushpanathan*** 1998 **– Consolidated factors for SOR into P&FA**; Ref claim, convicted trkg narcotics, excluded? No PC or RoA

-What is proper **SOR** to rev dcns of IRB? **P&F Q**: **Did leg’r intend Q to attract judicial def?** 🡪Assess, apply, weigh 4 factors:

1. **PC**: weighed against expertise as factor

* Ouster clause: full PC = compelling rsn for def to DM’s expertise; if partial/equivocal look to leg intent
* CL JR; Stat appeal: permits more searching rev (in this case: no PC, no RoA, leave req’t)

1. **Expertise**: Lack of expertise outweighs PC; assessed by courts relative to their own expertise; rel’ve exp’se most imp fctr

* Interpret ES: purposes, obj’ve, agency composition
* Specialized knowl of DMs: broad vs. court? Area generalist would know? Special procedures?
* Judicial skills/procedures – comparative assmt (e.g. HR dimension where Js more expert?)
* Elected bodies: Mins/delegates, SBs, municp’s; min’l dcns favour def b/c deemed expert in min area (*Baker*)
* Closer to leg? More def; closer to adjud’ve? Less def; **Polycentricity**: discretion🡪 def (el’d SB in *Chamberlain*)
* Pro disc comm = practicing Ls (and Js) but more expert than Js who are out of SCR (*Ryan*)

1. **Purpose of Act as whole and provision in particular**: Purpose and expertise often overlap

* Leg scheme in entirety using modern appr to stat interp
* Princ’s of **polycentricity** informs purpose (balancing mult intrsts, signif policy element) = jud’ restrt (**more def**)
* Disputes more **bipolar**/oppositional b/t discrete parties/interests = **less def**
* Whether rights/entitlements protected/affected; attend to vague, discretion-granting lang

1. **Nature of prob and lev of def**

* Q of law (less def at time, but now neutral/more) vs. Q of fact (more) of missed (neutral) or discretionary (more)
* “Pure” Qs of law have precedential impact or are narrowly jrdx’l; leg intent re: Qs of law, inters’n w/ expertise
* Generalized prop’n of law = correctness; discretionary power = reasonableness

**BACKGROUND**

**Pre-*Dunsmuir* (3 standards):**

1. **Correctness**

An incorrect decision is one that is different from one arrived at by RC (AT got it *wrong*)

1. **Reasonableness simpliciter**

***Southam*** – An unreasonable decision is one not supported by any reasons that can stand up to a somewhat probing exam, or if there is no line of analysis w/in given reasons that could reasonably lead AT from E before it to conclusion reached; requires inquiry into E foundation or logical process on which conclusion based

1. **Patent Unreasonableness**

***Ryan*** – PU dcn is one that suffers from serious/obvious defect; so flawed that no amount of def can justify letting it stand

***DUNSMUIR*, 2008 🡪 2 standards** – dismissal of D from civ serv @ DOJ, got sev’ce but insisted was owed DOF

-Made SOR analysis more coherent/workable (merged 2 def’l stds into one reasonableness std – from 3 to 2 SORs)

-Simplified selection of approp SOR by creating 2-step FW called SOR analysis to replace pragmatic and functional analysis

-Jud’l restraint re: phrasing s/t as jrdx’l (**corr**) – phrased Q as re: stat auth’y (does stat auth *x*?) subj to **rsn’ss rev**

**-Admin dcns concerning Qs of fact, mixed fact and law, law, and discretion, if authorized by statute, will be reviewed on a standard of REASONABLENESS unless this presumption can be rebutted** (// *Alberta Teachers’*)

* Reasonableness = rebuttable presumption; up to counsel to rebut via one of 4 grounds for correctness (see below)

-**Binnie J**: JR bsd on RoL, PC not *conclusive*, but is more than just another ‘factor’ – existence should presump’ly foreclose JR on basis of outcome on subst gds unless app can show PC, properly interp’d permits or there is legal rsn not to give it effect

* *Rational* doesn’t nec’ly = *reasonable*

-**Bastarache, LeBel JJ (maj):** Def = att of court and req’t of law of JR; def imports respect for DM’g process of adj’ve bodies re: facts and law; rooted in respect for gov’l dcns to create admin bodies w/ deleg’d powers; def is NOT blind reverence, subservience

-**Rsnbl’ss does NOT float on spectrum, takes colour from context**

**SUBSTANTIVE REVIEW – 2-step test (P&FA approach🡪SOR analysis –** crucial role of enabling statute): ***DUNSMUIR***

-Determining intensity of JR 🡪 4 **contextualized factors** to be *weighed/balanced* by reviewing J to determine SOR:

1. **Prior Jurisprudence?** Whether past cases have determined satisf’y degree of def owed to partic categ of Q: Y/N
2. **Contextual Factors to determine SOR** 🡪 using Modern Approach (*Rizzo Shoes*)
   1. Presence/absence of **Privative Clause** (presence = less deference)
   2. **Expertise** of DM (militates in favour of deference)
   3. Language/**Purpose** of provision in particular and Act as whole (if purpose = to exempt, more deference)
   4. **Nature of problem** in Q (i.e. determ’n of law, fact, discretion, mix 🡪 fact-based discretionary dcn = more deference)

-Jurisdictional issues🡪**Correctness** standard of procedural issues

-Errors of law 🡪 **Correctness** standard (RC not req’d to consider AT’s rsns: *Mossop, Northrop Grumman*)

**Correctness will apply to (*Dunsmuir*):**

1. A Constitutional issue (DOP, unwritten princ’s)
2. Q of general law that is BOTH of central importance to legal system as whole AND outside specialized area of expertise
3. Drawing jurisdictional lines b/t 2 or more competing specialized tribunals
4. A “true” Q of jrdx or vires (interp’d narrowly: whether AT has auth to make inq’y) (*Alberta Teachers’ Association*, 2011)

**PRIVATIVE CLAUSES and their relation to SOR: *Dunsmuir* vs. *Khosa* 🡪 PCs highly significant**

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
|  | **Leg. Intent** | **PC** | **Expertise** | **SOR** | **If no PC** | **Effect** | **Con model** |
| Binnie J  (***Dunsmuir***, 2008) | Fundamental re: SOR | Not conclusive but high ranking | = *Separate* ground for deference | *Presumptively* reasonableness | Leg. intent determines SOR | Appl’t has burden to show unrsn’ss | Always jud-leg. tension in admin law  (ML agrees) |
| Rothstein J  (***Khosa***, 2009) | Fundamental re: SOR | **Conclusive (SOR = reasonableness)** | PC indicates expertise | If PC, then presumptively reasonableness | Correctness | Appl’t has burden to show unrsn’ss | No, only if there is PC |

**Presumptions for Reasonableness Review**

-**Reasonableness will be the presumptive standard regarding outcome when** (choice and application)**:**

1. A 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
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 a range of possible acceptable interpretations**
7. Resulting in a decision that demonstrates **justification, transparency, and intelligibility** usually but not always through provision of **reasons**
8. And produces a **reasonable outcome defensible in respect of the facts and law**

\*\*Note importance of **REASONS** in establishing reasonable decision and outcomes

**MODELS OF STATUTORY INTERPRETATION**

* **Static Approach:** Stat to be interp'd how written regardless of how concept might change over time (FF @ US)
* **Plain Meaning Approach:** Common sense, dictionary meaning
* **Dynamic Approach:** Living Tree, opposite of original/framers’ intent, meaning changes over time
* **Modern Approach:** Purposive and contextual (*Rizzo Shoes*; e.g. *Agraira*: interp of “national interest”)

**The Modern Approach**

***Rizzo Shoes***, 1998

-Words are read in the entire **context**, in their grammatical/**ordinary sense** when not defined, harmoniously **with scheme** of Act, purpose or obj of Act and intent of Parliament, using **textual, contextual and purposive** approach to analysis

-**Tools for stat interp** (tools for argmt re: leg intent):

* Legislative history (Hansard debates, Min’s stmts affirming stat purpose in amdmts, leg silence re: pot’l amdmts
* Judicial Interp (Stat purpose(s) affirmed in jurisp, f’l analysis of inst’l relations and positions, rules of construction – express intent or silence, absurd results, struct’l analysis, consis exp’n across related statutes, coherence paramount)
* Agency interp (Agency precedents, reasons, stmts re: stat purpose by Agency Off’ls, soft law – directives, g’lines)
* Expert E (Ws, outside experts provide contextual info not for use in actual interp)

**CORRECTNESS REVIEW**

**Rationales underlying Correctness Review (*Dunsmuir*)**

1. **Supervise jrdx** of ADMs (generalist Js uniquely placed/indep of Exec)
2. Exhibit **expertise** in matters over which ADMs less adept/knowl’ble (but not all instances of law interp)
3. Ensure **consistency/predictability** in legal sys (*esp* where range of rsnbl alt interps exist; some legal Qs req ONE right A)

***Canada (AG) v Mossop***, 1993 – **Dominant approach to Correctness; SOR: human rights; relevance of stat interp**

-Fed emp to SSP’s funeral, bereavement leave ltd to “family”/spousal rlnsps, denied, complaint to CHRT (proh’d gd of fam status)

-Old understanding – fam status not defined, must be interp’d as prelim matter, narrow und’g re: jrdx (if wrong, exceeded jrdx)

-**What is approp SOR of HRT interp’g own statute?** Should RC *defer* to interp of AT? What is plain mng of fam?

-4 Js choose **Correctness** (consistent w/ jurisp @ time and view that CHRT is NOT **expert**) 🡪 CHRT = INCORRECT interp

-**Absent Charter chlg of its Con’y, when P intent clear, Cts/ATs not empowered to do a/t else but apply law, Charter can’t be used as interp tool to defeat purp of leg or give leg’n effect P did not intend**

|  |  |  |  |
| --- | --- | --- | --- |
| **Lamer CJ** (Sopinka, Iacobucci) (Dicey) | **La Forest** (Iacobucci) (Dicey) | **L’Heureux-Dubé** (dissent)  (normative) | **Cory/McLachlin** (2 dissents) |
| No P&FA | No P&FA | P&FA undertaken | No P&FA |
| **SOR = Correctness** | **SOR = Correctness** | **SOR = PU** | **SOR = Correctness** |
| [FCA has jrdx] | [FCA has jrdx] | [FCA has jrdx] | [FCA has jrdx] |
| Stat interp = Q of law | Stat interp = Q of law | Stat interp = Q of law | Stat interp = Q of law |
| No PC | No PC (w/o PC, correctness is presumptive app and CHRT not shielded from JR) | No PC (yet still chooses PU) | No PC |
| Expert = No | Relative expertise = No  -Not analogous to Labour Trib | Relative expertise = Yes  -Defer to HRT on Qs of fact  -Defer to HRT on Qs of law | App of SOR = concur w/ LHD |
| P’s intent = clear (use ordinary understanding of fam, = trad’l fam!) | P’s intent = ordinary language | P’s intent = ambiguous + contextual & purposive approach to HRA |  |
| CHRT = **Incorrect** interp  -S. 3 of CHRA permits discrim on gds of SO re: “family status” | CHRT = **Incorrect** interp | CHRT = **Reasonable** interp | CHRT = **Correct** interp  -“Family status” as sufficiently broad to incl SSCs living together in LT rlnsps |

***Northrop Grumman***, 2009 – military procurement K; **choice of application of correctness review**

-Rsnb’ss rev acknowl’s mult plausible interps (vs. **correctness: only 1, = *right* A in eyes of Ct**); “Cdn supplier” = ? **Stat Interp**

-N can only challenge dcn if has standing before CITT (= jrdx Q) – if yes, would gain rights w/o being party to AIT 🡪 problematic

-Purpose of Act: ensure trade flow, equalize playing field (favour Cdn supp’s); AT changed mind re: who = supplier

-Rothstein J: **Parliament’s intent clear/unambiguous:** Act/Provisions only to apply to domestic trade in Canada; policy: can’t allow AT’s interp to stand even if on face seemed OK (there *was* ambiguity in stat), result not OK

-Did SOR analysis, stopped at step 1: past jurisp est’d that CITT dcn re: whether s/t w/in its jrdx subj to **correctness** std

-**Correctness can be used to sub Ct’s rsng for AT’s (premised on idea that there is 1 correct interp of stat, grd’d in P intent)**

-Liston: should have been rsn’ss: how to make it that way 🡪 Q of stat interp of ES not jrdx’l Q, AT has exp’se (look at AT make up and qualif’n of mems), look at presence/lack of PC; be aware rsn’ss may not change result!

***Alberta Teachers’***, 2011 – **Jrdx revisited; affirms move away from phrasing Q as one of jrdx** (rejects *Northrop* approach)

-Info and privacy commissioner has ES that provides inq’y must be w/in 90 of complaint unless extended – took 22, no party raised issue 🡪 ATA applies for JR, says Comm’r lost jrdx due to failure to extend; **is timeliness a jrdx’l Q?** So correctness?

* Not a Con issue; not Q of gen law; now drawing lines b/t competing ATs; so, **‘is it true Q of jrdx’** = only Q left

-SCC reinstates adj’rs dcn on **timeliness** matter 🡪 **raise issue at first available instance**

**-Rothstein J:** True Qs of jrdx are narrow and will be *exceptional* (SOR = correctness); when considering dcn of AT interp’g/applying ES, should be *presumed* approp SOR is reasonableness – party seeking to invoke “true Q of jrdx” must demo why court should NOT rev AT’s interp of ES on def’l std of reasonableness

-**Binnie J:** Middle ground 🡪 if issue relates to interp/app of ES, it is w/in AT’s expertise and does not raise issues of gen legal imp, the SOR of reasonableness will apply and AT entitled to def (vs. Rothstein who puts aside limiting qual’n, presumption triggered entirely by location of controversy in ES)

***Canada (HRT) v Canada (AG)***, 2011 – **Correctness marginalized? REASONABLENESS applied to HRTs; *costs* case**

-Q of whether CHRT could award costs (in mil harassment case); **HRTs as last bastion w/ SOR of correctness applying to dcns**

-Indicia for arguing Correctness = right approach:

* Gen’t Js would have just as much **expertise** (always award costs); **central to legal system** (outside spec’d exp of HRT)
* Can only access rem’s in stat part of auth/jrdx of AT – if not empowered to award costs and they do, = outside jrdx

-Purposes of **costs** in legal sys: Equitably divide costs; punishment; divide up based on just outcome

-Past jurisprudence says: Correctness SOR for Qs of law by HRT

-**FC** uses P&FA (SOR) to say **Rsnbl std** (Qs of law; home statute+expertise; HR + stat interp; rsnble interp re: auth to award costs)

-**FCA** uses *Dunsmuir*: **Correctness** (Q of law o/s exp + of cent imp; req’s 1 clear/consis A; P’t did NOT intend costs recov regime)

-SCC applies 2-step *Dunsmuir* test: **1)** Correctness? ¼ exceptions? (Con – NO; cent imp + o/s exp – NO; true Q of jrdx – NO)

-HRTs can: award *basic* comp (e.g. if not given guar’d salary); demand ed progr’s @ workplace; make *special* awds (pain/suffering due to discrim); legal costs: not direct result of discrim but is nec to get rem

-Q of whether legal costs incl in AT’s comp order not Q of jrdx nor of law of cent imp to legl sys and o/s exp’se 🡪SOR = rsn’ss

-**Text, context, purpose of leg clear**: no auth in AT to award costs, no other rsnbl interp, thus AT adopted unrsnbl interp

**REASONABLENESS REVIEW**

***National Corngrowers*** **– Expertise 🡪 SOR = PU;** Cts have gen shown def to ATs resp for mng’g complex admin schemes

-Gonthier J – cannot reach conclusion re: rsnbl’ss of AT’s interp of ES w/o considering reasoning underlying it

-**Reasons:** Stat may mandate factors to take into acct; did DM fail to take acct? Acct for irrel fcts? Fail to take acct of CVs?

***DUNSMUIR***, 2008 – Sets out **SOR Analysis** and **2-step Test**

-Paradigm shift in pub law: Stat’s have diff lang to express what they want vs. CL so can’t always rely on CL as basis for approach to interp 🡪 must be *purposive* and *contextual* (ex of JR to construct leg intent, 4 corners of stat re: jrdx conferred 🡪 deference)

-Rev J must take into acct factors to gauge deference: PC, nature of Q, expertise of AT; BALANCING/proportionality/weighing (adverse impact of dcn on rts/intrsts of app vs. pub purpose sought to be advanced)

***Canada (CIC) v KHOSA***, 2009 – Street racing, chance of rehab (no – send back to India)

-**Deference indicators**: PC, expertise; Fish J (dissenting): Def ends where unrsn’ss begins (defects in rsng and E fdgs)

|  |  |  |  |
| --- | --- | --- | --- |
| **Binnie** | **Rothstein** | **Deschamps** | **Fish** |
| FC Act = grounds of rev of admin action which permit remedial relief | FC Act = SORs determined by legislature | FC Act = SORs determined by legislature |  |
| **Deference is presumptive** approach | **Legislated standards oust CL** | Legislated stds oust CL |  |
| **PC** signals greater **deference** | **W/o PC correctness is presumptive** approach |  |  |
| Courts ought not re-weigh/sub but can determine ROROs | **PC** signals relative **expertise** here |  |  |
| Reasonableness is single standard contextually applied | PC signals *Dunsmuir* SOR analysis; P’s intent: def only to findings of fact |  | SOR = reasonableness |
| SOR = reasonableness | ∴ SOR = reasonableness | ∴SOR = reasonableness | IAD needed to explain disagreement w/ S’g J |
| IAD = reasonable decision | IAD = reasonable decision | IAD = reasonable decision | IAD E finding incorrect |
|  |  | Does not sign on to Rothstein’s rsng in Parts I & II | IAD = Unreasonable decision |

***Southam***, 1997 – **Choice and application of Reasonableness**

-Iacobucci J: **Unrsnbl dcn** = not supported by rsns that can stand up to **somewhat probing exam**; RC *must* look to see whether any rsns support it; defect could be in E fdn (no basis for E) or logical process (contradiction in premises or invalid inf)

-AT ordered S to divest NPs (b/c of  comp) – did FCA owe def to AT’s findings? Should FCA have set aside AT’s rem’l order?

-**In absence of PC RC may rev dcns of AT even w/in its own jrdx** (i.e. less deference) BUT here AT well-suited to oversee stat scheme w/ econ obj’ves, purpose of Act better served by deference (task of RC on stat appeal more // to appellate rev than JR)

* Specialized **expertise** of AT (econ) in this case 🡪 SOR = **PU**

-Factors in determining limits of RC’s appellate function:

* Nature of prob before AT (Q of law, fact, or mixed – mixed here)
* Applicable law properly interpreted in light of purpose
* Area of AT’s expertise

-SOR more deferential than correctness but less deferential than PU (test for determining if AT exc’d jrdx) req’d 🡪

**Need for 3rd SOR where appeal from AT’s dcn lies by *statutory right*** (obviates need to find jrdx’l error) 🡪 = Reasonableness

* Diff b/t unrsnbl and PU lies in *immediacy*/obviousness of defect (on face of dcn = PU; less obv = unrsnbl)
* The **“clearly wrong”** test is close to std of **reasonableness *simpliciter***

***LSNB v Ryan*** – **Deference in Reasonableness Review**

-LSNB = Ls and Js (not byd exp’se of courts, BUT practicing Ls more acq’d w/ pro stds in action 🡪 def 🡪 rsn’ss

-Iacobucci J: Q ≠ whether dcn correct 🡪 no single right A; when dcn must be made acc’g to set of obj’ves in tension, no partic trade-off superior to others 🡪 not court’s role to seek out ‘best’ A when deciding if dcn unreasonable

***Celgene Corp v Canada (AG)***, 2011 – **Choice and Application of Reasonableness Standard**

-Q: Whether Bd has auth to make Celgene provide pricing re: drug seeking to sell in Canada and pot’lly order $ 

-Issue: Whether “sold in any market in Canada” to be **interp’d in acc’ce w/ comm’l law princps** (i.e. o/s jrdx of Bd) or **def** to be responsive to leg’ve context/purp 🡪 = *interp issue*; parties agreed on *correctness* (agrmt re: SOR not enough, must show rsns/why)

-Factors leading to **reasonableness review/deference**:

* **Expertise** (dominant here, w/ or w/o PC)
* Important **public policy function** (reg regims, intervening in market – consumer prot, imp’ce comm’d by leg)

-**Presumption = reasonableness**, unless ¼ exceptions met (correctness sets precedent)

-Modern Approach 🡪 contextual/purposive 🡪 determine leg intent (=constraint on court), purpose of leg scheme (hist’y, case law)

* Start w/ plain meaning (“sold” = ?), then go to statute/its purpose (econ, consumer prot) broadly interp’d
* Competing interps 🡪 guided by **what legislature intended** (what interp best meets purpose of Act)

-**Bd’s dcn unassailable under *either* SOR but operative SOR = reasonableness** (dcn that “any mrkt in Can” interp’d to incl sales reg’d by pub laws of Canada, dispensed in Canada, cost borne by Cdns) 🡪 Bd’s dcn consistent w/ consumer prot purpose

-RC shows def by staying close to AT’s rsns while checking them against stat FW and context (matters expl’y addressed AT’s dcn)

***Catalyst Paper v North Cowichan***, 2012 – **SOR for Municip Tax’n Bylaw = rsn’ss; PU subsumed (not replaced) by rsn’ss**

-CPC seeks to have mun taxation bylaw set aside as unrsbl re: obj’ve factors (e.g. consumption of mun services) – disprop burden

-C argues for *broad* scope for Courts on reasonableness rev to review; NC says jud’l power to overturn MTB very narrow

- McLachlin J: It WAS disprop burden but Ct says that’s OK, not enough for Ct to overturn MTB (falls w/in ROROs)

-**Power of Court to overturn mun bylaw very *narrow***, cannot be ex’d just b/c MTB imposes greater tax burden on some

-**Test:** ONLY if bylaw is one no reasonable body (informed by factors that elected mun councilors may legit consider) could have taken will it be set aside **🡪 WIDE def to municips as stat delegs, voted for/democ acctble** (but NOT *carte blanche*; rsnbl limits)

* Req’ts of process (i.e. ROROs) vary w/ context/nature of DM’g process in Q (formal reasons may be req’d for dcns involving quasi-jud’l adjud’n by mun’y but that does NOT apply to process of passing mun bylaws)
* Very POLYCENTRIC dcn (vs. *Homex*) – affects all ppl in municip, involve array of soc/econ/poli/non-legal consids, is leg’ve (not adj’ve or quasi-jud) 🡪 **def (bar for unrsn’ss *high*)** 🡪 harsh impact on NC but other consids prevail, rsnbl

***CN v Canada (AG)***, 2014 – **Going-in Presumption = Reasonableness** (unless satisfied ¼ exceptions)

-K b/t PR Coal and CN re: coal shipping, fuel surcharge in tariff, CN  strike price, refused to apply to PRC’s traffic; PRC app’d to CTA to have order varied under *CTA* to reflect higher price, dismissed; GIC rescinded that dcn

-FC said **GIC dcn** = jrdx’l, applied correctness; FCA applied reasonableness, set aside FC, dismissed CN’s app for JR of GIC dcn

-SCC: **GiC entitled to intervene, has pref’d policy outcome, has full auth under Act to overturn**, not acting in leg capac when ex’g auth’y under act, has auth to answer legal Qs, subj to JR by courts

-**Wording of statute provide basis for selection of SOR** (rsnbl’ss) 🡪Q does not fall w/in ¼ Corr’ss rev exc’s

-GIC entitled to conclude K factor to be taken into acct but not given partic weigh, entitled to set aside, make dcn to ben PRC that is reasonable 🡪 **Act confers broad auth** on GIC to address dcns of CTA incl those re: Qs of law

-***Dunsmuir* FW applies to ADMs generally, not just ATs, applies to adjudicative dcns of GIC; applicable SOR = rsnbl’ss**

-GIC has partic famil’y w/ econ reg, transport law/pol 🡪 **presump of def applies to adj’ve dcns of GiC**, not rebutted (dcn rsnbl)

**REASONS IN SUBSTANTIVE REVIEW**

**IN/ADEQUACY OF REASONS**

***NEWFOUNDLAND NURSES* 2011 – Adequacy of reasons is a matter for substantive review**

-**Absence of rsns = matter of DOPF** (SOR fairness: *Khela*)(were there rsns? If not, should there be? If yes, get them, if not, none)

**-Adequacy of reasons = matter for substantive review** (if reasons deficient)

* + If you want them to stand, argue implicit/supplement
  + If you want to challenge reasons, say no, deficiency renders decision unreasonable

-**Adequacy of rsns is NOT stand-alone basis for JR or rem of quashing dcn** (can’t just be “not good enough” – either argue not supported by stat interp, not supporting ex of discretion, relevant factors not considered; E errors made, etc.)

**-Rsns must be read together w/ outcome to show whether result falls w/in range of possible acceptable outcomes**

-DM not req’d to make explic finding on each element leading to concl, must just permit RC to u/s why AT mad dcn, if in ROROs

-**Functions** of reasons (Abella J)

* Disclose **expertise** using concepts/lang often unique to their areas, rendering dcns often counter-intuitive to gen’t
* **Justify** dcn using *transparent, intelligible, rsnble* rsng understandable to all (counsel, agencies, RC, pub, losing party)
* Illustrate that **outcome** is reasonable, esp when more than 1 reasonable result poss (not role of Court to say *right* outcome)

-How review of reasons is informed by **deference**

* Inadequate reasons and unreasonable decisions are NOT identical
* Unclear writing does NOT necessarily indicate deficiency in reasoning
* Deficient reasons are not a freestanding ground of appeal
* Reasons need not be perfect but merely sufficient
* Reasons need not be comprehensive or well-written, may contain errors
* Reasons need to be read as a whole and not with “forensic or microscopic lens”
* Can’t be thin; allow reviewing court to understand why outcome was acceptable even if they might have prob w/ outcome

-**Adequate** reasons:

* Exhibit **“justification, transparency and intelligibility”** (*Dunsmuir*) (vs. bare concl’s w/ no supporting info, inconsis’s)
* Permit parties to understand *why* AT made dcn (*Lafontaine (Vlg)*: rsns req’d, inad, rem=go back, give better), vs. opaque
* Facilitate appeal process and JR (vs. lack of E, minimal reasons immunizing from review/acct’y)
* Satisfy reviewing court that AT grappled w/ substantive live issues (vs. irrel consid’s, relevant consid’s omitted)
* Allow reviewing court to understand how outcome is within range of acceptable outcomes (vs. “trust us”)

-**Inadequate** reasons:

* Bare conclusions w/ no supporting info or principles; opaque conclusions; no intelligible path to conclusions
* Glaring inconsistencies; lack of E; minimal rsns that effectively immunize from review and accountability
* Irrelevant considerations or relevant considerations omitted; exhibit attitude of “Trust us, we got it right”

-**Deference as respect: IMPLIED/SUPPLEMENTED Reasons** 🡪 Def = respect for DM’ing re: facts and law, not submission but respectful attn. to rsns offered *or which could be offered* in support of dcn; even if rsns given do not seem wholly adequate to support dcn, court must first seek to supplement *before* it seeks to subvert them (Holding: Arb’r alive to issue, dcn w/in ROROs)

**Deference as Respect & Implied Reasons**

***Alberta (Information and Privacy Commission) v Alberta Teachers’ Association***, 2011 – **Implied Reasons**

-**Def as respect** (Dyzenhaus): requires Cts not submission but respectful attn. to rsns offered or which could be offered (*Dunsmuir*)

-Rsns may be forced to be inad if counsel holds back on issue, tries to raise it at JR as not being consid’d (CVs) 🡪 subvert process; parties cannot gut def owed to AT by failing to raise issue before AT and thus mislead AT on necessity of providing rsns

* When there is **no duty to give reasons** (*Mavi*)or only ltd rsns req’d, it is entirely approp for court to consider rsns that ***could be offered*** for dcn when conducting reasonableness review (point = parties cannot gut def’ce owed to AT by failing to raise issue before AT thus misleading AT on nec’y of providing rsns)
* In some cases, RC may not be able to adeq’ly show def w/o first providing DM w/ opp to give rsns for dcn; gen’lly inapprop to find no rsnbl basis for trib’s dcn w/o first giving trib opp to provide one
* Rsns given by trib in other dcns on same issue can assist RC in determining if rsnbl basis for implied dcn exists

***Agraira v Canada (Public Safety and Emergency Preparedness)***, 2013

-Libyan found inadm/denied PR on basis of mem’p in terr org; app for min’l relief denied (not in “National Interest” to admit indiv w/ sustained contact w/ terr org), app for PR denied; A challenged, FC granted JR app, FCA overturned (Min’s interp correct/rsnbl)

-SCC: **Mng of “nat intrst”** central to Min’s ex of discretion but was not expressly defined 🡪 no express dcn of ADM to review!

* BUT, applying *Albera Teachers*, meaning of “nat intrst” can be implied from Min’s holding that it’s not in NI to admit indiv’s w/ sustained contact w/ terr orgs” 🡪 interpretive dcn re: term **necessarily implied** w/in ultimate dcn
* Concl supported by **modern approach** (plain wds, leg hist, purpose/context) 🡪 interp **reasonable**
* **Prohibition on re-weighing**: Min considered/weighed all relevant factors as he saw fit, so it is not open to Court to set decision aside on basis that it is unreasonable (balancing; post-*Doré*: how explicit? What values are being balanced?)
* Affirms: if inadeq rsns, Ct should supplement before subverting
* When rsnbl basis for dcn apparent to RC, it will gen be unnec to remit dcn to AT
* Min’s broad interp of NI as re: nat’l security but not excl’g other consids in G’lines is consis w/ leg hist of prov
* G’lines NOT fixed code, just factors for eval of apps, Min did NOT have to apply fcts formulaically, they just guided ex of his discretion, Min entitled to def re: implied interp of “NI” 🡪 interp = reasonable
* **Ministers entitled to deference when interpreting their home statute (they are going to be deemed expert)**
* Court rejects argmt re: transf of min’l resp’y as changing mng (no, Min’s change all the time, no bearing on mng of stat)
* Polycentric dcn (policy dimension) 🡪 augers in favour of less deference; but dcn rsnble

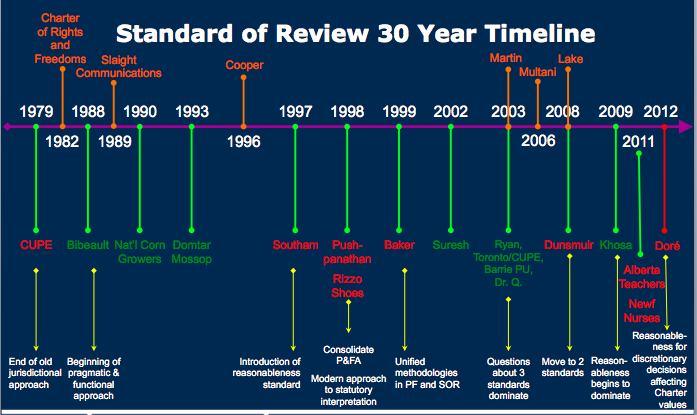
**Supplemented Reasons**

***McLean v BC (Securities Commission)***, 2013 – No reasons “cured” at JR; SOR for interp of LP meaning = reasonableness

-M entered sec agrmt w/ ONSC, G of misconduct 2001, barred; 2010 BCSC made order against M allowing impos’n of sanctions on parties w/ record like his; LP: Comm cannot commence prcdgs *more than 6yrs after “events giving rise”* (not defined) – M said events = underlying misconduct (2001) so prcdgs barred, C said events = settlement agrmt (2008) so NOT barred; meaning = ?

-SOR: M argued for **correctness** std re: interp of LP 🡪 Court rejects, doesn’t fit ¼ exceptions, **presumption of reasonableness NOT rebutted** (has become “fashionable” post-*Dunsmuir* to argue ¼ correctness exc’s – Court says stop it); SOR = rsnbl’ss

* **Resol of unclear lang in ADM’s ES best left to DM** – choice b/t mult rsnbl interps often involves *policy* consids we presume leg desired ADM (not Cts) to make: **ex of interp discretion part of ADM’s “expertise” 🡪** Comm holds interp upper hand: under rnsbl’ss rev, **court defers to any rsnbl interp adopted by ADM even if other rsnbl interps exist**
* When rsnbl basis apparent for dcn/interp to court, gen unnec to remit to AT (*Agraira*)
* Comm failed to give rsns for its interp of stat but basis for interp apparent from argmts adv’d by R who is also empowered to make orders under/interpret prov’s in Q 🡪 Even if rsns would have been pref’d; **when faced w/ 2 competing interps b/c of lack of clarity in ES, AT entitled to choose b/t them and court must respect that choice**; nothing gained from req’g cComm to explain what already apparent



**REVIEW OF DISCRETIONARY DECISION-MAKING**

**Discretion:**

**-Dcns where law does not dictate specific outcome, DM has choice of options w/in stat boundaries (*Baker*)**

-Discretion as dialogue: bottom up recip rlnsp b/t indiv & ADM, vs. Discr as power: top down (one way proj’n of auth)

**-Language** of discretion **(stat interp)**:

* Authorization: **May** (vs. shall)
* General/vague language (DM may do a/t nec/advisable to fulfill power; DM empowered to act for pub good)
* Obj vs subj grant of power (whether Min satisfied)
* Not truly free (even broadest grant of auth not totally unconstrained: *Roncarelli*)
* Approp and/or equitable rem’s in circ’s
* On Bal/P; Good gov; In Min’s opinion; For proper purpose; In pub intrst; Rsnbl; RG to believe; rel consids, etc.

**Traditional CL Grounds for Review for Abuse of Discretion**

***Roncarelli***, 1949 – hist’lly DDs unjusticiable as policy/leg’ve (no JR) 🡪 overturned

1. **Bad faith**: malicious intent; neg/fraudulent/deceitful; converting pub power for priv means (*Roncarelli*)
2. **Dictation/influence**: Wrong DM made dcn, dictated A (DM ex’g power under dict by Duplessis: *Roncarelli*)
3. **Unlawful delegation of powers** (court assume discretion bestowed on Exec DMs on basis of exp’se, same for sub deleg!)
4. **Fettering**: turning factors going into dcn to RULE (e.g. BIOC) – can’t decide in adv how to ex discr (*Thamotheram*: yes)
5. **Improper purpose/motive**: Sim to bad faith but w/o mal. intent; matter of stat interp (purpose of stat) (*Thorne’s*: none)
6. **Unreasonable/irrational/illogical DM’ing**
7. **Omission of relevant factors/consideration of irrelevant factors**

-Abbott J: D knew he wasn’t auth’d to interfere w/ admin or give order/auth’n to a/o of AT body to ex discr auth’y entrusted by stat

-Martland, Locke, Kerwin: Q of whether acts done by R in ex of f’ns not TBD on basis of *his* apprec’n of them but acc’g to *law*

-Cartwright (dissent, norm at time): Leg has not laid down any rules to guide Comm, leg intened comm to be “law unto itself”

-**Rand** (activist): Action dicated by arb’y dis/likes, irrel purposes, beyond duty – **no such thing as untrammelled discretion** (**ROL**), no leg Act can w/o express lang incl unltd arb’y power ex’ble for any purp however irrel regardless of nature/purp of stat

* Rand reads in constraints not there on face, finds implied public stat duty violated by D
* Role of Js: Use unwrttn princ’s to **constrain DDs that may violate imp rights/values/priv’s**

-Even at highest lev’s of exec action, discr ltd by legal princs

**Interpretive Approaches (diametrically opposed approaches to Discretion)**

|  |  |
| --- | --- |
| **Cartwright J (dissent)**  Top down (protect pub DMs room to manoeuver) | **Rand J (activist)**  Bottom up (purp of stat FW, att’ve to indiv) |
| No guidance/rules in statute expressly or implicitly | Always a perspective in which statute intended to operate |
| Legislature intends open-ended/unfettered delegation of discretion in licensing regime | **No such things as absolute/untrammelled discretion or unlimited arbitrary power** (absent express language) |
| **Plain meaning** approach to **statutory interpretation** | **Purposive approach** to statutory interpretation |
| No pre-existing right to license/keeping it if it can be cancelled at any time | Vital/vulnerable interest at stake (business owner, economic security at risk w/o license) |
| Function of Commission purely admin, not quasi/judicial | Commission must discharge public duties lawfully/rsnbly |
| Self-interpreting jurisdiction | No such thing! |
| Cancellation formally authorized by law  **Unwritten principle** of **Parliamentary Supremacy** | But unlawful if done capriciously, in bad faith, for irel’t purpose  Unwritten principle of **Rule of Law** |
| Good faith factual finding sufficient | Discrimination is a clear departure |

**Unreasonableness/Improper motives and Orders in Council**

***Thorne’s Hardware Ltd v The Queen***, 1983 – Imposition of harbor dues: **Order in Council: Bad faith/improp motive/unrsnble**

-OiC: hands off approach 🡪 category of dcns usu treated w/ **high def** as partic form of DM’ing coming from cabinet/close to leg

-Q: Is purpose of  harbor revenue o/s purp of stat? Did it interfere w/ prop rights? THL argues improp motive in passing OiC (only reason was for increased rev) 🡪 don’t find sympathetic audience at SCC

-Dickson J: We don’t know rsns/motives for gov’s dcn to pass OiC, **not court’s duty/right to investigate motives** **of GiC in passing OiC** 🡪 they have jrdx, clear in legislation, this is proper ex, don’t like it – remedy @ *ballot box* (vote them out)

* **Dcns involving pub convenience and gen policy are final and not reviewable in judicial proceedings** (i.e. stop sign!)
* **Dcns made by GiC pursuant to statute are reviewable for jrdx’l error and proc’l error** (lots of deference)
* Mere fact that stat power vested in GiC does not mean it is byd JR
* **Quashing OiC requires an “egregious case”** (not here)

**FETTERING and Guidelines (vs. Rules)**

***Thamotharem v Canada (Minister of Citizenship and Immigration)***, 2006 FCA

-Tamil applies for ref status, raised obj’ns re: G’line 7 issued by ChairP of IRB, arguing it violates CL princ’s of NJ and PF (**G7 sets out *standard order for Q’ing* ref claimants**, basis/procedure for varying order prcdgs)

-Ref Prot Div (Board) of IRB concluded G7 did NOT give rise to denial of NJ, A not conv ref/in need of protection

-**Although not legally binding on DM, G’lines may validly infl DM’s conduct** (use of soft law imp to achieve consis’y)

-A applies for JR of dcn 🡪Q: whether G7:

* Denies A RtBH
* **Fetters discretion** of RPD mem’s (**YES**) – Fettering on Bal/P; lots of def esp where poss’y of built-in flex’y
* Unlawfully distorts adj’ve role of RPD (NO)

-*Baker*: NJ, PF do *not* dictate spec order of Q’ing, BUT, **CP std order of Q’ing fetters RPD’s discretion**

* Mandatory lang of G7, ltd/narrow description of exc’l circs, unsubtle exp’n of compliance 🡪 limits discretion, dictates procedure, allows few exceptions on proc’l issue that could affect fairness of hrg
* G’lines produced by Exec, no process of scrutiny/acct’y; non-binding; expect issuing body to follow them!

-**While ATs may issue G’lines/pol stmts to structure ex of stat discr to enhance consis, ADMs may *not* apply them as law:**

**-Dcn made solely by ref to mand presc’n of g’line may be set aside on gd that DM’s ex of discr was unlawfully fettered**

-**FCA – Evans JA:** NOT unlawful fettering – E that there ARE variances occurring w/in admin body; allows for indiv consid

**Contemporary Framework – Both Qs of law *and* Discretion are to be reviewed under same approach (P&FA) (*Baker*)**

***Baker*** – **Abuse of discretion** as another way of thinking about **unreasonableness** 🡪 take indicia of AoD, brings under rsn’s rev

-Act had broad deleg’n (may: discr; exempt: exc’n); one prov w/ mult signals from leg that this is **highly discretionary** dcn/body

-Baker wanted Correct’ss (Q of law/stat interp), discr’n ex’d in acc’ce w/ CRC, Min to apply BIOC as *primary* consid in H&C dcn

-Min argues SOR = Rsnbl’ss (mixed fact/law), cannot re-weigh factual det’ns, CRC not impl’d in Cdn law, req’ing interp in acc’ce w/ it improperly interferes w/ broad discretion and DOP b/t fed and prov govs and b/t courts and other branches of gov

--No strict dichotomy b/t discretionary and non-discretionary dcns – ex of disc and interp of rules of law not easily differentiated (choices in both!) 🡪 Rev should follow P&FA b/c factors it uses to det SOR accommodate specificity of discr powers

**-Pragmatic and Functional Approach to review reasonableness of exercise of discretion** (takes into acct discr to DM, def)

* SOR factors used to review, and if nec, constrain discretion (PC, expertise of DM, lang/purp of prov/Act, nature of prob)
* The whole thing is about **INTERPRETATON** (interpret facts, lang, choices, ex’s of discretion)
* DDs gen given respect, but:
* **DD will gen be given consid’ble respect, BUT discretion must be ex’d** **in acc’ce w/ boundaries imposed by statute, princ’s of ROL, princ’s of admin law, fund’l values of Cdn society, and principles of Charter**

-Qs: Did DM make rsnbl choice re: arriving at dcn AND re: outcome of dcn?

* Dcn was UNREASONABLE
* Manner in which dcn reached inconsis w/ **values** underlying grant of discretion (conflicts w/ interp of H&C values)
* Rsns disclose that DM misinterpreted nature/scope of delegated discr’y power
* Failed to consider relevant/imp factor (BIOC); failed to give factor “serious weight” (= Court re-weighing!!)

**Discretionary decisions, deference, weight, and “re-weighing”**

***Suresh v Canada***, 2002 – Charter applies to a/o on Cdn soil

-**Parliament**: est criteria/proc’s gov’g deport’n w/in Con limits (P can fetter and ≠ constraint, can make biased laws)

-**Minister**: decide acc’g to P’s criteria/proc’s and pub law values incl Con

-**Courts**: Review M’s dcn to see if ex’d w/in P’s constraints and pub law values incl Con; if approp factors considered in conformity w/ constraints/values, then deference; Subst’l Risk of Torture = fact-driven, o/s exp’se of RC (defer unless PU)

-**Re-weighing**: Min (not court) obliged to give *proper weight* to rel fctrs; Courts review whether DM *failed* to consider/weigh – in this case, Min and delegate failed to comply w/ **self-imposed** g’lines; **weighing for DM alone** (//*Lake*, *Khosa*)

-**In ex’g discretion conferred by stat, DM must conform to POFJ under s. 7 (all ex’s of discretion must conform to Charter)**

* RC should gen adopt deferential approach to Min’s dcn re: whether ref presence = danger to sec of Canada
* **RC should NOT re-weigh factors or interfere merely b/c it would have come to diff conclusion**

**Charter Values and Review of Discretionary Decisions**

**\*\*Charter does NOT directly apply to DDs b/c these dcns, made under stat auth, are *not* considered “prescribed by law” for purp’s of s. 1 or s. 52 of the Charter (*Doré*)**

***DORÉ V BARREAU DU QUÉBEC*** – **Reasonableness & Proportionality** (integrates spirit of s. 1 into JR) 🡪 overturns *Multani*

-Changes method’l approach used to review DDs involving CVs/interests: **When indiv’d admin DD limits CVs, approp FW for assessing legality = CL princs of subst rev found in admin law (not Con law and *Oakes* test)**

* **SOR for review of DDs** = **reasonableness w/ “proportionality”** serving as central criterion
* Primary way to show prop’y analysis undertaken reasonably is through **provision of REASONS**
* How CV best protected while recog’g stat obj’ves; whether properly balanced w/ severity of interf in light of stat obj’ves)

**-An ADM exercising statutory discretion will be constrained by Charter values – ADM must balance rel CVs w/ stat obj’s** (in best position to ask how CV at issue will be best protected in light of obj’ves) **🡪 RC must ask whether ADM disprop’ly/unreasonably ltd Charter right to determine if dcn reasonable (proportionate); def owed, ADM deemed expert**

-CV (FoE) vs. stat obj 🡪 balance, proportionality, generous though (if DM has rsnbly ID’ed right/value, can imply it in rsng)

-Admin dcn that is discretionary/individualized is NOT law (i.e. rule/norm of gen app) that can be justified as rsnbl limit under s. 1

-*Oakes* Q: Does law interfere w/ right no more than rsnbly nec to achieve obj? (If yes, = proportionate/rsnbl limit under s. 1), vs:

-SOR Q: **Has ADM disproportionately/unreasonably limited a Charter right/value when ex’g stat discretion?**

* If no, right not unreasonably ltd, approp balance b/t right and obj’ve recognized; look to REASONS

-**ADM Methodology:** How does ADM apply CVs in ex of stat discrn? Core: ADM must balance severity of CV interf w/ stat obj

1. DM balances CV w/ stat obj’ve
2. DM asks how CV will best be protected in light of stat obj’ve
3. DM engages in **proportionality analysis** = balancing severity of interference w/ stat obj’ves
4. DM chooses outcome which “falls w/in range of PAOs” and is explained by rsng exhibiting “J,I,T”

\*\*Here expression was low value, stat obj’ves outweighed value of FOE\*\*

-**RC (JR) Methodology:** How does Court review DD that affects Charter right? Abella J: On JR Q becomes: whether, in assessing impact of relvt Charter prot’n and given nature of dcn and stat and factual context, dcn reflects **a *proportionate* balancing** of CVs

1. Know that **proper FW** to use to determine compliance w/ Charter is **admin law proportionality review**
2. **SOR** for DDs affecting CR/Vs is **reasonableness (contextually applied)** (implicitly using Mod App to stat interp)

* Recall: SOR for AT interpreting of ES/home statute is **correctness**
* CVs have horiz eff in AL sim to eff they have on CL; past case law may indic def owed; DM best plcd re: facts

1. Consider **factors** from **SOR Analysis** to assist w/ determination of **what is *reasonable* and *proportionate***
   1. **PC**
   2. **Purpose** of AT from interp of ES (e.g. Purpose of Barreau = self-reg legal profession)
   3. **Nature** of Q
   4. **Expertise** of spec;d trib (DM in best pos to determine impact of CV on facts of case; admin bodies empowered, req’d to consider CVs w/in scope of exp;se: p36; AT has skill to recog CVs fund’l, can weigh w/ facts, stat purp)
2. Court will determine **whether** **outcome disproportionately harms** **a CV** (here CV = FOE – same one ADM chose)

-In balancing intrusion on CV (FOE) w/ stat obj’ves, SCC finds stat obj’s *outweigh* CV (i.e it’s a justified limit)

-**Downside of *Doré***: Onus shifted, up to app to show dcn unreasonable (vs. burden on gov in Charter to justify infringement)

-**Downside of *Charter***: Expensive, limited

**\*\***When RC faced w/ reviewing admin dcn that implicates *Charter* rights, issue is one of ***proportionality*,** calls for integrating **spirit of s. 1** into JR

* Though JR is conducted w/in the **admin FW**, there is conceptual harmony b/t rsn’ss review and *Oakes* FW – both contemplate giving “margin of apprec’n” or **deference** to admin and leg bodies in balancing CVs against broader obj’ves
* **Where ex of discr (spec “adj’ve discr” applying discr powers to indiv cases) engages CVs, JR should be conducted acc’g to CL princ’s of subst’ve rev rather than under s. 1 of Charter FW for justifying rights infringement**

**Charter and Substantive Review**

**Approaches to Review under the Charter:**

**Express vs. Imprecise Authority**

***Slaight Communications v Davidson***, 1989 (this line of cases ultimately overruled in *Doré* 🡪 rev DDs w/ admin law not Charter)

-Unjust dismissal; rem = adj’r *may* req employer to pay $,etc 🡪 adj’r order letter of rec (**positive order**) and *only* letter (**negative order**) – w/in his power? Infringe employer’s **FoE**? 🡪 = **Discretionary Dcn** (diff post-*Doré*) NOT statute being challenged as unCon but rather dcn as defective (adj’r used discretion to decide order/content so this would look diff after *Doré*)

-**FW est’d sets out distinction b/t acts bsd on *express* stat auth to infringe right and those bsd on *imprecise/discr’y* auth**

-**Dickson CJC** (labour) **goes Charter/orthodox**: examine admin dcn for CR infringement, turn to s. 1; prov violates 2(b) but saved

-Admin law still imp for Qs untouched by Charter (e.g. Qs of fact) b/c PU lacks sophistication of s. 1 analysis

1. Determine if order made pursuant to leg conf’g expr or implic power to infringe rt 🡪 if yes, leg must satisfy req’ts of s. 1
2. BUT, if leg provides broad discr and auth to infringe (NOT express), **order itself must be just’d** in acc w/ s. 1

(Do s. 1 test to see if justif’ 🡪 if not, jrdx exceeded; if yes, AT acted w/in jrdx)

-**Lamer J mixed approach** (more complicated!) **for + order**: **1)** 1st use admin law to review legality of dcn under PU std; **2)** if discretion ex’d unreasonably, set aside order; **3)** if dcn survives AL analysis, THEN turn to s. 1 of *Charter*

-**Lamer J mixed appr for – order:** If discr’y power expressly conferred or nec’ly implied, challenge dcn under Charter and use s. 52 to declare leg’n invalid unless justified under s. 1 (if no express/implied discretion, but there is *imprecise* discretion limiting right, then order subj to Charter analysis 🡪 if discr rsnbly/justif’y limits, then adj’r w/in jrdx; if not, jrdx exceeded, order invalid)

***Insite*** 🡪 As w/ all ex of discretion, Min’s dcn must conform to Charter; Charter rev of stat (OK b/c exemp) *and* dcn (would be admin under *Doré*), decided min’s dcn (to deny exemption) violated Charter and could NOT be justified under s. 1

* Would be diff w/ *Doré*? Here had to test leg w/ s. 1, but unclear if no noeed to test leg (so no *Oakes*), whether rsn’ss analysis would = basis for intervention in case like this

**Authority to Infringe – Express vs. Imprecise Authority revisited (overruled in *Doré*)**

***Multani v Commission scolaire Marguerite-Bourgeoys***, 2006 - Dissent ultimately wins

-Student kirpan, council’s prohibition, and FoR (infringed? justified?) – not CoC (law) being challenged, but *dcn* re: rsnbl acc’n

-**Charron J** **(Majority)**: **Orthodox/*Slaight* approach** **using s. 1** provides proper method’l FW to review dcn

* AT *exceeds jrdx* if it makes order infringing Charter
* **SOR** **for admin dcns that apply/interpret Charter is** **correctness**
* Charter may be infringed by **1)** invalid leg’n and **2)** invalid act. pursuant to leg auth’n (applying/interp leg)
* Both are “prescribed by law” and subj to analysis under s. 1
* If discretionary decision NOT ex’d acc’g to its ES, then it is not “prescribed by law” and cannot be justified under s. 1
* If **DD** is at issue, court must determine if decision falls “w/in range of reasonable alternatives”, **SOR = rns’ss** (para 51)
* If DD violates Charter, legislation remains valid but **remedy found under s. 24(1)** (NOT s. 52)

-**Deschamps and Abella JJ (dissent)**: **Admin law approach 🡪** Same concl, diff methodology (Abella uses this dissent in *Doré*)

* Dcns/orders are NOT norms of general applic’n: “Law” means only stats/regs (admin = **indiv** dcn🡪use AL not Charter)
* Need to maintain analytic tools developed by each area of law, esp attn. to expertise
* Must NOT use appr starting w/ Con rev🡪 Charter was made to rev *statutes* (DM’ing treated only through admin law)
* **Pragmatic and Functional Approach** should be used to determine SOR 🡪 use **reasonableness** (gave ***weight*** to CRs)
* Imp’ce of giving weight to CRs, = element of analysis (dcn unrsnbl b/c SB failed to consider M’s CRs)

**Agency Jrdx over Charter**

***Cooper* – ATs = main conduit for Charter to be made meaningful to ordinary Cdns; ATs have no indep jrdx under s. 52**

- **LaForest (maj):** Authority to decide gen Qs of law may incl power to decide validity of law under Charter (express terms NOT nec but jrdx is given by statute, can be implicit: use P&FA to see if P gave them impl jrdx) 🡪 moderate FW

* As long as AT w/in jrdx, may consider/decide Charter issues as Qs of law (jrdx NOT found in this case – don’t use s. 52 to declare provisions in ES inop’ve but rather fail to give them effect)
* Dcns to be reviewed on *correctness* std (jrdx’l)

-**Lamer (concurring, sorta!):** S. 52 can only be used by Cts; ATs can’t be given power to consider Con’y of their ES

* Courts have monopoly on power to decide valid’y of laws under Charter, incl provs in agency’s ES; *o/w undermines SOP*, (leg makes laws, exec applies – agency jrdx would let ATs decide limits of its own jrdx, defeat laws of leg, invert rlnsp)

-**Dissent:** If AT has jrdx to consider Qs of law, that incl Charter auto’lly (explicit auth’y NOT req’d); Charter for ppl/not holy grail

* **Dissent wins in *Martin*** (If AT emp’d to decide *any* Q of law (not spec’lly *Charter* in leg intent), then can app Charter)
* **Cannot ask ATs to apply unCon leg** (refuse to apply: inoperative for that dcn; can’t render it invalid)

***Martin***, 2003 – **adopts *Cooper* dissent re: who can interp Charter** (but still s. 1 for ADM dcns)

**-ATs empowered (expl or impl) to consider Qs of law may also consider Con’y of their ES (concomitant jrdx) 🡪 corr’ss std**

**-ATs empowered to consider Qs of law may also consider *Charter* issues**

**-ATs may be CoCJ for the purposes of awarding *Charter* remedies**

-**Gonthier J overturns *Cooper*, vindication of dissent**; Con = supreme law, s. 52: Q of Con validity applies to every leg enact’t

-Allowing AT to decide Charter issues does NOT undermine role of courts as final arbiter of Con’y in Canada

-AT dcns bsd on Charter subj to JR on *correctness* std (NOTE: *Doré* changes this)

-M’s benefits discont’d, dcn rvwd/claim denied, appeal denied, appealed Bd dcn to appeals trib on ground that regs infringed s. 15 🡪 WCB challenged own AT’s jrdx to hear Charter argmt

-Less restr’ve appr re: leg intent re: AT auth to consider Qs of law (not spec to intent for AT to apply Charter, just *any* Q of law)

**The TEST (to determine whether AT has jrdx to consider Charter challenges to leg’ve prov’s in their ES):**

1. Look to ES for **intent to confer jrdx** explicitly/implicitly to decide Qs of law under challenged provision(s)
2. (a) **Explicit jrdx** must be found in terms granting auth’y in ES

(b) **Implied jrdx** must be found by looking at statute as whole; Look at:

* Statutory **mandate**, whether deciding Qs of law nec to fulfill mandate (if nec to agency functions);
* **Interaction** w/ other elements in admin system;
* Whether AT is **adjudicative** in nature;
* **Practical considerations** (e.g. capacity to consider Qs of law; cannot override clear stat impl’n)

1. **If jrdx found, power *presumed* to incl auth’y to decide Con Qs** (unless expressly removed by statute: BC *ATA*)
2. Burden of *rebutting* presump of expl/impl jrdx lies on party *challenging* admin body

-**Princs at play:** Con’l supremacy (AtJ argmt); Admin rev = record for JR; AT dcns rev’d on corr’ss SOR for Qs of law (still opp for ATs to self correct, non-binding; also doesn’t undermine role of Courts as final arbiters)

**\*\*NOTE: Tension:** BC *ATA* expressly denies most prov ATs jrdx over Charter issues 🡪 Justification:

* Courts more expert than ATs re: complex/far-reaching Charter Qs
* Permitting ATs to resolve these Qs means lit’s must hire $ lawyer
* Drain on resources/time to settle Charter challenges at AT level
* $/AtJ justif’s exacerbated by non binding nat of AT dcns over Charter Qs, would have to be dcd anew in subseq prcdgs

**Reasons and Justifications**

***Lake v Canada (Minister of Justice)***, 2008 – **Mini’l discr: Charter viol’n – SCC does *not* use s. 1 on dcn, but rsn’ss analysis**

-Was Min’s dcn to extradite L to US (vs. pros’n @ Canada) a justifiable infrgmt of L’s s. 6(1) rights/**reasonable**? YES

-**LeBel J:** Uses rsn’ss to give *def* to s.1 justif’n of Minister for limiting right (1st time SCC shows def to s. 1 *justif* rather than min!)

* **Rsn’ss is approp SOR for DDs**/Min’s dcn, regardless of whether L argues extrad’n would infringe CRs

-Min had **duty to provide reasons, but need not be comprehensive** (here, brief but sufficient; was a DD)

* Court should *supplement rsns before subverting*; read into rsns pressing/subst matter (*Oakes* step 1), = foreign relations

-**Purpose of reasons**: 1) Allow individual to understand why dcn was made 2) Allow RC to assess validity of dcn

-Case also imp for issue of **weight** – rsns do not req “blind subm’n” to Min’s ass’t, but determ of if Min’s dcn falls w/in RoROs

**Charter Remedies:** Is AT **Court of Competent Jurisdiction** w/in mng of **S. 24(1)**

***Conway***, 2010 **– Test to determine if AT can grant partic remedy under s. 24(1)**

**-ATs that can consider Qs of law/Charter may grant s. 24 Charter remedies *if their ES permits***

-C seeks abs disch as 24(1) rem for viol’ns of Con rights alleged (at hrg before rev Bd re: NG/NCRMD for SA)

-Does Rev Bd have jrdx to grant Abs D as 24(1) 🡪 depends on **whether AT has jrdx, explicit/implied, to decide Qs of law**: YES

* Exercise in discerning **legislative intent** (whether rem sought is kind that leg intended to fit w/in stat FW of partic trib)

-AT = CoCJ to award remedies under s. 24(1); relevant consid’s = **scope/nature of trib’s stat mandate and function**

-If AT has jrdx to determine Con Qs, it may also award remedies under **s. 24(1)** (YES) although this requires assess’t of leg’ve intent re: specific types of rem’s the AT is auth’d to award; then Q becomes can AT grant *partic rem* sought in case (here, NO):

**TEST: FW for determining Charter jrdx (whether AT CoCJ w/in mng of S. 24(1))**

**1) Does AT have jrdx to decide Qs of law? Does stat give express/implied jrdx? Has leg intended to withdraw jrdx?**

* If YES, YES, NO – then AT can grant s. 24 and s. 52 remedies for Charter issues
* **2)** THEN: For s. 24, can AT grant *this particular remedy*? Look to stat scheme re: leg’ve intent that such rem would fulfill statute’s purposes and AT’s function, be consis w/ stat goals

**-ATs that can consider Qs of law (and thus the *Charter*) can also access Charter REMEDIES under s. 24 so long as power to award partic rem is within their jrdx according to the ES**

-Intended to avoid forcing lit’ts to test rem by rem if AT = CoCJ, but still forces them to test rem by rem whether AT has jrdx re: *spec rem sought* once it’s shown AT = CoCJ for awarding remedies

-Jrdx grounded in stat scheme alone (rather than state scheme AND Charter considered as power-conferring enactment), app’s entitled to petition ATs *only* for those remedies/orders *available already under statute* (need more cases to know if agency jrdx to grant remedies under 24(1) has any *independent* substance)

**ABORIGINAL ADMINISTRATIVE LAW**

**Constitutional Bases**

***Royal Proclamation* of 1763 –** “Magna Carta” of Indian Rights

-“Great frauds and abuses” committed in purchasing lands of Indians 🡪 to prevent again: No priv person can purchase from Indians any lands reserved to them w/in colonies, can only be purchased from Crown/Governor or Commander in Chief of colony

-Lands under control of abo’s not treated same as priv/real prop 🡪 part of protection is that C will protect those lands, intervene as protector, can’t buy direct from abo pps (intermediary to prevent abuse) = orig basis for why abo lands treated diff, why held in trust by C, why abo’s cannot alienate them in same manner as non abo ppls

-C/indigenous ppls rlnsp seen as **sovereign to sovereign** rlnsp

-**Legal pluralism**: abo legal trad’s pre-exist ours; CL rec’d abo **customary law** as LAW (not just customs, formal sys of laws)

***British North America Act*, 1867**

-S. 91(24): Powers of Parliament (distr of powers) includes authority over Indians and Lands reserved for Indians

***Constitution Act*, 1982**

-Part II: Rights of Abo Ppls of Canada

* S. 35(1) – Recog of existing ATRs**: Existing** abo and treaty rights of abo ppls of Can are hereby recognized and affirmed
* S. 35(2) – Def of “abo ppls of C”: In Act, “abo ppls of C” includes the Indian, Inuit and Métis peoples of Canada
* S. 35(3) – Land claims agrmt: For greater cert, in (1) “TRs” incl rts that now exist by way of LCAs or may be so acquired
* S. 35(4) – ATRs are guar’d =lly to both sexes: ATRs in (1) guar’d =lly to male and female persons
* S. 35, like admin law and Charter, has its own s. 1-like FW (where abo rts in s. 35 affected, must prove there is s. 35 rights, then, b/c rights not absolute, burden on gov to prove infrgmt consis w/ DM enviro, Con, F&DS, and abo-non-abo rlnsp, that right can be ltd)
* Fiduciary legal rnslp manifested in s. 35 🡪 PROVEN rights subj to C control: need to consult before can justify infrgmts of existing rights (CL DtC/A w/in Con FW: POTENTIAL *and* undefined ATRs)

**Unwritten principle of the Honour of the Crown**

-Shared b/t abo, admin and Con law

-C sovereignty is asserted or assumed, but NOT *de facto*; HoC “not a mere incantation” (*Haida Nation*)

* Abo ppl were not conquered 🡪 they fought, and where they were not conquered they entered into agrmts (treaties)
* Where there is no agrmt, C should seek treaty w/ abos – w/o it, = conquering (not good for legit sovereign)

-Connection w/ **ROL**: convert moral/poli duty to *legal* oblig (*Haida*); affirm/demand hist’y continuing legal oblig; realize large/lib interp of Abo rts; protect un/proven ARs through legally controlled inst’l process; check power of C, eliminate unstruc’d discretion

**Evolving Aboriginal Modes of Self-Government** 🡪 A redistrib of sov’y and a recog of deep legal pluralism

1. Sovereignty and self-government: e.g. Nisga’a Agreement
2. Self-management and self-administration: e.g. Band councils under *Indian Act*
3. Co-management and joint mngmnt: e.g. Impact Rev Board (public); Impact Benefit Agrmts (priv); Reconciliation Agrmts
4. Participation in government: e.g. Nunavut (consensus model; distinct forms of aboriginal institutions)

**Future Prospects**: Repeal IA (colonial); recog abo sov/laws; share jrdx (w/ feds, provs); facilitate abo self-gov; complexify fed’m

**Aboriginal Administrative Justice**

**-Connections w/ Admin Law:** *Delegated authority*

* Delegated stat auth through *Indian Act* and other leg
* Variety of abo DMs (band and settlement councils, tribs)
* Variety of actions taken (dcns, bylaws, codes, judgments)
* App of principles of fairness to procedures taken by: abo auth’s affecting abo and non abo’s (e.g. elections), non-abo auth’s affecting abo rights/interests
* Review of **reasonableness/correctness** of dcns taken by public authorities
* Flex’y inherent in PF (*Doré*: are CVs wide enough to encompass indigenous values?...)

**Aboriginal DMs and Admin Justice**

**Applying Admin Law To Abo DMs:** Principles of **PF, Indep, Impart’y & Bias** revisited

***Sparvier v Cowessess Indian Band***, 1993 FC – **band elections** (S won, L kicked up fuss, AT took away S’s ldrsp, S contests)

-Will Court impose CL derived princ’s of PF or respect diff’s due to custom law?

-*Indian Act* no longer guides elections; S appeals loss b/c other candidates not residents as req’d under Act; AT nullified election, ordered new on; L wins, S contests AT’s procedures

-Q: Who has **jrdx** to hear complaint? SKPC said they can’t b/c it’s excl subj matter of FC 🡪 does FC have jrdx to hear appeal?

* **Jrdx cannot be conferred by consent** (even if parties agree FC has jrdx to hear) – but hear FC decides they *do* have jrdx

-*Federal Courts Act*, s. 18(3) – Powers of FC: on app for JR, FC ***may*** order any other trib to do s/t it has not done, to award prerog writs as rem 🡪 Rothstein J says **FC has jrdx** here

* **Band council** elected pursuant to cust ind law (trib derives power from Act), **is fed bd**, thus FC has jrdx to decide app

-Min (universal?) stds of **PF**: abo band mem’s entitled to due process, PF in proc’s of tribs that affect them; NJ and PF apply

-**PF has min stds that apply *everywhere* no matter ID/cult’l context of DM – we have *universal* demands of content of PF: notice, fair hearing, opp to make reps (and no bias) = universal content of PF**

-**RAB**? No – no E of effect on dcn 🡪 can’t apply RAB test; if court did, band couldn’t govern themselves (imp b/c whole point of alt’s to *IA* is to have self-gov); adj’ve context 🡪apply RAB test more strictly, BUT **need to contextualize RAB Test**: need to be sensitive to context of small indigenous societies where distance b/t rlnsps is impossible (always indirect interests at stake)

* BUT – **min stds of NJ and PF *must* be met during autonomous process of electing band council (but they are flex)**

**-Confirms autonomy of dcns made by abo govs *as long as* adequate internal accountability exists**

**PF: Independence**

***CP v Matsqui Indian Band***, 1995 – **Princ’s of NJ/PF do apply to band councils as they do to other ATs performing sim f’ns**

-**CL may trump partic’s of abo custom if too much tension w/ CL PF** 🡪 **flex’y/context’m inherent to CL may have limits**

-MB enacts assessment bylaws re: real prop in reserve, appoint Ct of Rev and Ass Rev Comm (ARC) to hear appeals (adj’ve, paid remun’n, no tenure/can’t be apptd to sit on future ass’t appeals); stat appeal on Q of law to FC from dcns of ARC

-Q: Does inst’l FW provide suff guarantees of **indep/imp’y** to satisfy CL demands? Is CP/Unitel land “w/in reserve” – if yes, tax

-CP/Unitel complain re: tenure/indep (have track/cables on land) **🡪 interp Q: “in reserve” = ?** Who has jrdx to interpret? SOR=?

* Does trib’s jrdx incl abil to determine if lands “in reserve”? (**Prelim Q Doctrine**) – if no, app proc not adeq alt rem
* Lamer CJ concludes P intended concurrent auth’y to hear appeals on this matter
* **Intent/Purpose** of ass’t scheme – **part of policy scheme to promote abo self-gov 🡪 issues should be resolved *w/in* sys dev’d by abo ppls before recourse taken to ext’l solutions** (avoid going to court, seeking JR): *Harelkin*
* Inst’l indep and discr to provide for inst’l indep or not are *different* things: Indep premised on discretion is illusory (problematic: take away power from Band, give back to feds to pick mem’s of ass’t trib mem’s?! What about self-gov?? Basically back under *IA*!)

-**Test for inst’l bias must be applied in light of f’n being performed by AT:** req lev of indep depends on: nat of AT, intrsts at stake, other indices of indep like oaths of office 🡪 in some cases high levl req’d (e.g. where dcn aff SOP of party)

* WWRRMP conclude? Factors: 1) $ security 2) security of tenure 3) interests of ppl wo whom they owe apptmts

-**Issues should be resolved w/in sys dev’d by abo ppls before recourse taken to external institutions**

-Sopinka J (dissenting): Bylaws should be interp’d in context of fullest knowl of how they are applied in practice – o/w admin law hypo’l “right-minded person” is r-m’d but uninformed (we don’t know if proc lacks PF b/c it hasn’t been used yet!) 🡪 he would deny JR b/c this is premature (Liston agrees) 🡪 can’t say proc’s inadequate w/o seeing them in action

-Parliament’s intent was self-gov as driving obj’ve (not just “policy consid”) but bottom line = **PF, as understood by CL, trumps** (i.e. *Matsqui* still good law 🡪 Liston says we need a case to say NO this is not ratio, Sopinka actually right all along)

|  |  |
| --- | --- |
| **Lamer J** | **Sopinka J (dissent)** |
| Principles of NJ apply to Band tribs and are flexible | Agrees |
| Context of abo self-gov does not change force of princ’s  Mem’s of appeal tribs perform adj’ve f’ns not unlike courts | Disagrees + diff approach to stat interp |
| Trib mem’s appear to lack sufficient indep as struc’l cond’n  Present case before mem’s apptd by those who oppose claim  (Structure on its face raises RAB) | Defer app of test until have operational knowl (context imp!)  Cannot apply princ’s (o/w right-minded p hypo is uninformed)  There should be ass’t appeal proc, no facts on ground |
| Discretionary apptmt by Band Chief/Counc w/ no prot’n from arbitrary dismissal | --- |
| No security of tenure | --- |
| No security of remuneration | --- |
| Allegations of lack of impartiality/bias are speculative | Agrees |
| Appeal tirbs are not adequate alt remedy | Yes they are |

**Duty to Consult and Accommodate 🡪 forward looking, generative, content varies w/ circs**

***Haida v BC***, 2004 – **FW for DtC/A – transforms *moral* (or political) duty into a LEGAL duty**

-**Duty to Consult grounded in the Honour of the Crown** 🡪 HoC ALWAYS at stake in dealings w/ Abo ppls

-Right to log cedar; HN objected to transfer of tree farming licenses, said gov should **consult**, Min refused; TJ found gov had MORAL duty to negotiate but no *legal* duty; CA reversed, found gov AND Weyerhauser owed legal DtC/A

-SCC holds **only gov has legal duty to consult/accommodate prior to making dcn that might affect right, both proven and unproven** (W as priv Co not subj to duty but could be liable for dmgs in civ ct if neg’t, dealt dishonestly, etc.); no duty to *agree*

-**Content of Crown’s duty:**

* C cannot act unilaterally; ultimate DM must hear concerns of affected Abo comm’s
* C must always consult; duty cannot be (sub)delegated; rests on both fed and prov govs and agents/reps/del’d auth’s
* Duty inheres in process; process must be fair/in good faith; may fund Abo particip’n; C must justify action(s)
* C may have to accommodate; no duty to agree

-**Content of Aboriginal peoples’ duty:**

* Good faith consultation; clarity of claims; E in order to assess severity of impact
* Not frustrate C’s GF attempts at consult’n; try to reach mutually satisfy sol’n; no “veto” power (can’t trump)

-**Dtc arises when:** C has knowl, real or constr, of pot’l exist’ce of abo right/title and contemplates conduct that might adv’ly aff it

-DtC analogous to *Doré* 🡪 **proportionality**

**-**To extent issue one of pure law, can be isolated from issue of fact, SOR = **corr’ss**; where 2 intertwined SOR likely **rsn’ss 🡪 fusion of Fairness and Reasonableness**

**-If gov misconceives seriousness of claim or impact of infringement, this Q of law would likely be judged by *correctness***

**Post-*Haida* FW & SORs applicable:**

**STAGE 0: No review, Crown’s discretion**

**STAGE 1:**

1. **“The trigger”**: C has knowl (real or constructive) of pot’l Abo right or title (**= fact, reasonableness SOR)**

* Low threshold for knowl + credible abo claim
* Actual knowl = claim filed in court/advanced in neg’n, when treaty right impacted (*Mikisew Cree*)
* Constructive knowl = know/reasonably know that lands trad’lly occ’d and rsnbly anticipate impact on rts

1. **Decision to act**: C contemplates action/decides to act

* Not confined to gov ex of stat powers (*Huu-Ay-Aht First Nation*)
* Only pot’l impact ned, not immed so captrues “strategic higher level dcns”

1. **Potential adverse effect**: Conduct may potentially adverselyaffect Abo right or claim

* DtC kicks in as *positive obligation* on gov (*Halfway River*)
* Must be new, not historic/continuing, impact (*Carrier Sekani*)
* Onus on claimant to show causal rlnsp b/t conduct and potential adverse impact (heavy onus on abo claimant)

**STAGE 2:**

* **“The Spectrum”**: Determine scope of duty (**= correctness** re: strength of claim, severity of impact as Qs of law – unless large degree of fact’l determin’n, then mixed fact/law = reasonableness)
  + Proportionate w/ strength of abo claim, pot’l impact, mult variables or contextual factors (e.g. pub interest)

**STAGE 3:**

* **Consultation**: Consultation w/ affected parties (re: adequacy of req’d consult’n: **reasonableness/fairness**)
  + Consultation should be meaningful, but also only needs to be *adequate*
  + Burden on C: ID relevant abo and non-abo parties
  + Burden on abo claimants: must assert rights and specify nature of pot’l infringements
  + **PF components of consultation process** (underline indicates overlap w/ conv’l PF components):
    - Not act unilaterally
    - Timely notice and early consultation
    - C must inform itself of impact of proposed project
    - C must communicate its findings
    - Comprehensive disclosure of C’s knowledge
    - Provide meaningful opp to be heard (e.g. formal particip in DM’ing)
    - Allow submissions and arguments in reply
    - Must provide meaningful engagement (e.g. direct meetings)
    - C *must* (duty) listen and respond carefully to reps
    - Written reasons
    - C must intend and subst’lly attempt to minimize impact on rights and address Abo concerns: good faith
    - Wherever possible, concerns must be demonstrably integrated into plan
    - Consent (in certain cases)

**STAGE 4:**

* **Accommodation** (adequacy of req’d consult’n could be **reasonableness** (*Haida*) or **correctness** (*Little Salmon*))
  + *May* be req’d (go back, re-consid dcn, re-shape to further minimize impact on abo right)
  + DM must demo abo interests considered usually through reasons
  + DM balances competing interests [proportionality analysis] (**reasonableness**) 🡪 directly analogous to *Doré*
  + *May* require modif’n of dcn or policy to minimize impact on Abo ppls

**Constitutional Nature of the DtC obligation – Balancing and Fairness – Duty owed to community, NOT individuals**

***Beckman v Little Salmon***, 2010 – salmon trapline admin’d by YK gov

-LS FN has right of access for hunting/fishing under Treaty on parcel incl in land grant app of Paulsen (wants to farm) 🡪 land has been surrendered, FN do not have control, but if app goes ahead, farming will interfere w/ FN right to hunt 🡪 dcn in favour of B

-LS made written submissions but no particp @ hearing; c onsult’n adequate, gov not req’d to consult, only as *courtesy*

-LS want dcn quashed, consult @ high end, claims breach of DOPF, dcn unrsnbl; YK says treaty compl code, ousts CL where expl

-**General rule/principle of interpretation for abo law: Generous and liberal interpretation** (Binnie J)

* Argument that Treaty = “complete code” untenable (other parts of law can/should get in: unwrttn princ’s, ROL, DtC)

-**SOR**: No def owed to Director re: legal/Con limits of ex of discretion (correctness); but dcn reviewed on reasonableness

-**PF and DtC:** PF as flex concept; admin law to regulate relations b/t gov DMs and *all* residents of YK, abo and non-abo

* **Polycentricity** – interests to be weighed are multiple; not a given that FN interests will come out on top
* **Abo interests should be given great WEIGHT**
* Consultation NOT matter of *courtesy*, all govs MUST fulfill if subj to duty (where breached, law will provide remedy)

-Conclusion: Disallowing app would put weight of prob on indiv app Paulsen (unfair), *somebody* has to bring consult’n to end, weigh up interests 🡪 Director did not err in law in concluding consult’n was adequate (partic weight to P’s PF probs)

-Liston: dcn rights on merits on own but if happened again and again = worrisome (abo interests not always given heavy weight)

-**All dcns to consult/accommodate are discretionary** (note: how does DM weigh interests?)

-**Consulation proceeds w/ Abo comm’y rather than partic mem** of comm’y even when indiv’s intrsts partic’ly aff’d

***Rio Tinto v Carrier Sekani***, 2010 – **Limits of DtC**

**-No remedy for past; DtC is fwd-looking/generative but does not exclude past breaches giving rise to present damages**

**-All DtC dcns are discretionary**

-RT and BC Hydro (C corp) enter energy purch agrmt (EPA) in 2007, to solidify, BCH needs approval of BC util comm – they approve; SC sought to be heard at UC in dcn proc 🡪 did they fulfill DtC before entering EPA?

-UC looks at claim that EPA will **adv’ly aff abo intrsts/rts** to satisfy CS’s request for reconsid of dcn (e.g. water flow impact on fish pop, flooding burial gds) 🡪 2008 UB gives rsns for dismissing CS’s reconsid motion: **no new impact** on abo intrst (all OLD)

-McLachlin CJ: **DtC/A part of process of fair dealing and reconciliation**, concerned w/ ongoing rlnsp, pref for remedies that promote ongoing negotiations (DtC as dynamic/responding to current and future needs, not reified)

-No fresh duty, past gov action, no change in effect, = continuation; DtC/A does NOT correct for historic in justices (implied limitation) 🡪 redress for past grievances require diff remedy (e.g. dmgs)

* McL rejects broad temporal understanding of DtC (as contrary to *Haida*), confines duty to current/forward UNLESS it is dcn where continuing affects are being *amplified* in “now” way 🡪 unhappy ending for CS; dcn found reasonable

-Re: BCUC jrx 🡪 BCH had DtC as C copr, but UC didn’t (it’s an AT) but could *review* DtC (Q of law; simple jrdx Q)

-BC *ATA*: UC’s findings of fact: **PU std**; Qs of law: **correctness**; didn’t cover Qs of mixed fact/law: **attracts CL SOR (rsn’ss)**

***West Moberly First Nations v BC (Chief Inspector of Mines)***, 2011 BCCA (leave to SCC denied – hard for DtC/A to make it up)

-Treaty 8, right to hunt caribou/manage herd: only 11 left, WM put ban on hunting/eating to sustain pop, facing extirpation (future), First Coal wants to explore for coal deposits; expert E re: impact on caribou (would end pop)

-Vs. *Carrier Sekani*: past incident BUT here there is current process w/ **FRESH impacts continuing in future**

-WM wanted to be consulted AND accommodated in abil to ensure caribou continue to exist (in *future*)

-Treaty 8: only laws re: hunting that were in interests of abo were to be made, abo’s free to hunt after (can’t now – down to 11!)

-Finch CJ: New dcn allowing for pot’l explor’n which WILL have adverse impact on abo rt/intrsts (DtC kicks in differently than in *Carrier Sekani*) 🡪 corrects Chambers J re: **weight**:

* Very rel fctr given very little weight = mistake (scope and temporality: impact of dcn big but given very little weight; thrust of WM app forward-looking, wanted to preserve/restore caribou, needed meaningful consid in consult’n process)
* No real eng’t w/ FN in context = mistake of law, DtC/A not adequately undertaken (needed to provide explan’n to WM, explain that position was considered, but more persuasive rsns why their requested course of action not nec/was unrsnbl)
* Rsns would have to be *very* persuasive to say coal co’s claim was OK (abo intrsts affected way too much)

-Hinkson J re: adequacy of accommodation:

* Requiring coal co to make plan for more protection of caribou goes beyond scope of duty of reasonable accommodation (beyond judicial role) – would have set aside that aspect of dcn

-Q = whether consult’n proc was rsnbl 🡪 rsnbl proc recog’s/gives full consid to rts of abo ppls and rts/intrsts of broader comm’y

-**Judicial reluctance to order specific accommodations:** due in part to rsnbl’ss SOR and def this SOR demands

**BC *ATA***

**BC *ATA***

* Enacted 2004; tells you what SOR is (uses 3)
* Prov’s attempt to give more clarity via codification (but doesn’t work as well as originally intended to; out of step w/ other admin law dev’ts)
* Depending on Con view of rlnsp b/t courts and leg, may be underlying Con issue not yet addressed
  + Removal of jrdx from some AT’s to consider Charter as inconsis w/ dev’t of Con law
  + Violation of POFJ (re: impartiality of DMs – overly constraining, spectre of partiality; leg as encroaching on JI)
  + Overall intent was to **circumscribe courts** – inconsis w/ how CL evolved to sideline correctness std
* PC = prov in AT ES giving AT excl/final jrdx to inquire into, hear, decide certain Qs; dcns in jrdx binding/not open to rev

**Section 58: SOR if AT’s ES has PC**

**(1)** If trib’s enabling Act contains PC, relative to courts the trib **must** be considered to be **expert** trib in relation to all matters over which it has **exclusive jrdx**

**(2)** In JR prcdg re: expert tribs under (1)

**(a)** a finding of **fact or law or ex of discr** by trib re: matter over which it has excl jrdx under PC **must not be interefered w/** unless it is **patently unreasonable**

**(b)** Qs about app of CL rules of NJ and PF must be decided having regard to whether, in all circs, trib acted **fairly** and

**(c)** for all matter other than those ID’ed in paras (a) and (b), SOR to be applied to trib’s dcn is **correctness**

**Section 59: SOR if AT’s ES has no PC 🡪** no mention of Qs of mixed fact/law (gap); b/c no PC, expertise *irrelevant*

**(1)** In JR prcdgs, SOR to be applied to dcn of trib is **correctness** for all Qs except those re: ex of discretion, FoF and app of CL rules of NJ and PF (\*i.e. correctness mandated regardless of gen Q of law, Q of law @ expert trib and mixed fact/law)

**(2)** Court must not set aside a FoF by trib unless there is no E to support it, or if, in light of all E, finding is o/w unreasonable

**(3)** Court must not set aside a **DD** of trib unless it is **patently unreasonable**

**(4)** For purposes of (3), **DD** is **PU** if discretion (\*\*if challenging DD under s. 59, try to fit claim into 1 of these: WHY it is PU)

**(a)** is exercised arbitrarily or in **bad faith**,

**(b)** is exercised for an **improper purpose**

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

**(d)** fails to take stat req’ts into account

**(5)** Qs about app of CL rules of NJ and PF must be decided having regard to whether, in all circs, trib acted **fairly**

**PU and the *Dunsmuir-Khosa* Confusion**

-CL abolished SOR previously codified in *ATA* (PU)

**S. 18.1 of *Federal Courts Act* in *Khosa***

**(1)** App for JR may be made by AG of Canada or by a/o directly affected by matter in respect of which relief is sought

**(2)** App for JR re: dcn or order of fed bd, commission, or other trib shall be made w/in 30 days after time dcn/order first communicated by fed bd, comm or other trib to office of Dep AG of Canada or to party directly affected by it, or w/in any further time that J of FC may fix or allow before or after end of those 30 days

**(3)** On app for JR, FC may

**(a)** order fed bd, comm or other trib to do any act or thing it has unlawfully failed or refused to do or has unreasonable delayed in doing; or

**(b)** declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accce w/ such directions as it considers to be appropriate, prohibit or restrain, a dcn, order, act or prcdg of fed bd, comm or other trib

**(4)** FC may grant relief under (3) if satisfied that fed bd, comm or other tribunal

**(a)** acted w/o jrdx, acted beyond its jrdx or refused to ex its jrdx

**(b)** failed to observe a princ of NJ, PF or other proc that it was req’d by law to observe;

**(c)** erred in law in making dcn or order, whether or not erro appears on face of record;

**(d)** based its dcn or order on erroneous FoF that it made in a perverse/capricious manner or w/o regard for mat’l before it;

**(e)** acted, or failed to act, by reason of fraud or perjured E; or

**(f)** acted in any other way that was contrary to law.

**(5)** If sole ground for relief est’d on app for JR is a defect in form or technical irregularity, FC may

**(a)** refuse the relief if it finds no substantial wrong or miscarriage of justice has occurred; and

**(b)** in the case of a defect in form or technical irreg’y in dcn or order, make an order validating dcn or order, to have effect from any time and on any terms that it considers appropriate.

**Binnie J for majority in *Khosa***

-Despite *Dunsmuir* PU will live on in BC, but content of expression/degree of def in diverse circs nec’lly continue to be calibrated acc’g to gen princ’s of admin law 🡪 in s. 58 of BC *ATA* leg directs courts to afford ADMs high degree of def on issues of fact and effect must be given to this clearly expressed leg intent

**Rothstein J (concurring) in *Khosa***

-Says NO to Binnie – when BC codified, that was the end, it ousted CL

* To access remedy:
  + If you want FC to do s/t (quash, order, etc.) 🡪 say ADM erred *in law* (old school way) OR made erroneous FoF (if you characterize claim that way, can get rem 🡪 Binnie said that’s what provision does, Rothstein says no)

**BC Case Law on relationship b/t CL and *ATA* on PU**

* CL dev’ts cannot overrule clear stat dir’n in *ATA* which is determinative re: SOR (*Lavender Co-operative Housing*, 2011)
  + What leg said, they said; CL can’t displace (whereas stat *can* displace CL)
  + CL relevant where ss. 58 and 59 do NOT apply
  + Settled area now (was more alive 2008-2011)
* Courts may not use CL to amend leg’s clear intent to use pre-existing terms such as “PU” and it is therefore defined by CL immediately prior to *Dunsmuir* (*Manz* 2009, *Jensen* 2010, *Coast Mountain* 2010, *BC Ferry and Marine Workers’ Union*, 2013)
  + Provides more content re: PU
  + Not obliged to undertake SOR analysis where SOR made clear
  + Reasonableness does NOT inform PU in BC (fed case law on reasonableness not relevant to BC cases on PU)
* PU requires the highest level of deference (*Viking Logistics*, 2010)
  + Court must not undertake its own reasoning analysis and measure trib’s dcn against that analysis
  + Court must not re-weigh E, 2nd guess conclusions, sub diff FoF or conclude E is insufficient to support result
* Content of pre-*Dunsmuir* CL definition (*LSNB v Ryan*, 2003, *Jensen*, 2010)
  + PU means openly, evidently unreasonable or clearly irrational
  + Dcn based on no E is PU, but insufficient E is not
  + Review applies to result, not reasons leading to result
  + Dcn set aside only where admin body commits jrdx’l error
  + High degree of def re: reasons offered or could be offered to support impugned dcn

**BC *ATA***:**Basic Steps**

**1.** Read ES

**2.** Determine if it incorporates *ATA* SOR

**3.** If statute does NOT incorporate *ATA*, go to CL

**4.** Determine if there is PC and go to appropriate provision (58/59)

**5.** Ss. 58 and 59 are intended to complete codes for SOR

**6.** ID type of Q

**7.** ID SOR (e.g. Fairness for matter of PF – akin to correctness but allow for def re: choice of proc of DM and DM’s expertise)

**8.** If PU (s. 58(2)(a)) and is Q of fact or law w/in exclusive jrdx, follow jurisprudential guidance re: its content

**9.** If PU and discretionary (s. 58(2)(a)), apply definition of PU set out in s. 58(3)

**TOOLS**

**FLOW CHART**

-What is right **FORUM** (constrained by stat proc code?) 🡪 What are proper **GROUNDS** (substantive/procedural)?

-What is effective **REMEDY**? Can be controlled by statute, but most are CL: *Habeus Corpus*, quash, mandamus

**PROCEDURAL FAIRNESS**

* **Threshold** (*Cardinal*)
* Is it a **public body** exercising public power? If yes, DOPF owed (*Nicholson*)
* **Threshold** Q: Has indiv’s ***rights, interests or privileges*** been affected by dcn/action of ADM/pub off’l? (*Cardinal*)
* **Which principle(s) at play?**

1. **Right to be heard**: *Audi alteram partem*; and/or
2. **Independence, Impartiality, Bias**: *Nemo judex en sua causa*
   * Deal w/ *Ocean Port*: DMs must be impartial/unbiased BUT not as much as Js; no Con guarantee of AT indep
   * RAB test highly contextual (clues raising app of bias? No smoking gun but more than mere suspicion needed)
   * **Indiv:** Use **close minded** test if more leg’ve type DM, more lenient std (for pre-hrg, inv’ve stage) (*Nfld Tel*); Use **open mind** test if more adjudicative, more strict std
   * **Institutional bias**: modification of test from *Geza*

* Considering # of fctrs incl but not ltd to: pot’l for conflict b/t intrsts of trib and mem’s and those of parties before them, **will there be RAB in mind of fully informed person in** ***subst’l # of cases***
* If NO, alleg’s of RAB cannot be brought on inst’l lev; must be dealt w/ case-by-case re: *one* inst’l instance (**indiv**)
* **ID any Limitations/exceptions on PF at play** (pp.5-6)
* DOPF applies only to ***final*** dcns gen in nat (not dir’d @ indiv), NOT to **leg** dcns/fxns b/c SOP (*CAP*, *Authorson*)
  + **Cabinet/ministerial** dcns that are leg’ve exempt from duty (*Inuit Tapirisat*)
  + Policy or **“purely” ministerial** dcns may be exempt from duty (*Matsqui*, *Imperial Oil*)
* **Subordinate leg** (mun bylaw) *may* be covered by duty in certin circs if bipolar rather than polycentric (*Homex*)
* Duty may be suspended/ltd in **emergency** (*Cardinal*); no such thing as unfettered discretion (*Roncarelli*)
* No longer applies to pub off holders **employed under K** even if statute also present (*Dunsmuir* overruling *Knight*)
* **Content of DOPF** (*Baker*)
* Does **legislation** ***specify* content** of DOPF? Give trib auth to craft own proc’l rules/policies/g’lines?
* Does **ES** or proc’l code **oust** proc content? (Only way to challenge is via Con challenge to statute) – both princ’s
* Does **ES** set out ***minimum* req’ts** (that may be supplemented/expanded in indiv case as court sees fit)?
* Does a **Prov stat’y proc’l code** establish proc’l req’ts for admin prcdgs in Q?
* Note: Breach of PF will *not* be protected by **PC** 🡪 it is **jrdx’l** in nature
* **BASICS of content** (*Nicholson* 3 = N, fair hrg, rt to make reps)(varies w/ context) - **What PF was received?**
  + Did person get **notice**?
  + Did they know the **case to be met** (disclosure)?
  + Did they make **submissions** (written)?
  + Was there **delay**?
  + Was an **oral hearing** req’d b/c cred’y was at issue?
  + Was it an **unbiased DM**?
  + Were **written reasons** available?
  + Did they (have to) **come from the actual DM** and if so, why?
* **5 *Baker* factors: Is decision fair considering all circumstances/factors?** (pp.6-7) 🡪 Content of DOPF = ?
* **Nature of decision** 
  + Criminal/penal 🡪 More adjudicative = More PF
  + Policy/security 🡪 Administrative; discretionary = Less PF
  + Between whom? Polycentric? Between 2 parties?
* **Statutory scheme**
  + PF specified as principle?
  + Privative clause?
  + Notice and/or reasons requirement?
  + Appeal? Internal? Statutory? Stat RoA *may* indicate more PF (e.g. reasons) owed but NOT determinative
* **Importance of decision**
  + High end? (*Baker*) – LLSOP? Economic? Security? Remaining in country? 🡪 More PF
  + Right or privilege or interest at stake? Right has most WEIGHT
* **Legitimate expectations?**
  + Recall: Only gets you *more/better procedure*, NOT promised outcome
* **Expertise and DM’s choice of procedures**
  + **Deference** (SOR = fairness – may be deference for DM’s choice if expert)
* **Remedy**
* Should **discretionary remedy** be issued? If so, which one?
* For PF, usual remedy is ***certiorari*** – QUASH the decision and ***mandamus*** *–* send it back for redetermination w/ directions re: PF

**STANDARD OF REVIEW**

***Dunsmuir* 2-step Test** – what is applicable SOR?

* **1) Past Jurisprudence** determining SOR? (Unlikely)
* **2) SOR Analysis** (do all factors; signals re: how much def leg intends court to demo) – contextual; mod appr to SI (*Rizzo*)
* **PC?** (Presence = deference; but never absolute: *Crevier*)
  + If there is a **PC** and **expertise** and it’s **home statute** – **Presumption of Reasonableness** kicks in quick
  + If no PC, further guidance from nature of Q (law, fact, discretion) and expertise
* **Relative Expertise** 🡪 more expertise = more deference (reasonableness = presumptive SOR)
* **Nature of Q** at issue
  + Q of fact (e.g. cred’y) 🡪 more deference
  + Q of mixed fact/law (correctly take test and apply facts to it) 🡪 more deference
  + Discretion 🡪 more deference (reasonableness)
  + Q of law (e.g. misstating legal test) 🡪 less deference
* **Purpose of AT as determined by interp of ES; purp of provision/prov within statute** (mod appr)
  + More specific purpose 🡪 deference
  + Polycentric 🡪 more jud’l restraint (*Pushpanathan*), more deference 🡪 balancing mult interests, constituencies, factors (e.g. *Can Imm Consult’s*, vs. *Baker*: indiv dcn 🡪 less def) or has signif policy dimensions (*Agraira*, *McLean*)

**Does it fall into 1 of 4 Correctness exceptions (*Dunsmuir*)?**

* + - 1. **Constitutional** issue?
      2. Q of gen law that is BOTH of **central imp to legal sys** as whole AND o/s spec’d expertise
      3. Drawing **jrdx’l lines** b/t 2 or more competing specialized tribunals (*Figliola*)
      4. Determination of “True” Q of **jrdx/vires** 🡪 where AT deciding whether it has jrdx to consider certain matter (*Alberta Teachers’*, *CUPE*)

**\*\*Reasonableness = *presumptive* SOR when:** specialized/expert AT; interpret its ES or closely related stat; Q of fact or mixed Q; on Q of law involving interp of home stat; ex’g broad stat discretion to render indiv’d dcn affecting CV; correctly applies all legal princs/tests; construct interp of stat powers that fall w/in RoPAIs; supported by adeq rsns

\*\*If above 4 factors all calibrate in favour of less deference/correctness – still fit it into one of 4 correctness exceptions

* **Apply SOR – was SOR met in circs?**
* Look at **reasoning, reasons, outcome**
* Is outcome within the **range of possible acceptable outcomes** defensible in respect of the facts and the law?
* Is there **justification, transparency and intelligibility** to the dcn?
* Indicate some **expertise** (recall: interp of HS gives ADM interp upper hand 🡪 don’t construe jrdx too narrowly)
* Recall: reasons need NOT be perfect (prohibition on re-weighing, but that’s what courts do!)
* Apply to fact, talk about in terms of **impact on client**, importance of interest, PI imp’ce; rhetoric of public law
* **Remedy**
* Usual remedy is ***certiorari*** – QUASH dcn and send back for re-determination
* Can also use, at FC, for example: remedial power of FCs; other prerog writs (declaration; order s/o to fulfill duty in partic way: *Insite*; prohibit DM from acting, etc.)