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# Introduction to Administrative Law

## Public vs. Private law

* **Private Law: Enables or constrains the use of individual power in relationships**
	+ Provides a framework for obligations and agreements between or among individuals’
	+ Structures relationships involving corporations or other private associations in civil society – “horizontal” in nature
* **Public Law: Structures the relationships b/w the individual and the state and among state institutions**
	+ Facilitates and constrains the exercise of public power – is “vertical” and general in nature
	+ Applies only to public entities
	+ Includes constitutional, criminal, administrative law, statute, etc.
* There is no longer a clear distinction between public and private law—public functions have been privatized or hybridized in many instances, leading to an unclear application of the public law.

## Who are administrative actors and what do they do?

* **Administrative actors** include:
	1. A person or institution that delivers a public program or engages in government action
	2. Acts through and is controlled by legislation – “a creature of statute”
	3. Has delegated authority from the legislature in order to implement the legislative scheme under the statute
* Includes the Executive, Ministers, municipal government, school boards, agencies, Commissions, tribunals, etc.
	+ They span the “constitutional divide b/w the executive and the judicial branches of gov’t” (***Ocean Port***)
* Typical actions include decisions, creation of regulations, adjudication, policy development, prosecutions, etc.
	+ E.g., securities regulators, parole boards, welfare officers, residential tenancy boards, HR tribunals, etc.

## What is administrative law?

* **Administrative law** is one of the three basic areas of public law that deal with the relationship between government and its citizens. The other two are constitutional law and criminal law.
	+ The main purpose of administrative law is to ensure that activities of government are authorized by Parliament or the legislature and that laws are implemented in a fair and reasonable manner.
	+ **Judicial review** is a key component of administrative law
		- Courts can intervene to review matters of jurisdiction, procedural fairness, and, in some cases, to engage in substantive review.
* Administrative law is roughly divided into **three parts**:
	+ 1) **Procedural fairness**: is this an issue that courts should review and, if so, did the administrative decision-maker use the proper procedures in reaching a decision?
	+ 2) **Substantive review**: Did the DM make an error of the kind or magnitude that the court is willing to get involved in?
	+ 3) **Remedies and the legitimacy of judicial review**: If there are procedural or substantive defects, should the court intervene? How?

## How do courts get involved? Jurisdiction and Judicial Review

* **Judicial Review** is the means by which courts supervise those who exercise statutory powers, to ensure they do not overstep their legal authority. The function of judicial review is to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes. Judicial review is about preserving the rule of law (***Dunsmuir***).
* Where do courts get the power to exercise judicial review?
	1. **Original jurisdiction** – sue government or administrative actor through ordinary civil law of contract, tort, etc. (***Roncarelli***)
	2. **Appellate jurisdiction** – statute creates a right of appeal federally or provincially. If not in statute, then no right to appeal.
	3. **Supervisory Jurisdiction** – Courts may review decisions made by administrative actors through the court’s inherent judicial review jurisdiction.
		+ Superior courts may hear any matter unless there is a specific statute that says otherwise or grants exclusive jurisdiction to another court or tribunal. Derived from the preamble, the rule of law, and section 96 of the *Constitution Act, 1867*.
		+ Uncertainty arises when privative clauses are attached to statutes.
		+ Previously governed exclusively by the prerogative writs and common law principles; now often consolidated and provided for in statutes.
			- Uneasy relationship between common law of judicial review and statutory provisions.
* There is a substantial difference between s. 96 superior courts and administrative tribunals
	+ Jurisdiction of administrative tribunals designed by their enabling statute; s. 96 grants courts inherent jurisdiction to review administrative decisions to make sure they are acting *intra vires*.
	+ Tribunals are only immune from JR to the extent that the privative clause demands deference. However, even the presence of a privative clause is not the last word.
		- ***Crevier***: constitutionally-recognized right to judicial review, at least regarding questions of jurisdiction. Provinces cannot attempt to create *de facto* s. 96 courts by way of strict privative clauses.
* **Jurisdiction of the Federal Court** (Federal Courts Act):
	+ **S. 18.1(3):** On application for judicial review, the Federal Court may:
		- **(a)** order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do.
		- **(b)** declare invalid or unlawful; quash; set aside and refer back for determination in accordance with directions; or prohibit or restrain a decision, order, act or proceeding of a federal board, commission or other tribunal.
	+ **S. 18.1(4):** The Federal Court may grant relief under subs. (3) if it is satisfied that the federal board, commission or other tribunal:
		- Acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction
		- Failed to observe a principle of natural justice or procedural fairness
		- Erred in law in making a decision or order
		- Based its decision on an erroneous finding of fact that it made in a perverse or capricious manner without regard of the material before it
		- Acted in any other way contrary to law
	+ **S. 2:** A "**federal board, commission or other tribunal**" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court or any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.

## Brief History of Administrative Law

* Early years of nation building (1850 – 1913)
	+ Executive centred government is established; legislature becomes “weakest” form of government
* WWI and the Depression (1914 – 1939)
	+ State intervention in the market becomes commonplace; growth of the administrative state/agencies
	+ Origin of the welfare state; response to massive economic and social crisis
* WWII (1940-1980)
	+ Discourse of human rights began to dominate
	+ Continued intervention in the market (e.g. marketing boards); growth of the welfare state as people returned from war; massive influx of immigrants
* 1980s Until Now
	+ Trend: Limit gov’t intervention in the economy; increasing privatization and new forms of governance (PPPs)
	+ Welfare state is no longer “cradle to grave”; provided on as “as needed” basis
	+ Rise of expertise; appointment of individuals w/ greater expertise in roles within administrative agencies
		- Also a result of the increasingly complex nature of the administrate state (e.g., special expertise required to deal with immigration, securities, human rights, etc.)
	+ Growth of public international law
	+ End of judicial hostility to the administrative state – deference as respect
* Animating policy considerations:
	+ Tension between the appropriate role for governments, administrative agencies and courts – and which sets of decision makers are accountable to others – continues to be a strongly contested set of issues.

## Snapshot of the Review Process

**Step One: Threshold Question**

* Is this the kind of decision that should attract some kind of procedural right? In other words, should the court review the DM’s procedures at all?
	+ Generally, when an administrative decision affects an individual’s rights or interests, there will be some minimal entitlement to PF (***Cardinal***)
	+ When a decision is a legislative or policy decision, there is typically no such right.

**Step Two: The Content of Procedural Fairness**

* If a court determines that some PF is required, it must then address what those procedures will be.
	+ To answer this question, **first consult the home statute** and any other relevant statutes, rules, or guidelines (such as the ATA). Where the statute specifies a certain kind of procedural right, or specifically denies a common law procedural right, the statue must prevail.
	+ Where the statute does not specify, the common law may supplement. In order to determine what level is appropriate, **apply the *Baker* framework.**
	+ Having determined the general level of PF, the court will then decide what specific procedures are required, such as:
		- **Notice** that the decision is going to be made
		- **Disclosure** of the information on which the tribunal will base its decision
		- Some opportunity to **participate** or make views known
		- A full **hearing**, similar to that which occurs in court;
		- An opportunity to **give evidence** and cross-examine;
		- Right to **counsel** (rare)
		- Oral or written **reasons**
		- **Independent and impartial** decision maker

**Step Three: Substantive Review**

* With substantive review, the courts look at the content of the decision itself, and not just the procedures that were used to reach that decision.
* Courts must first determine the **standard of review.**  Following ***Dunsmuir,*** there are only two possibilities:
	+ **Correctness:** Was the decision correct? Was it the decision the court would have made?
	+ **Reasonableness:** Did the tribunal’s decision fall within a range of reasonable alternatives?
		- Reasonableness is the default standard.
* When determining the standard of review, courts will first consider whether there is precedent on point. If there is not, they will 1) consider whether one of the four “correctness exceptions” are present; 2) engage in a more in-depth analysis by weighing **four non-exhaustive factors**:
	+ 1) Presence or absence of a privative clause
		- Strongly determinative of a reasonableness standard
	+ 2) Purpose of the tribunal, as determined by the enabling legislation
	+ 3) Nature of the question at issue
	+ 4) Expertise of the tribunal

# Baker v Canada (SCC 1999)

**Facts**: Baker was a visitor who remained in Canada as an illegal immigrant. Employed as domestic worker for 11 years, had 4 children. Faced deportation order in 1992; immigration law required her to apply for permanent residence from outside of Canada, meaning she would have to return to Jamaica; applied for exemption from this requirement under 114(2) and regulation 2.1, which authorizes minister to grant discretionary exemptions on humanitarian and compassionate grounds. Was denied, initially w/o reasons; then provided notes made by Lorenz. Procedure included written application, documentation, and decision with ‘reasons’. Baker sought JR.

**Sources of Law**

* Domestic Law
	+ *Immigration Act*, s. 114(2) – allows the Minister to exempt persons from regulations
	+ *Immigration Regulations*, s. 2.1 – authorizes the Minister to exempt persons based on H&C grounds
* International Law
	+ Jurisprudence from UK, Australia, New Zealand, India (comparative processes); considered heavily by LHD
	+ *Convention of the Rights of the Child* (not yet incorporated into domestic law in Canada)
* Not “Law”/Soft Law
	+ Immigration guidelines = “soft law” but possess significant weight
	+ Fundamental values of Canadian society
	+ Articles by legal academics

**Judicial Review**

* *Immigration Act* contains a provision allowing JR of a decision with leave requirement from FC
* Can only be appealed to the FCA if the FC certifies a “serious question of general importance” for FCA to consider
	+ Must have far reaching (national) implications for the jurisprudence; huge policy component
* Certified Question:
	+ Given that the Immigration Act **does not expressly incorporate** the language of Canada’s **international obligations** with respect to the International Convention on the Rights of the Child, **must** federal immigration authorities treat the **best interests of the Canadian child** as a ***primary consideration*** in assessing an applicant under s. 114(2) of the *Immigration Act*?

*Procedural Fairness Review*

* **First Principle of Fairness: Duty to Hear the Other Side**
	+ When determining the nature and extent of the duty of fairness owed, five open-ended factors should be considered and weighed:
		- 1) **Nature of Decision and the Process Followed**
			* The more the decision and process resemble judicial decision-making, the more fairness that is required.
			* Baker: H&C decisions are not like judicial decisions, because they involve considerable discretion
		- 2) **Nature of the Statutory Scheme**
			* What does the statute say? Greater procedural protections required when no appeal procedure is provided
			* Baker: Asking for an *exception* provided for by the statute (i.e., generally not entitled). However, no appeal although JR may be sought.
		- 3) **Importance of the Decision to the Individual Affected**
			* The more important it is, the more PF required
			* Baker: very important to the lives of applicants.
		- 4) **Legitimate expectations of person challenging decision**
			* If a claimant has a legitimate expectation that a procedural will be followed, then that procedure is required.
			* Baker: Articles of the Convention did not give rise to a legitimate expectation.
		- 5) **Respect for Agency Expertise**
			* Particularly important when agency is left to determine its own procedures
			* Considerable flexibility and discretion accorded to the minister
		- Conclusion in Baker: circumstances require full and fair consideration of the issues, including a meaningful opportunity to present evidence and have it considered. However, oral hearing not necessarily required. Participatory rights satisfied.
	+ In certain circumstances, the duty of procedural fairness will require the provision of **written reasons.** Reasons required when:
		- Decision is significant for the individual
		- Statutory right of appeal
		- Other circumstances
	+ In Baker, the notes of Lorenz were sufficient to be considered ‘reasons’.
* **Second Principle of Fairness: Right to an Independent, Impartial and Unbiased Decision Maker**
	+ Test for reasonable apprehension of bias (RAB):
		- What would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude?
	+ Standards for reasonable apprehension of bias may vary according to context.
		- Baker: well-informed member of the community would perceive bias when reading Lorenz’s notes. Suggest that he was drawing conclusions based on bias, rather than the facts.
* **Approach to Determining the Standard of Review**
	+ Conclusion in Baker: reasonableness
		- Court concludes that decision was unreasonable because children’s interests were not sufficiently taken into account; also failed to consider hardship that would come to Ms. Baker.
			* Some criticism that the Court is re-weighing the factors and not conducting a review based on reasonableness.

# Rule of Law

* The rule of law is a fundamental, unwritten principle that has its source in the preamble to the constitution and the British legal tradition.
* The key proposition is that all public power must be **legally bounded** in order to be considered valid and legitimate. There are explicit and implicit legal constraints on the exercise of public power:
	+ Explicit: the enabling statute and regulations; the constitution; public law.
	+ Implicit: legislative purposes, legal values, the principle of the rule of law
* There are five theories posited about the rule of law by various authors. Three ideas are common to all theories:
* Law is a human institution
* Law structures human and institutional relations
* All laws, written and unwritten, have need of interpretation
* Both rules and principles give rise to legal obligations
	+ **Rules:** applicable in an all-or-nothing fashion. If the rule is valid and applicable, it dictates the result. Rules do not have weight.
	+ **Principles:** open-ended and do not set out automatic consequences. Principles have a dimension of weight. When principles conflict, the decision maker must weigh them against one another. Functions:
		- 1) Principles structure legal relationships
		- 2) Principles interrelate with one another to create the content of legal decisions
			* E.g., four overlapping principles in the secession reference.
			* Key principles for this course: rule of law, democracy, honour of the Crown
* The Rule of Law can be characterized by three interrelated features:
	+ (1) A jurisprudential principle of legality
	+ (2) Institutional practices imposing effective legal restraints on the exercise of public power
	+ (3) A distinctive political morality shared by all Canadians
* The rule of law is animated by the need to prevent and constrain **arbitrariness** within the exercise of public power with respect to process, jurisdiction and substance.
	+ ***PHS*** is an example of a case where the court found substantive arbitrariness. While the CDSA complied with s. 7, the Court found that the Minister’s decision *not* to grant the exemption was a violation of s. 7 that was not in accordance with the principles of fundamental justice because it was arbitrary, disproportionate in its effects and overbroad.
	+ Court concluded that the decision was inconsistent with the statutory objectives of public health and safety found in the CDSA; denying essential services provided by Insite was grossly disproportionate to the benefit of having a uniform drug policy.
	+ Court used *mandamus* to grant the exemption to Insite.
* The principle of **legality** restrains arbitrariness in three ways:
	+ 1) constrains the actions of public officials
	+ 2) regulates law-making activities
	+ 3) minimizes harms that may be created by law

## Rule of Law Theorists

* Different theorists provide us with different ways of understanding the rule of law and the role of judicial review in the Canadian legal system.

**Dicey**

* Rule of law possesses three features:
	+ (1) Absence of arbitrary authority in government, especially in the executive and administrative branch
	+ (2) formal legal equality
	+ (3) constitutional law that forms a binding part of the ordinary law
* Judge-made law combined with unwritten constitution represented a better mode of legal constraint than written codes and constitutions (harder to overturn).
* Common law courts provide the institutional connection between legal rights and remedies
* Parliament supreme, but administrative actors not to be trusted; therefore, courts have a strong supervisory role to play. Correctness should be the norm.
* Courts are the chief rule-of-law check on gov’t; their function is to ensure that the executive properly applies and administers the law; Correctness should be the standard of review, but deference would be shown where expressly demanded by the legislature.
* In contrast to Dicey, Fuller and Raz emphasize that the rule of law demands a set of formal characteristics that are public and can guide the conduct of all legal subjects.

**Fuller**

* Takes a procedural approach to the rule of law. Compliance occurs because citizens derive benefits from following the law.
* Unlike Dicey, Fuller does not believe that administrative bodies are inherently lawless; rather, if they follow the basic principles, they may make decisions that are owed defence.
* Eight principles:
	+ Laws should be general
	+ They should be promulgated so that citizens might know the standards to which they are being held
	+ Retroactive rule-making and application should be minimalized
	+ Laws should be understandable
	+ They should not be contradictory
	+ Laws should not demand the impossible, requiring conduct beyond the abilities of those affected to meet
	+ Laws should remain relatively constant
	+ There should be congruence between the laws as announced and their actual administration

**Raz**

* Believes it is possible to reduce the rule of law to one basic idea: law must be capable of guiding the behaviour of its subjects.
* The principle of judicial independence is key, to preserve the rule of law.
* Rule of a law has an instrumental role to play as a means to realizing other important ends, like democracy, equality and human rights.
* Advocates for a relative autonomy of law from politics.
* Statutes are to provide guidance and are the chief source of legal constraints; guidelines and soft law are important.

**Dworkin**:

* Dworkin’s rights-based model is the dominant way of thinking about the rule of law
* The rule of law necessarily entails the judicial determination of rights through principled interpretation, which must fit the existing positive law but also must be compatible with principles from a larger political morality. These principles help in the decision of hard cases
* Judges, not legislators, are ultimately charged with guarding the moral integrity of the public order.
* Dworkin acknowledges that, in some cases, rights can be justifiably proscribed
* Purposive approach to statutory interpretation and to determining the level of deference owed. Principles permit robust judicial review, but they can also constrain the exercise of judicial power.
* In the ***Secession Reference***, the SCC follows Dworkin’s lead, saying the following about unwritten constitutional principles:
	+ Identified, interpreted and given content primarily by courts
	+ Written text maintains primacy
	+ Used to “fill in the gaps” in the express terms of the constitutional text
	+ May have “full legal force” that can limit government action

**Dyzenhaus**:

* “Deference as respect” model
* Dyzenhaus is concerned that judges can be arbitrary and that this form of arbitrariness is harder to contain.

## The Supreme Court of Canada on the Rule of Law

***Roncarelli v Duplessis*** (1959)

F: Roncarelli, a Jehova’s Witness, owned restaurant; posted bail for several other JW’s; Duplessis, premier, ordered that the liquor board cancel Roncarelli’s permit to sell alcohol.

A:

* No public official is above the law. Duplessis stepped outside the authorized bounds of the power of AG (the power to cancel licenses was not in the hands of either the premier or the AG).
* Substance of the decision was incompatible with the statute, and therefore violated the rule of law.
* Rand J.: There is no such thing as absolute, untrammelled discretion; unless there is express language to the contrary, discretion necessarily implies good faith in discharging public duty within the confines of the statute.
	+ In other words, the decision violated the substantive content of the rule of law.
* This case still stands as an example of the substantive review that can be conducted pursuant to rule of law requirements.

***Secession Reference*** (1998)

F/I: Legal validity of potential secession of Quebec.

A:

* Identified four unwritten principles that animate the Canadian constitutional order: federalism; democracy; constitutionalism and the rule of law; and respect for minorities.
* This principles are interrelated and permeate every part of the legal order; they are the ‘vital assumptions’ of the legal system.
* In addition to interpretive weight, these principles can have full legal force.
* The *Secession Reference* represents the peak of the articulation of the full legal effect that the rule of law might have. In *Imperial Tobacco, Charkaoui,* and *Christie*, the SCC narrowed the effect of this principle.

***BC v Imperial Tobacco*** (2005) – *Current judicial definition of the Rule of Law*

F: Statute allows province of BC to sue manufacturers of tobacco products for compensation for healthcare costs. Tobacco companies challenged on the basis that the statute violated the rule of law.

A:

* Rule of law principle does not give rise to an ability to strike down legislation based on its content.
* The rule of law does not require that legislation be prospective or general; nor does it ensure a fair civil trial.
* Written constitution has primacy; when legislatures use their power validly but arbitrarily, and an express constitutional provision is not engaged, then citizens must look to the democratic process.
* The **current judicial definition** of the rule of law:
	+ 1) Supreme over private individuals and government officials and precludes the influence of arbitrary power;
	+ 2) It requires the creation and maintenance of a positive order of laws which preserve the more general principle of normative order;
	+ 3) It requires the relationship between the individual and the state to be regulated by law; and
	+ 4) It is related to the principle of judicial independence
* Robust use of unwritten principles – and ironically the rule of law itself – risks entrenching the rule of judges and opens the door to judicial arbitrariness by permitting courts to substitute their views for those of Parliament.

# Deference, the Rule of Law and Administrative Doctrines

* At the beginning of the 20th century, the emerging administrative state was often seen as a threat to both Parliamentary supremacy and the rule of law because delegated powers from the executive operated outside legislative scrutiny.
* Because so many of these administrative bodies were created to respond to political pressures and regulatory problems (e.g., labour boards), courts had to rethink their attitude to them. This attitude was usually characterized as ‘deference’.
* Key conflict: courts duty to police the exercise of delegated executive power, and their need to respect the separation of powers and the policy-making exercises of the government.

## Deference as Respect: Case Study

* Contrasting approaches to the intensity of judicial scrutiny of agency decisions inform the differing opinions of Gonthier and Wilson JJ in the following case:

***National Corn Growers***

**F**: Canadian Import Tribunal conducted an inquiry pursuant to s. 42 of the *Special Import Measures Act* and concluded that continued importation of grain from the US had caused or was likely to cause injury to Canadian producers. This affirmed the deputy minister’s preliminary decision to the same effect. The Act contained a privative clause that stated that the tribunal’s decision is final and conclusive.

**L**: The *Federal Court Act* allowed for judicial review if a board had based its decision on an erroneous finding of fact that it “made in a perverse or capricious manner or without regard for the material before it.”

**A:**

* + **Wilson (Concurring):**
* When patent unreasonableness is the standard and there is a privative clause, there should not be a wide-ranging review of the conclusion reached by the tribunal. Close analysis of the tribunal’s reasoning should not be the norm.
* The approach to review should be flexible and respectful.
* **Gonthier (Majority):**
	+ Analyzed both how the tribunal reached its decision as well as the decision’s merits.
	+ Argued that it is not possible to assess the reasonableness of a tribunal’s interpretation without considering the reasons themselves.

## Deference as Respect: Interpretive Problems

* The principles of deference and judicial restraint inform statutory interpretation in many ways. Three examples are courts’ approaches to **privative clauses**, the **standard of review**, and the **adequacy of reasons**.

### *Privative Clauses*

* Privative clauses typically seek to prevent administrative decisions from further review.
	+ When they prevent further internal review, they are known as **finality clauses.**
	+ When they prevent external judicial review, they are known as **ouster clauses.**
* The conundrum is that the statute prescribes limits on powers, but at the same time seemed to give officials unfettered discretion
* In ***Dunsmuir***, Binnie J. (Dissent) concluded that a privative clause should not be determinative of the standard of review, but that they are owed a great deal of weight. Reasonableness is the presumption, and legislative intent ultimately determines which standard applies; expertise is a *separate* ground for deference.
* In ***Khosa***, Rothstein J. (Dissent) argues that privative clauses are conclusive. Absent a constitutional challenge, courts must follow the express legislative intent that they embody. If there’s a privative clause, the standard of review is reasonableness. If there is no privative clause, the standard of review is correctness.
* Both Binnie and Rothstein agree that the applicant has the burden to show unreasonableness.

### *Standard of Review*

* Pre-Charter administrative law was limited to the review of questions of law, jurisdiction, and procedural fairness.
* In ***Dunsmuir***, the SCC concluded that determining the applicable standard of review is accomplished by establishing **legislative intent**, and that there are only two standards of review: **reasonableness and correctness**. The court introduced a two-step test for determining the standard of review:
	+ 1) Consider past jurisprudence.
	+ 2) If step 1 is inconclusive, conduct a standard of review analysis that takes the following factors into account:
		- The presence or absence of a privative clause
		- The purpose of the tribunal
		- The nature of the question
		- The expertise of the panel
* **Reasonableness** is the presumption.
* **Correctness** should be limited to (1) constitutional issues (2) questions of general law that are both of central importance to the legal system and outside the specialized area of expertise (3) drawing jurisdictional lines between competing tribunals (4) true questions of jurisdiction or vires.

### *Adequacy of Reasons*

* While there is not a general duty to give reasons, *Baker* held that reasons are required in certain circumstances, especially when important individual interest are at stake.
* The absence of reasons will often be considered a breach of procedural fairness; but how should the *adequacy* of reasons be treated?
* In ***Newfoundland Nurses***, the SCC addressed this question:
	+ When reasons are present, their **adequacy is not a matter of procedural fairness but one of substantive review**; generally, they are reviewed on the reasonableness standard.
	+ If a decision maker must give reasons, the reasons must show that the decision maker has considered the relevant facts and law, applied the law correctly, and explained the decision with clarity and intelligibility.
	+ They do not have to be perfect or well written, but they must be capable of permitting effective judicial review and they must address the ‘substance of the live issue’.
	+ Bare or opaque conclusions with no supporting information will be unsatisfactory.

### *Administrative Law and the Charter*

* The Charter can constrain delegations of broad, discretionary powers where Charter rights and freedoms are implicated.
* ***Dore*** changed the methodological approach used to review discretionary decisions that engage Charter interests. The Court held that the *Oakes* test does not apply to discretionary administrative decisions; rather, the standard of review will be reasonableness, with proportionality serving as the central criterion of reasonableness.
	+ The orthodox Charter/*Oakes* analysis continues to apply when legislation itself is challenged.
* Another significant development is the finding in ***Conway***(2010)that administrative law tribunals may have the jurisdiction to consider Charter challenges to their enabling statutes and to award Charter remedies.
	+ **McLachlin J**. supported this approach in ***Cooper*** (1996), writing in dissent, because she thought that it provides an efficient way to resolve rights disputes and to allow citizens to access the Charter. “The Charter belongs to the people.”
	+ However, writing for the majority, **Lamer C.J.** held that the CHRC has no jurisdiction to decide Charter matters because they serve the government of the day and are not suited to make such decision.
	+ **La Forest** thought it was illogical that a body whose purpose is to properly apply a statute could consider whether the statute should be applied.
* In BC, statute takes away the power to consider constitutional questions from a number of tribunals. Despite this, the general practice is to allow tribunals who have the power to consider the law to consider Charter issues.

# Remedies in Administrative Law

## Remedies at the Tribunal Stage

* The **Statute** is always the starting place when considering remedies are available at the tribunal stage.
	+ Tribunals **do not have inherent jurisdiction**, so the power to impose a remedy must be provided for in the enabling statute. Any orders made that exceed the tribunal’s powers will be void.
	+ The statute may set out a narrow list of remedies, or it may grant broad discretionary power. For example, the Ontario *Human Rights Code* gives the OHRT discretion to order a party “to do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with this Act.”
* Tribunals have the potential to take a broader approach to disputes than courts –partly because of their particular expertise – and to offer creative remedies. For example, they can incorporate an independent third-party to develop and implement remedial measures.
	+ In ***McKinnon***, the OHRT found that McKinnon (an aboriginal correctional officer) had suffered discrimination and harassment. The tribunal ordered a number of systemic remedies, including the relocation of certain individuals and the implementation of a training program.
	+ When the remedies were not implemented, the tribunal ordered further action be taken – establishing third-party mediators to deal with discrimination complaints and appointing an independent third-party consultant to develop and oversee the implementation of the programs.
	+ The orders were geared less towards righting wrongs and more towards **effecting systemic change**.
	+ Later, the deputy minister faced contempt proceedings, but the matters were settled in 2011.

## Challenging Administrative Action

* A party may challenge the tribunal’s **jurisdiction**, its **procedure**, its **impartiality**, its exercise of **discretion** or the **substance** of its final decision.
* Sometimes these challenges are made through applications for judicial review; however, there are other means of challenging administrative action.

### *Internal Tribunal Mechanisms*

* The enabling statute will set out the internal review process.
* In some cases, tribunals can re-consider their own decisions. In other cases, there may be internal appeals available.
	+ For example, parties appearing before the IRB can appeal to the Immigration Appeal Division.

### *Statutory Appeals*

* In addition to internal mechanisms, the statute may also set out a right to appeal to the courts in certain circumstances. Courts, however, do not have inherent appellate jurisdiction over administrative tribunals.
* The scope of an appeal (at the court to which an appeal may be directed) is confined to what the statute expressly provides.
* Some statutes permit *de novo* review of tribunal decisions, while others will be limited to issues of law.
* Appeals can be by way of right or by leave.
* The BC *ATA* says that the commencement of an appeal does not operate as a stay on the decision being appealed unless the tribunal orders otherwise.
* Occasionally, a statute may provide a right of appeal to Cabinet.

### *Judicial Review*

* Judicial review is about the inherent jurisdiction of courts to oversee and check administrative action in the interest of the rule of law and as part of their constitutional function.
	+ “Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance.” – Binnie in ***Telezone***
* Judicial review is a **discretionary remedy** that must be granted by the court.
* Judicial review is at the heart of the **tension** that underlies all of administrative law: the court’s duty to uphold the rule of law and police the boundaries of government action and the democratic principle that Parliament and legislatures can create administrative agencies and endow them with broad powers.
* Originallythere were **five grounds** for refusing to grant judicial review:
1. Adequate **alternative remedies** available. All avenues of appeal should be exhausted before seeking judicial review.
2. The application is **premature.** For example, the tribunal proceedings have not been concluded. Absent exceptional circumstances, challenges can’t be brought to interim rulings.
3. **Delay and acquiescence.** Even if time limits are met, parties should not delay their applications; further, they should object promptly to any perceived impropriety.
4. **Moot issues**. Dispute is over or has not yet arisen, for example.
5. Applicant does not have **clean hands**. For example, because they are seeking a remedy to facilitate illegal conduct or to obtain an unfair advantage.
* While they are still relevant, in the 1990s courts moved past the five original grounds for refusing to grant judicial review and began to show more deference toward administrative tribunals, refusing to grant JR even where none of the five factors were present. However, as is discussed below, we may now be seeing a shift back towards a court-centric model.

**JR Decision Tree**

1. Are you barred from proceeding because of standing, mootness, justifiability, limitations, delay, unclean hands, etc.?
	1. If yes, no JR.
2. Is the decision maker exercising a private or public function? If they are a private actor, are they exercising public power or part of the machinery of government?
	1. If not public, no JR.
3. Is the decision final and have all remedial routes been exhausted?
	1. If no, first exhaust all other routes of challenge and appeal.
4. Is the authority provincial or federal?
	1. Determines which court to apply to
	2. Both provincial superior courts and the Federal Courts have judicial review jurisdiction.
5. Check applicable statutory procedures acts (e.g., ATA or rules of court)
	1. Applications to Federal Court must be within 30 days; 60 days in BC.
6. Apply for JR
7. Decision whether to grant JR at the discretion of the court

\*At each of these stages, there may need to be an argument made that JR should be granted (e.g., argument about whether or not public actor, or whether or not decision is final, etc.).

### *Availability of Judicial Review: Case Law*

***Domtar v Quebec* (1993) SCC --** *conflicting administrative interpretations do not provide an independent basis for judicial review*

**F:** Employee injured at work three days before plant shut-down; employee wanted to be compensated for entirety of shut-down, company only wanted to pay for three days. Four statutes were engaged, and two administrative bodies (CALP and Labour Court (penal body)) came to conflicting interpretations of the same statute; CALP said that Domtar should pay 90% salary for 14 days, LC said that employer was not guilty for refusing to pay.

**D:**

* The two tribunals each offered a rationally defensible interpretation, especially given the different contexts (penal vs. admin).
* KP: conflicting administrative interpretations do not provide an independent basis for judicial review, for several reasons:
	+ Legislatures accept that statutes, by their nature, will give rise to differing interpretations.
	+ When decisions are not patently unreasonable, the question is whether curial deference to expertise should give way to other imperatives. LHD says not in this case.
		- Concerned that review for inconsistency will turn superior courts into appellate jurisdictions. The nature of JR is to police arbitrariness; not to impose it on administrative actors.
	+ “For purposes of judicial review, the principle of the rule of law must be qualified.”
		- Lack of unanimity is the price to pay for the decision-making freedom and independence that is given to the members of these tribunals.
		- The tribunals themselves, like the legislature, have the power to resolve these conflicts.
		- Suggests the obligation to maintain the rule of law rests not only with the courts, but with the other branches. Rejection of the Diceyan model.

In ***Dunsmuir***and ***Khosa***the courts arguably moved away from the *Domtar* position, instead emphasizing the importance of the courts in upholding the rule of law. In ***Khosa***, the Court says that deference to tribunals is a part of the judicial review process, but not a freestanding basis to refuse to grant JR in the first place. This has been viewed as a resurgence of the common law bases for granting JR and a solidification of the court’s discretionary power. In particular, a fear was expressed in ***MiningWatch*** that courts could undercut the rule of law by exercising their power to *refuse* judicial review in an arbitrary manner.

* For the exam, when considering whether JR should be granted, focus on the common law grounds for refusal, whether the DM is “part of the machinery of government”, and whether all avenues of appeal have been exhausted.

***McDonald v Anishinabek Police Services* (2006)**  *-- Public Function Test – A body or tribunal will be subject to judicial review if it is “part of the machinery of gov’t”*

**F:** McDonald was a First Nations Constable who faced a number of sexual assault complaints during training course; Police chief expelled him from the training program and terminated from the force, without speaking to the applicant. Bringing an application for judicial review, alleging the chief was without statutory authority to discharge him and that there was a lack of procedural fairness. Seeking reinstatement and wages.

**A:**

* Four relevant sources of law: Canada Labour Code; Code of Conduct; Tripartite Agreement; Police Services Act.
* Key argument by the respondent: Police Chief was not exercising statutory power, and therefore JR is not available.
* The exercise of prerogative power is subject to judicial review if its subject matter affects the rights or legitimate expectations of an individual: ***Black***
* Further, courts have the power to review bodies that are neither established by statute nor by prerogative power.
	+ If the body is fulfilling a government function, the body is part of the machinery of government, the duty of fairness applies, and the decision is subject to judicial review.
* Various factors can be used to distinguish domestic tribunals from public bodies, including: source of powers; functions of the body; how the body was created; the extent of the government’s control over the body; how the board is funded; relationship to other parts of government; etc.
* The power exercised by the APS is public and should be considered a public body.

**D:** Duty of fairness not met because applicant did not have an opportunity to know the case against him and to respond. Decision to terminate quashed.

***Harlekin v U of Regina*** – *Requirement to exhaust all adequate means of recourse before seeking judicial review*

**F:** Harlekin chose not to pursue his claim to the Senate Appeal Committee, instead proceeding straight to JR.

**A:**

* Several factors should be taken into account when deciding whether the right to appeal constituted an “adequate” alternative remedy, including:
	+ Procedure on appeal
	+ Composition of the senate committee
	+ Powers and the manner in which they would likely be exercised
	+ Efficiency, expediency and costs

**D**: Right to appeal to Senate committee provided an adequate alternative remedy to seeking judicial review.

\*Despite the rule in *Harelkin*, there may be some limited circumstances in which internal review procedures could be bypassed. There would have to be some evidence of serious unfairness or prejudice in the internal-review mechanism.

## Remedies on Judicial Review

* The remedies available on judicial review have their roots in the ancient prerogative writs. These writs were extremely technical and narrow, which led to injustice and statutory modification.
* The general rule is that judges cannot substitute their interpretation of administrative law for that of the decision maker.
* Generally, tribunal orders are not automatically stayed when JR is granted.

### *The Prerogative Writs*

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| **Name** | **Translation** | **Effect if Successful**  |
| **Certiorari** | “Cause to be certified” Superior court requires tribunal to provide it with record to review for excess of jurisdiction | Quash or invalidate an order or a decision. Typically, court does not substitute decision because no statutory authority to do so. |
| **Prohibition** | Common law injunction to prevent entity from exercising power.  | Prevent the unlawful assumption of jurisdiction or halt the proceedings where unlawful jurisdiction is being exercised |
| **Mandamus** | “We command” | Order a duty to be performedBUT cannot tell tribunal how to decide |
| **Certiorari + Mandamus** | The most common administrative law remedy | Decision quashed, sent back (with directions) for reconsideration.  |
| **Declaration** | Statement of a legal position or status | Public law = declare action *ultra vires* (outside jurisdiction)Not enforceable but usually obeyed (however, see *Khadr*) |
| **Habeas corpus** | “Produce the body” | Bring party before court; ensure detention is not illegal. |
| **Quo warranto** | by what authority? | challenge basis of authority used to justify acts |

### *Conditions for Obtaining Mandamus*

1. Demonstrate a clear legal right to have the thing sought done, in the manner, and by the person.
2. Duty must lie on the official at the time relief is sought
3. Duty must be ‘purely ministerial’ in nature (i.e., non-discretionary)
4. Applicant has asked for the duty to be upheld and the duty was refused

\*See ***PHS*** (page 8, above) for an example of mandamus (Court orders minister to grant an exemption to Insite under section 56 of the CDSA; minister bound to exercise discretion in accordance with the Charter).

### *Statutory Reform*

* The BC *Administrative Tribunal Act*, the BC *Judicial Review Procedure Act* and other statutes have sought to simplify and clarify the procedures surrounding JR. Some of the provisions:
	+ Parties now submit application without having to specify which writ they are seeking
	+ Right to appeal initial JR decision
	+ Mechanisms to resolve interlocutory orders and interim issues (i.e., extending JR to exercises of statutory power, rather than final decisions)
* Interaction between JRPA and ATA in BC:
1. Check to see if the tribunal is subject to the ATA
2. If the ATA does not apply, JR proceeds according to common law and/or any requirements in the JRPA
3. If ATA does apply, check to see the limitation periods, what standard of review applies, Constitutional jurisdiction, etc.

### *Private Law Remedies*

* Private law remedies available to parties, as against administrative agencies, are outside the scope of administrative law and judicial review.
* However, attempts to obtain such remedies have become increasingly common, and have put pressure on JR doctrine (i.e., parties would rather have money than a JR remedy, in many cases).
* To obtain monetary relief, a party must initiate a separate civil action for damages alongside, or in lieu of, a JR application. Negligence and misfeasance in public office are popular torts that are pursued.
* In ***Telezone***, the SCC made it clear that parties do not need to seek judicial review *before* they can bring a private law action for damages, and the concurrent proceedings does not violate the rule against collateral attacks.

***Canada v TeleZone*** (2010) *-- Private law remedies and concurrent jurisdiction*

**F:** T claims it was wronged by the decision of the Minister of Industry to reject T’s application for a license to provide telecommunications services; arguing that it met all the criteria, and the Minister must have considered some other, non-disclosed criteria. Seeking compensation for breach of contract and negligence. Minister argues that Superior Court does not have jurisdiction to consider the claim unless T first obtains an order to quash the Minister’s decision, on the basis that FC has *exclusive* judicial review jurisdiction re: federal administrative decisions (citing ***Grenier***).

**A:**

* ***Grenier***offends s. 17 of the FCA, which grants concurrent jurisdiction to Superior Courts when relief is sought against the Crown.
	+ Concludes that *Grenier* was wrong; Superior Courts cannot be stripped of their jurisdiction to hear these matters.
* Claimants who want an order set aside will have to pursue JR; however, if they are content to let the order stand and seek compensation, there is no need for them to first proceed to the Federal Court.
* Any derogation from the jurisdiction from the superior courts requires clear and explicit statutory language.
* Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the extent possible, without procedural detours.

**D:** Telezone not seeking JR; allowed to proceed for damages in Superior Court

# Duty of Fairness

## A Common Law Doctrine

* The availability of procedural protection in administrative law once depended on the way in which a decision was characterized.
	+ Judicial and quasi-judicial decisions were required to be made in accordance with the ‘rules of natural justice’ (the duty to hear the other side and the preclusion of being a judge in one’s own cause)
	+ Any other administrative decision could be made without any procedural requirements.
	+ An applicant was required to convince a court that a decision was properly characterized as judicial or quasi-judicial, or else no protections were available.
* The SCC abandoned the all-or-nothing approach in ***Nicholson,*** where the majority found that a general duty of “procedural fairness” applies to administrative decisions.
* In subsequent cases, the “duty of fairness” came to replace natural justice as the key organizing principle of administrative law.
* The requirements of the duty vary in accordance with the relevant circumstances.
	+ The focus is *procedural*, not on the substantive outcome of the decision.
* The **Duty of fairness** requires two things:
1. The right to be heard
2. The right to an independent and impartial hearing
* Fairness is a **common law concept** and, as such, may be limited, prescribed, modified, or even ousted by ordinary legislation, subject only to compliance with the *Charter*. Express language is required to override the duty.
	+ The common law duty supplements statutory procedural duties
* **Two key questions** arise when judicial review proceedings allege a breach of the duty of fairness:
1. Has the **threshold** for the application of the duty been met?
2. What does the duty of fairness require in the **circumstances**?
	1. Both are questions of law that will be reviewed on a standard of correctness (technically on a standard of “fairness”, which is a more flexible version of correctness).
* If correct procedures were not followed, the decision will be quashed and sent back for re-determination.

***Nicholson v Haldimand-Norfolk Police Commissioners*** (1979) SCC -- *A duty of procedural fairness lies on all public bodies exercising public power (including Cabinet and the Crown); Court abandons former “all-or-nothing” approach to natural justice/procedural fairness.*

**F:** Probationary constable dismissed 15 months into service; not given reason for dismissal, not given notice, not allowed to make representations prior to dismissal. Regulations: constables over 18 months would be given a hearing and right of appeal, but those under 18 months could be dismissed for any reason. Decision was not judicial or quasi-judicial; at CL, no procedural requirements.

**A:**

* Old classification system is arbitrary and overly formalistic. Creates sharp divide between constables who have 18 months and those who don’t.
* Not entitled to hearing, but **entitled to be treated fairly and not arbitrarily**, including being told why he was being dismissed and given the opportunity to make submissions.

## The Threshold Test

* Subject to some exceptions, the **duty of procedural fairness** appliesto the **administrative decisions** of **public authorities** (e.g., executive actors, tribunals, and officials acting pursuant to statute) that affect an individual’s **rights, privileges or interests**: ***Cardinal.***
	+ This threshold captures mostly every form of administrative decision-making that affects an individual in an important way.
	+ Public authorities are all those that fulfil a public function and are part of the machinery of government: ***McDonald***
* Procedural fairness is subsumed under the principles of fundamental justice in section 7 of the Charter, but the duty is not constitutionalized. The section 7 threshold is higher, and the analysis must be conducted separately.

***Cardinal v Kent Institution*** (1985) SCC -- *Threshold test*

**F:**  Cardinal (inmate) segregated pursuant to section 40 of the *Penitentiary Act*, which allows the Warden to segregate individuals where the Warden is satisfied that doing so is necessary for the maintenance of good order or in the best interests of an inmate. Statute makes it clear that segregation does not deprive of other privileges.

**A:**

* General common law duty of procedural fairness that lies on every public authority making a non-legislative, administrative decision. What does this require?
* Because of the **urgent nature** of the need to segregate (in this case), there could be no requirement of prior notice and an opportunity to be heard before the decision.
* The unfairness stems from the continued segregation of the appellant, despite the recommendation of the Segregation Review Board to the contrary, without giving reasons and without an opportunity to be heard.
	+ The Director had discretion to disregard the recommendation, but was required to act fairly in doing so.
* Requirements in this case: (i) Inform the appellants of the reasons for his intention to keep them in segregation; (ii) give them an opportunity to make representations (however informal) regarding the segregation.
* The denial of a right to a fair hearing (i.e., a breach of the duty of fairness) must always render a decision invalid.

## Limitations on the Application of the Duty of Fairness

* The duty of fairness applies only in contexts in which *decisions* are made. It does not apply to investigations or advisory procedures that may occur prior to a formal decision-making process.
* The duty applies to **final decisions, not preliminary ones.** The duty may apply to preliminary decisions, if those decisions are *de facto* final.

### *The Duty Does not Apply to Legislative Decisions*

* The rules governing procedural fairness do not apply to a body exercising purely legislative functions: ***Canada Assistance Plan.*** The wisdom and value of legislative decisions are subject only to constitutional boundaries and electoral scrutiny: ***Wells v Newfoundland***
	+ What is “purely legislative” has never been explicitly set out
	+ Clearly includes primary legislation and the process that surrounds its creation and passage.
	+ As with the old, common law categorical approach, this classification has important ramifications for individuals.
* “Legislative” does not necessarily mean by the legislature.

***Re Canada Assistance Plan*** (1991) SCC -- *Rules of procedural fairness don’t apply to a body exercising purely legislative functions*

**F:** BC argues that federal government acted illegally when it amended the CAP without the consent of BC, on the basis that it violated the legitimate expectation of BC.

**A:**

* The doctrine of legitimate expectations may give rise to a right to make representations or be consulted, but it does not give rise to substantive rights (such as consent). This doctrine is part of the rules of procedural fairness. The doctrine was set out in ***Mavi***:
	+ “Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty.”
* The rules governing procedural fairness do not apply to a body exercising purely legislative functions.
1. **Purely ministerial decisions**, on broad grounds of public policy, will typically afford no procedural protection (including the doctrine of legitimate expectations). Any challenge will have to be based upon abuse of discretion.
2. **Public bodies exercising legislative** functions are similarly exempt.
* Parliamentary sovereignty is the key reason underlying this exception.

**D:** No procedural fairness required, therefore legitimate expectations not engaged.

***Wells v Newfoundland*** (1993) SCC

**F:** Wells lost his (quasi-judicial) government job, argues he should have received procedural fairness. The decision to restructure the board and not re-appoint the respondent were made in good faith.

**D:** No procedural fairness owed; his termination was the result of government policy decisions that re-structured the administrative board on which he served.

**Cabinet and Ministerial Decisions**

* Cabinet and ministerial decisions are not exempt *per se,* but it will often be easy to characterize these decisions as legislative in nature.

***AG Canada v Inuit Tapirisat*** (1980) SCC – *Cabinet and ministerial decisions that are legislative in nature will be exempt.*

**F:** Respondent objected to CRTC decision that permitted Bell to increase telephone rates, option to appeal to Federal Court of Appeal or filing petition with Governor in Council. Federal Cabinet rejected appeal from decision made by CRTC without allowing the petitioning group to be heard and before they had filed their response.

**A:**

* Under s. 64, the Governor in Council has broad discretionary power to vary or rescind any order or decision of the Commission, without any petition or application.
	+ Parliament has not burdened the executive with any standards or guidelines to be followed.
* Fixing utility rates is “legislative action in its purest form”.
* Cabinet and ministerial decisions which are legislative in nature will be exempt from the duty.
	+ This case shows that for a decision to be “legislative” it does not have to be made by the legislature. One feature of such decisions is that they are general in application (i.e., affects many, unlike *Homex*).

**Subordinate Legislation**

* In some cases, the passage of a municipal bylaw will be subject to the duty of fairness: ***Homex***

***Homex Realty v Wyoming (Village)*** (1980) SCC -- *when bylaws are not general in nature but aimed at single party, procedural fairness is owed*

**F:** Dispute between municipality and developer overwho should pay costs for new subdivision; after bitter negotiations, the municipality passed a bylaw to designate the developer’s land not to be a ‘registered plan’, doing so without notice to HX. This action was authorized by the *Planning Act*; notice is not expressly or impliedly required under the Act.

**A:**

* When a statute authorizes the interference with property or rights and is silent as to whether notice is required, the courts will “supply the omission” and require the agency to do so.
* Concludes that the creation of the bylaw was not legislative but rather quasi-judicial.
	+ Bylaw was not general in nature, but was aimed at resolving a dispute with one party.
	+ Therefore, procedural fairness required. Council had a duty to ‘hear first and decide later’. Council also violated the principle of not being the judge in one’s own cause.
* Homex did not have an opportunity to make its final position known, once the Village had taken its position.

**D:** *Despite* not receiving the opportunity to be heard, the Court concludes that *Homex* should not receive the remedy that it seeks (i.e., to have the order quashed). This was because of Homex’s actions during negotiations and litigation

***Immigration Consultants v Canada*** (2011) – *Enactment of new regulations are legislative matters for which procedural fairness is not required*

**F:** Following a competitive selection process, CSIC lost its rights as regulatory body for immigration consultants; applies for JR of Minister’s decision (which was effected by new regulations).

**A:**

* Decision to terminate the mandate of CSIC was ‘essentially a legislative action’ (even though it was carried out by the executive).
* The fact that the decision was aimed at a single body did not make it a non-legislative, individualized decision.
* Therefore, no duty of fairness was owed.

### *The Duty Does not Apply to Public Office Holders Employed Under Contract*

* In ***Dunsmuir***, the court held that if the terms of an individual’s employment are governed by contract (rather than statute alone), then **ordinary private law contractual remedies** will apply in the event of dismissal, regardless of the public nature of the employment concerned.
	+ The duty of fairness will not apply, unless it is provided for in the contract.
	+ Government employers must still abide by statutory and common law notice standards for terminations without cause (common law requires reasonable notice in the circumstances).
* There are two exceptions:
	+ 1) Employees not protected by employment contracts, or subject to employment at pleasure, will still be protected by the duty of fairness.
	+ 2) The duty of fairness may arise by necessary implication in some statutory contexts.
* Regarding individuals employed under contract, *Dusnmuir* overrules the approach taken in ***Knight****,* where the court said that a public law duty of fairness applies unless expressly excluded by the employment contract or statute.
	+ However, *Knight* still stands for the proposition that PF may be owed to at-pleasure appointments, even if not expressly provided for in the statute

### *The Duty May be Suspended or Abridged in Emergencies*

* There will be instances in which procedural duties cannot be carried out before a decision is made.
* In ***Cardinal***, for example, even though the duty of fairness applied to segregation decisions, there could be no requirement of notice or hearing before the decision was made in that case.
* To what extent will a court defer to a decision-maker as to the existence of an emergency?

## The Content of the Duty of Fairness

* Fairness is a minimum duty that must be met – a floor for procedural protection. In determining whether the duty of fairness has been met, the basic question to ask is: **was the procedure used fair considering all of the circumstances?** (***Baker***)
	+ \*Breach of the duty of fairness will always render the decision invalid (quashed/certiorari), usually to be sent back with revised procedures and reconsideration.
* The **General Rule** is that the legislature intends a duty of fairness to apply unless there is clear statutory language (or necessary implications) to the contrary.
	+ Common law procedural fairness can supplement, but not override, legislative provisions.
		- The enabling statute may impose procedural requirements
		- The tribunal may be authorized to make procedural rules
	+ If statute ousts PF entirely, the only way to challenge would be by way of constitutional challenge to the law itself.
* In ***Baker***, the applicant argued that she should have been given an oral interview; that her children and their father should have been able to make submissions; and that she was entitled to reasons.
	+ The SCC determined that Baker was entitled to procedural fairness protection, but that it was minimal in the circumstances: an oral hearing was not required; it was enough that she was permitted to submit complete written documentation and that reasons were provided.
* The Court identified the two competing policy concerns surrounding the duty of fairness:
	+ The duty exists to ensure that administrative decisions are made using a fair and open procedure where those involved have an opportunity to put forward their views and evidence fully. The rule of law demands no less.
	+ On the other hand, the needs of ADMs must be respected, and deference is owed to their expertise and their jurisdiction to make their own procedure.
* The ***Baker*** court enumerated **five criteria** that are relevant to determining the **content of the duty of fairness.** These criteria are not exhaustive**.**
1. **The nature of the decision being made and the process followed in making it**
* While no longer relevant at the threshold stage, decisions that are **judicial or quasi-judicial** tend to demand more extensive procedural protection than those that are **administrative or regulatory** in nature.
1. **The nature of the statutory scheme and the terms of the statute pursuant to which the body operates**
* The **legislation** that enables the decision is important. Is there a **privative clause**? What is the **purpose** of the legislative provision?
* Preliminary decisions will require less fairness than final decisions. Initial decisions (that precede appeals) will probably require reasons, for the appeal to be meaningful.
* Discretionary exceptions (e.g., *Baker*) require lower standard
* Whether or not there is an **appeal procedure** is an important consideration (suggests that reasons may be required)
1. **The importance of the decision to the individual or individuals affected**
* Content of the duty increases in proportion to the importance of the decision to the individual.
* Whether a Charter right or value is engage can be important
* Is a right or a privilege at stake?
1. **The legitimate expectations of the person challenging the decisions**
* The doctrine of legitimate expectations may extend the content of the duty of fairness on the basis of the conduct of public authorities.
* May arise out of representations, promises, undertakings, or past practice/current policy of the decision maker. Cannot generate substantive rights, only procedural (see ***Mavi***).
1. **The choices of procedure made by the agency itself (respect for expertise)**
* In order to establish a workable standard, the choice of the decision-maker must be taken into account. DMs have superior knowledge of its needs and the needs of the community it serves.
* Compromises may be required in order to allow decisions to be made within a reasonable timeframe and at a reasonable cost.
* The standard of review is fairness, which is akin to correctness but with some deference shown to the DM’s procedural decisions.

## Specific Components of the Duty of Fairness

* **Notice**
	+ Notice is the most basic aspect of the duty of fairness. Participation starts with notice, and notice must be adequate.
	+ Includes disclosure of the ‘who, what, when, where and why and how’ of the decision.
	+ When notice requirements are not found in a tribunal’s rules or home statute, litigation may arise over the timing and sufficiency of notice.
	+ The notice requirement is an ongoing duty that arises prior to and continues throughout the decision-making process.
	+ The notice period must be *fair*: it must provide an opportunity for the individual to prepare and respond.
* **Disclosure**
	+ Must information held by the decision maker be disclosed? If so, how much?
	+ *Stinchcombe* does not apply in the administrative context: ***May*.**
	+ Generally, there must be sufficient disclosure to allow the individual to know the case that he or she has to meet.
	+ More serious situations will require more disclosure (e.g., professional discipline proceedings)
* **Oral Hearings**
	+ Oral hearings are often demanded but seldom required. There are good reasons for not granting them (expense, delay, adequacy of written submissions).
	+ In some situations, an oral hearing will be required (e.g., when a decision depends on witness credibility: ***Singh***).
	+ More likely: serious import; reputation; livelihood; personal security.
* **Right to Counsel**
	+ No general right to counsel in the administrative context, though some statutes may make it clear that individuals may be represented.
	+ Where deprivation of life, liberty or security of person is at stake, the principles of fundamental justice may require counsel in the administrative process: ***New Brunswick v G(J)***.
* **Right to Call Evidence and Cross-Examine**
	+ Normally part of an oral hearing. However, the right is not absolute. ADMs in control of their procedures may limit these rights.
	+ Parties must be provided a reasonable opportunity to present their case.
* **Timeliness and Delay**
	+ No right to have an administrative decision made within a reasonable time.
	+ However, the SCC concluded in ***Blencoe*** that in the right circumstances delay in the administrative process might rise to the level of a deprivation of liberty or security of the person under s. 7 of the Charter
	+ Normal remedy for a delay would be an order in the nature of mandamus, requiring the tribunal to perform its duty expeditiously.
* **Independent and Impartial Decision Maker**
	+ See section below on independence, impartiality and bias. Falls under the umbrella of procedural fairness.
* **The Duty to Give Reasons**
	+ Historically, there was no duty on ADMs to give reasons. This changed in ***Baker***, when LHD said that, in certain circumstances, procedural fairness will require the provision of a written explanation for a decision. They are required in at least two circumstances:
		- The decision has important significance for an individual
		- If a statutory appeal process exists (impossible w/o reasons)
		- Large residual discretion for courts to require reasons
	+ Two main avenues for challenge:
		- 1) Failure to provide reasons in circumstances in which a court concludes they are required
		- 2) Challenge to the *adequacy* of the reasons
	+ In ***Newfoundland Nurses***, the court said that the *absence* of reasons is a matter of procedural fairness while the *adequacy* of reasons is a matter for substantive review. If reasons are present, there is no breach of the duty to provide reasons. The adequacy of reasons is not a stand-alone basis for JR or quashing a decision.

### *Determining whether Reasons are Required*

* As always, first check to see if the statute addresses reasons. If not, apply the ***Baker*** factors and argue that reasons are/are not required:
	+ 1) Nature of the decision and process
		- Disputes between parties suggest more extensive protections
		- Where rights are involved, more protection required
		- When the ADM is judicial or quasi-judicial, more stringent requirement for reasons
	+ 2) Nature of the statutory scheme and its terms
		- Preliminary vs. final decision
		- Existence of appeal procedures
	+ 3) Importance of the Decision to Individuals Affected
		- More important the decision, more likely that reasons will be required
	+ 4) Legitimate expectations of person challenging the decision
		- Were reasons promised? Were they part of similar decisions before?
	+ 5) Respect for agency expertise/jurisdiction
		- Ability and expertise to create its own procedures
		- Efficiency concerns pull against reasons

***Mission Institute v Khela*** (2014 SCC) – *Standard of review for procedural fairness is “fairness” (not strictly correctness);*

**F:** Khela transferred from medium security to maximum security after conspiring to stab fellow inmate. Khela argued that the transfer was unreasonable. Received some reasons but no information as to what the sources said or why they might be reliable. Khela submitted written rebuttal, asking for the scoring matrix that was used to determine his security ranking. Warden said she could not disclose the information, but that all of the appropriate policies had been followed.

**A:**

* According to the statute, inmates transferred on an emergency and involuntary basis are entitled to “all the information considered in the decision-making process”, or a summary; subject to limitations (as are strictly necessary) in situation in which the warden has reasonable grounds to believe that disclosure would jeopardize the safety of any person or the security of a penitentiary.
* Onus on Warden to prove that there were reasonable grounds to withhold information. Burden not met in this case (didn’t even plead it), therefore statutory procedural fairness requirements not met. Particularly, the statements made by the sources and information concerning their reliability should have been disclosed.

**D:** Correctional authorities failed to comply with the statutory disclosure requirements, which rendered the decision unfair and unlawful. Writ of *habeus corpus* granted, ordered back to medium security.

* ***Khela*** also stands for the proposition that the standard of review for procedural fairness is *fairness,* not strictly correctness. This is because the **principle of deference** informs the content of procedural fairness; reviewing courts will accord a “margin of deference” to the procedures used, especially where discretion is present.

# Independence, Impartiality and Bias of Tribunals

* Procedural fairness demands that the decision maker and the decision-making process are independent, impartial and unbiased. This is the “second component” of the duty of fairness.
	+ **Bias**: Reasonably perceived partiality towards a particular outcome
	+ **Impartiality**: ability to make judgments with an open mind
	+ **Independence**: the means of achieving impartiality; more independence provides greater insulation from political or other pressures that may influence the decision-making process.
* Challenging administrative tribunals for lack of independence has become one of the **most litigated issues in administrative law**.
	+ To what extent should tribunals and ADMs be independent of the branches of government that have created them?
	+ Administrative decision-making bodies are typically connected to government, and most have some connection to the executive.
* Understandings of independence and impartiality may be different from the perspective of a court than from the perspective of an administrative actor.
* The process for determining the level of independence/impartiality required is mostly the same as determining the content of the duty of procedural fairness: consult the statute and apply the ***Baker*** factors. The minimum threshold is “fairness”.

## Development of the Law of Tribunal Independence in Canada

***Theory of Judicial Independence***

* Judicial independence is traditionally conceived as the ‘complete liberty’ of judges to decide cases before them without interference.
* Three structural conditions have been identified as necessary to guarantee independence:
	+ Security of tenure
		- Judges of Superior Courts shall hold office during good behaviour or until they turn 75 (*Constitution Act*, s. 99)
	+ Financial security
		- Salaries shall be fixed (*Constitution Act,*s. 100)
	+ Administrative/institutional control
		- Ensure judges not put in compromising situations

***Transition to Tribunal Independence***

* Litigants have pushed for tribunals to be held to the same degree of independence as the courts. However, tribunals generally do not have to meet the same standard of independence as the courts.
	+ In ***Matsqui***, the court said: “the requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will **depend on the nature of the tribunal**, the interests at stake, and other indices of independence.”
* In particular, financial security and security of tenure is much weaker in the administrative context.
	+ Tribunal members can be appointed for a variety of terms, and some serve only ‘at the pleasure’ of the government.
	+ Financial security is variable and set by legislation or contract
* In BC, tribunals that are covered by the *ATA* have certain statutory guarantees of independence:
	+ Section 2: Chair of the tribunal is to be appointed on merit, to hold office for initial term of 3-5 years.
	+ Section 3: Members are to be appointed on merit, to hold office for 2-4 years.
	+ Section 8: Chairs or members may only be terminated for cause

***Ocean Port Hotel v BC*** (2001 SCC) – *No constitutional guarantee of tribunal independence; common law independence/fairness requirements can be ousted or modified by statute*

**F:** OP’s liquor license suspended by Liquor Control and Licensing Branch; Liquor Appeal Board held a *de novo* appeal and confirmed the suspension. At the BCCA, OP argued that the Liquor Appeal Board lacked sufficient independence to render a fair hearing. OP took issue with the ‘at pleasure’ appointments of the board members. Argued that Board should have same level of independence as courts.

**A:**

* Court decided that there is no freestanding constitutional guarantee of tribunal independence.
* Tribunals ‘span the divide between the executive and judicial branches; they make quasi-judicial decisions, but they are an extension of the executive; it is up to Parliament and the legislatures to decide how much independence is required of a tribunal.
* The degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature; absent constitutional constraints, this choice must be respected.
* When legislation is ambiguous or silent on independence, courts will infer that the decision making process must comply with the principles of natural justice (determined by the application of the *Baker* factors). When it is clear, courts must defer (unless unconstitutional).

**D:** Legislature clearly intended board members to serve at pleasure; therefore, higher degree of independence cannot be required.

***Saskatchewan Federation of Labour*** (2010 SKCA) –*Express statutory provisions can override common law procedural fairness/independence requirements.*

**F:** Following a general election, the government terminated the appointments of chairperson and vice-chair of the Labour Relations Board; SKFL applied for judicial review, which was dismissed; SKFL then sought appeal. The government did not have confidence that the current board would give effect to new policies.

**D:** The statute explicitly empowered the LG to terminate the board members; no grounds to assert a higher degree of tribunal independence.

##  Reasonable Apprehension of Bias

* Allegations of reasonable apprehension of bias exist in two forms:
	+ 1) Perceptions of **individual bias** (of the decision-maker)
	+ 2) Perceptions of **institutional bias**
* All administrative actors required to meet the standards of procedural fairness are subject to the rule against bias.
* An allegation of bias must be brought to the decision maker on the first available occasion.
* The standard for independence/bias varies according to **context.** What will give rise to a RAB in one ADM context may not do so in another.
	+ To determine what level of independence is required (and what test should be applied), apply the ***Baker*** framework. There are three possibilities:
		- The **Reasonable Apprehension of Bias Test** will apply to decision makers on the adjudicative end of the spectrum.
		- The **Closed-Minded Test** will apply to decision makers on the political/policy/investigative end of the spectrum.
		- In between these two ends of the spectrum, the RAB test will be applied in a **flexible** manner.
* The test for **tribunal independence** and the test for **reasonable apprehension** of bias **are the SAME.** The classic test was formulated in ***Committee for Justice and Liberty v NEB***:
	+ - “The apprehension of bias must be a reasonable one held by a reasonable and right minded persons. **What would an informed person, viewing the matter realistically and practically – and having thought the matter through –conclude**? Would he or she think that it is more likely than not that the decision maker would not decide fairly?
	+ In order to satisfy the test, the grounds must be **substantial –** a real likelihood or probability of bias should be demonstrated. The onus is on the applicant to prove bias.
	+ The focus is on the *perception* of bias held by a reasonable person.
* The **closed minded** test is more stringent: the alleging party must establish **pre-judgment in fact;** an expression of a final opinion that can’t be dislodged.
* If the required levels of independence or impartiality are not met, the remedy is to **quash** the decision and to send back for redetermination.
* \*\*Note: there is uncertainty over precisely when the closed-minded test and when the RAB test applies.

### *Perceptions of Individual Bias*

* There are **four situations** at common lawin which a reasonable apprehension of bias may arise regarding an individual decisions maker, when there is a reasonable perception of:
	+ A pecuniary or material interest in the outcome of the matter being decided
	+ Personal relationships with those involved in the dispute
	+ Prior knowledge or information about the matter in dispute
	+ Attitudinal predisposition toward an outcome

***Pecuniary or Material Interest***

* + Only direct and certain financial interests will count
		- ***Energy Probe***: Energy Board renewed license of nuclear station; part-time member of the board was the president of the company that supplied cables to the plant; no RAB.
	+ Insignificant gains or gains that are no different than those received by the average person in a widespread group will not count
	+ Statute may authorize indirect pecuniary benefit

***Personal Relationships with those Involved in the Dispute***

* + Includes parties, counsel, witnesses and others
	+ Is the relationship close enough and current enough to pose a threat to impartiality?
		- No RAB when a client of the labour board member’s old firm appeared before him (over a year later): ***Marques***
	+ ***Pinochet*** – British Lord with connections to Amnesty International, who was arguing in favour of Pinochet’s extradition; RAB found.
	+ Context is important – some aboriginal communities, for example, consider decisions to be fair when rendered by non-strangers who they know and trust.

***Prior Knowledge or Information about the Matter in Dispute***

* + In ***Weywakum***, Binnie (as deputy minister of justice) was involved in developing the Crown’s litigation strategy against the band. Court determined that Binnie’s role was neither active nor material.
	+ Statute could authorize overlapping functions

***Attitudinal Predisposition Toward an Outcome***

* + Predispositions may be gleaned from decision-maker’s comments in the course of the hearing and outside the proceedings (e.g., antagonism towards the litigant or *ex parte* communications).
		- See ***Chretien***

***Newfoundland Telephone v NFLD*** (1992 SCC) -- *Spectrum of independence according to context (RAB – Closed Minded Test)*

**F:** Under the *Public Utilities Act*, the Board is responsible for the regulation of the NFLD Telephone Co.; Andy Wells appointed to the Board and publicly stated that he intended to play an adversarial role on the Board (Re: consumer rights); Board commissioned an analysis of the costs of NFLDTC, followed by a public hearing to discuss the report; Wells expressed public outrage regarding the executive salaries at NFLDTC (“I’m not having anything to do with the salary increases and big fat pensions.”); at the hearing, NFLDTC argued that Well’s statements created an apprehension of bias. Board disallowed the costs of the enhanced pension plans.

**A:**

* Procedural fairness cannot exist if an adjudicator is biased.
* Administrative bodies fall on a spectrum from political in nature to purely adjudicative; at the investigative/political end of the spectrum, the “**open mind test**” will be applied. At the judicial end of the spectrum, the **RAB test will be applied**.
	+ Closed-minded test: alleging party must establish prejudgment in fact; expression of final opinion that cannot be dislodged.
* Strict application of RAB test to policy makers would undermine their legislative function. Strong opinions will not meet the close-minded test.
* Board (in this case) dealing mainly with policy issues, not legal questions (assessing whether rates are unreasonable). Board has an investigative function and then, later, an adjudicative function.
* At the investigative stage, the **closed-minded test applies.** However, for comments made during/after the hearing, the **RAB test applies.**
	+ The application of the RAB test is flexible, and need not be as strict for a board dealing with policy matters as with a quasi-judicial board.
* Statements by Wells before the hearings did not indicate a closed mind. However, the post-hearing comments by Wells raised a RAB and also demonstrated a closed mind.

**D:** Decision quashed and sent back.

***Chretien v Canada*** (2008 FC) ­­– *Flexible RAB test applied to investigative commission*

**F:** Commission of Inquiry into the Sponsorship Program, Gomery the Commissioner; Commissioner made several public statements during the hearings which Chretien alleges demonstrate a RAB; stated conclusions publicly before hearing all the evidence (“I simply confirmed the findings of the Auditor General, which I think I’m in a position to do after three months of hearings.”)

**A:**

* Commissions of inquiry are independent fact-finders; however, they are also endowed with wide-ranging investigative powers. Court determines that a high level of procedural fairness is owed.
* Court concludes that the Commission falls “between the middle and high end of the NFLDTC spectrum”; the RAB test should be applied in a flexible manner.
* Court concludes that an informed person, viewing the matter realistically and practically and having thought the matter through would find a reasonable apprehension of bias on part of the Commissioner (viewing comments cumulatively).
* Concluding that the mismanagement was ‘catastrophic’ before hearing all the evidence undermined the purpose of the commission of inquiry. Made comments that degraded the applicant and the process (golf balls; spectacle).
* The Commissioner’s assurances that he had not prejudged the case is irrelevant; the test is not a subjective one.

**D:** Findings of the report, as they relate to Chretien, must be set aside.

* \*The application of the RAB in *Chretien* is somewhat inconsistent with the idea in *NFLD* that the close-minded test will apply in investigative contexts – the commissioner’s findings had no enforceable impact.
	+ KH: however, application of *Baker* factors takes other matters into account (e.g., PM’s reputation at stake, legitimacy of commission process).
* There remains some conceptual uncertainty of when to apply which test and why.

### *Perceptions of Institutional Bias*

* In ***Ocean Port***, McLachlan said that every tribunal, no matter how adjudicative, has some role to play in implementing government policy. Tribunals have at least three means of making/implementing policy:
	+ Through their decisions
	+ Through informal rule making (guidelines, bulletins, manuals, etc.)
	+ Formal rule making (delegated legislation, regulations, rules, etc.)
* There is tension between the policy making/implementing function of tribunal members and their adjudicative function.
	+ Adjudicative independence embodies the ability of a decision-maker to decide free of inappropriate interference by other decision-makers.
* This tension often appears when **full-board meetings** are used to promote consistency in tribunal decision making.
	+ Tools used to promote consistency often involve the input from other tribunal members
	+ Some boards have hundreds of members, who each have differing ideas about how the statute should be applied.
	+ In ***Consolidated Bathurst***, the SCC set out the guidelines that tribunal members should follow to allow them to promote consistency without compromising adjudicative independence of decision makers.
* Another tribunal practice that has come under scrutiny is the use of **lead cases**. The goal here is to use one case in which there is a thorough finding of fact and thorough legal analysis to allow more efficient disposition of similar cases. See ***Geza.***
* The **RAB** test should be used to challenge particular practices of decision-makers that affect the duty of fairness. When an **institutional practice** creates bias across a broad range of cases, then the **2-part *Geza* test** should be used to demonstrate systemic bias:
	+ **Step One:** Having regard for a number of factors including the potential for conflict between the interests of tribunal members and those of the parties who appear before them, will there be a reasonable apprehension of bias in the mind of a fully informed person in a *substantial number of cases*?
	+ **Step Two:** If the answer to that question is no, allegations of apprehension of bias cannot be brought on an institutional level.
* **KH:** What is the consequence if the Geza test is satisfied? Are there more wide-ranging consequences than if the individual RAB test was satisfied?

***Consolidated Bathurst*** (1990 SCC) – *Guidelines for ensuring that full board meetings do not interfere with adjudicative independence. Key question is whether ADM feels pressure to decide against conscience or opinion.*

**F:** Ontario Labour Relations Board (OLB) held a meeting of the full labour board to discuss the draft reasons of one of its three-member panels; the question was whether a particular legal test should be replaced with another

**A:**

* SCC acknowledged the need for full board meetings, especially as encouraging he coherent application of the law.
* However, Court said that no outside interference may be used to compel or pressure a decision maker to participate in discussions or to adopt a position.
* The relevant question is whether there is ***pressure***on the decision-maker to decide against his or her conscience or opinion. Set out the following guidelines:
	+ Discussions be limited to law or policy and not facts
	+ Parties be given a reasonable opportunity to respond to any new ground arising from the meeting
* At the OLB meeting, consensus was not required, no minutes were kept, no vote taken, attendance is voluntary, and the decision is not binding on other panels. The Court endorsed these features as promoting independence.

**D:** No evidence that the decision makers were pressured by others or had opinions imposed on them; no evidence that non-panel members participated in the decision.

***Geza v Canada*** (2005 FC) – *Test for institutional bias; lead case program designed not only to improve efficiency, but to decrease the number of successful applications.*

**F:** IRB instituted procedure to select one of several similar refugee claims to create a full evidential record for all. Lead case was selected with the participation of applicant’s counsel, the minister was invited to participate, and the panel members chosen were familiar with Hungary and the Roma situation.

**A:**

* Evans JA at FCA: cannot point to single fact which, on its own, establishes bias; however, the entire factual matrix gives rise to a RAB.
	+ Applies stringent standard (adjudicative nature of decision)
* Interactions amongst board members (e.g., emails) gives the impression that the lead case program was designed not only to increase efficiency but to reduce the number of positive decisions that would otherwise be rendered in favour of the Roma applicants.
* This bias influenced the selection of the lead cases, and the lawyers who would argue them.
* Panel was tainted by the board’s strategy to reduce claims.

**D**: This decision is quashed, but no effect on previous decisions decided under the same matrix.

# The Charter and Administrative Law: Procedural Fairness

* How does the court’s approach change when an administrative decision appears to engage a Charter protected right? The relationship between the common law of judicial review and the Charter is complex; the Charter has both influenced and *been influenced by* the common law.
* There is uncertainty over how and when courts will resort to the Charter in an administrative context. There is growing consensus that the Charter does not replace the common law, but rather embodies and supplements the fundamental legal principles contained within it.
* According to s. 32, the Charter applies to the legislatures and governments of Canada, the provinces and territories. The Charter may also apply to a non-government body that is entrusted with the implementation of a government policy or program (***Eldridge***).
* **Section 1 analysis**:
	+ Infringements will not be struck down if they are 1) reasonable; 2) prescribed by law; 3) demonstrably justified in a F&DS.
	+ ***Oakes****:* 1) pressing and substantial objective 2) means rationally connected to objective 3) minimal impairment of rights 4) proportionality between infringement and objective.

## Procedural Fairness and the Principles of Fundamental Justice

* In addition to the common law duty of fairness that is owed by all administrative actors, a duty of fairness **may also be owed under the Charter**. The situations in which the Charter applies are narrower than at common law.
* The **primary source** of procedural fairness under the charter is the principles of fundamental justice under **section 7.**
	+ Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
* To access procedural safeguards under s. 7, the complainant must first **establish** that their life, liberty or security interests are impaired by the relevant decision.
	+ Life: right to live and be free from state conduct that increases the risk of dying
	+ Liberty: freedom from physical restraint and freedom to make fundamental life choices
	+ Security: threat of physical or severe psychological harm
* While common law procedures can be overridden by statute, the procedural requirements under the principles of fundamental justice are constitutionalized.
* Other **non-Charter sources of procedural safeguards** that legislation cannot oust include:
	+ The *Bill of Rights*: 1(a) right not to be deprived of life, liberty, security of person, and enjoyment of property except by due process of law
		- Can only be overridden by notwithstanding clause.
	+ Honour of the Crown and fiduciary duty (re: aboriginal people)
* As in the common law context, the specific procedural requirements of the principles of fundamental justice are determined flexibly but on a **standard of correctness**.
* When Courts are determining the content of participatory rights/procedural fairness, they apply the *Baker* framework. In the context of a s. 7 claim, this analysis may generate a substantive duty to give reasons as a principle of fundamental justice: ***Suresh***.
	+ Common law procedural fairness is the “floor” for Charter procedural protections (i.e., minimum requirements under s. 7): fair hearing, acting in good faith, opportunity to state one’s case and to be heard by an unbiased and independent decision maker.
	+ *Singh* is an example of how much more might be required under the Charter.

***Singh v Minister of Employment and Immigration*** (1985 SCC) – *Principles of fundamental justice include procedural requirements that are available to everyone physically present in Canada. Oral hearings generally required when s. 7 engaged or when serious issue of credibility.*

**F:** Seven refugee claimants were denied an oral hearing. Statutory scheme provided possibility of oral hearing, but only if there were reasonable grounds to believe that the applicant could make a successful claim. Common law procedural fairness was of no assistance: the statute was clear that no oral hearing was owed.

**I:** Are there Constitutional sources of procedural fairness in Canada?

**A:**

* Three judges found an infringement of Charter 7 and three found an infringement of 2(e) of the *Bill of Rights.*
* Court concluded that the principles of fundamental justice under s. 7 include procedural fairness. Further, the reference to ‘everyone’ in that section means **everyone physically present in Canada**.”
* The decision deprived Singh of his right to be free from the threat of physical punishment or suffering.
* When the interests under s. 7 are engaged, an oral hearing will generally be required (though not always). Oral hearing required when there is a **serious issue of credibility**.
* Utilitarian and budget concerns cannot outweigh rights. The procedure cannot be saved under section 1.
	+ In subsequent decisions, courts have pulled back from this position.

**D:** Decision quashed and sent back; gov’t forced to reformulate the Immigration and Refugee Board appeals process.

***Suresh v Canada*** (2002) – *Common law Baker framework is used to determine the content of the s. 7 procedural rights; no Oakes analysis undertaken.*

**F:** Suresh was detained on a security certificate for alleged links with Tamil Tigers. Adjudicator denied refugee status re: membership in a terrorist organization. Minister issued opinion (under 53(1)(b) of the Act) that Suresh constituted a danger to the security of Canada and should be deported, despite the likelihood that S would face torture in Sri Lanka. S challenges on administrative and Charter grounds.

**A:**

* Court: barring extraordinary circumstances, **deportation to torture will generally violate section 7.**
* No particular procedure required under 53(1)(b). Minister gave S an opportunity to provide written submissions.
* Court applied the ***Baker*** framework to assess what participatory rights were required:
	+ Weighing the factors, the court decided that an oral hearing was not required. However, Suresh was entitled to **disclosure** of all the materials; the **right to reply** to the claims; and **responsive reasons**.
		- Disclosure: subject to privilege or other valid reasons for reduced disclosure.
		- Reasons: the security interest (potential torture) gives rise to a more robust reasons requirement
* The common law factors are used to determine the content of the s. 7 procedural rights. \*Good example of the Court weighing the *Baker* factors.
* Breach not justified under section 1 (no *Oakes* analysis); court acknowledges that extraordinary circumstances could justify deportation to torture.

**D:** Decision quash and sent back for reconsideration.

***Charkaoui v Canada*** (2007) – *Standard of review for procedural fairness under section 7: given the context and the seriousness of the violation, was the process fair?*

**F:** Canada alleged that C (permanent resident) and others were involved with terrorist organizations. Security certificates issued; detained prior to deportation pursuant to s. 77 of IRPA.

**L:** Detention and the reasonableness of the security certificate are subject to review by the Federal Court. Review may be held *ex parte* and *in camera*, at the request of the Crown, if the judge believed the disclosure of some or all of the evidence could undermine national security. Named person received summary of evidence; judge could rely upon evidence that would be inadmissible in court; no appeal or further review.

**A:**

* Liberty interest engaged: face detention; security interest engaged: person may be removed to a place where life or freedom will be threatened.
* Section 7 requires a **fair process**; the question is whether, given the context and seriousness of the violation, the process was fair.
	+ The security context imposes certain constraints that can be properly considered at the s. 7 stage (e.g., full disclosure might not be possible). However, the s. 7 analysis is not a balancing exercise.
* Procedural requirements: decision must be impartial and based on fully tested facts and law; the accused must know the case they have to meet.
	+ The secret regime denies the accused the opportunity to know the case against them; that undermines the judge’s ability to come to a decision based on all of the relevant facts and law.

**D:** Parliament does not have to select the perfect or least restrictive course of action; however, the Act does not minimally impair rights because there were far better alternatives available (e.g., special advocate system). Decision suspended for 1 year so that Parliament can respond.

# The Charter and Administrative Law: Substantive Review

* The key decisions in this area are ***Dore*** and ***Martin***. Two key principles stem from these cases:
	+ 1) Tribunal’s generally have the jurisdiction to apply the Charter
	+ 2) Discretionary decisions made by administrative actors should be reviewed using administrative law, not the Charter.
* Prior to *Dore*, there was considerable uncertainty in this area of the law.
* \*\*Dore applies to **individualized, administrative discretionary decisions** that engage Charter values
	+ *Dore* applies to all administrative decisions. The *Oakes* test is reserved for laws themselves.

***Dore v Barreau du Quebec*** (2012 SCC) – *ADMs must balance Charter values with statutory objectives; on judicial review, the Court must consider whether the balance struck was proportionate and reasonable. Oakes test not used when the question is whether administrative discretion was exercised in accordance with the Charter.*

**F:**  Dore was a lawyer practicing in Quebec. He wrote a personal letter to the judge of one of his cases which accused the judge of being ‘pedantic, aggressive and petty’, amongst other things. The letter was forwarded to the Quebec bar, and Dore’s conduct was found to have been in violation of the code of ethics; he was suspended for 3 weeks. The discipline committee accepted Dore’s argument that the provision violated 2(b), but found it to be justified under s. 1. Dore changed his argument: instead of arguing that the ethical provision violated the Charter, he argued that the interpretation and application of it by the DC violated the Charter.

**A:**

* The SCC upheld the tribunal’s decision, but in doing so set out a new procedure for reviewing administrative decisions that engage Charter rights.
* The Court said that the *Oakes* test should be reserved for laws themselves; when considering whether ADMs have exercised their statutory discretion in accordance with the Charter, the review should be in accordance with an administrative law approach.
	+ Because administrative decisions are not “prescribed by law” (they are individualized), they cannot be scrutinized under section 1.
* **When applying Charter values in the exercise of statutory discretion**, an ADM must balance Charter values with the statutory objectives by considering how the Charter value will best be protected in light of those objectives. Must balance severity of interference with statutory objectives.
* **When conducting judicial review of these decisions**, the question becomes whether the decision reflects a proportionate balancing of the Charter values at play. The SOR is reasonableness.
	+ - **Key SOR question**: has the decision-maker disproportionately and unreasonably limited a *Charter* right/value when exercising statutory discretion?
			* Primary way to show proportionality is through **reasons**
		- The decision must reflect the ‘fundamental importance’ of the affected Charter values balanced with the nature of the decision and the statutory and factual context.
			* Consider the *Dunsmuir* SOR factors to assist with determining what is reasonable and proportionate in the circumstances.
* The question before the court: did the council’s decision to reprimand D reflect a proportionate balancing of D’s expressive right with the Council’s statutory mandate to ensure that lawyers behave with ‘objectivity, moderation and dignity’?

D: The decision to sanction Dore does not represent an unreasonable balancing of Dore’s expression rights and the Council’s mandate.

* In rejecting a strict section 1 analysis of administrative decisions, *Dore* overrules *Multani*.
* The administrative law approach is seen as a “richer” approach because it suggests that ADMs are required to weave Charter values into their decisions and application of their statutes, when those values are engaged.
* The proportionality analysis here is said to be in “conceptual harmony” with the *Oakes* analysis
* Are Charter values a watered-down version of Charter rights?
* If the law appears to violate a right on its face, the orthodox Charter/*Oakes* approach applies; if a discretionary decision engages the right (including a decision as to procedure), the *Dore* analysis applies

## The Path to *Dore*

***Slaight Communications v Davidson*** (1989 SCC)

**F:** Labour adjudicator found that Davidson had been dismissed unjustly; ordered the employer to write an unembellished factual letter of reference (positive order) and also ordered the employer not to make any comments about Davidson otherwise (negative order). Slaight sought JR and argued that both orders violated 2(b) guarantees.

**A:**

* Which route should be taken: Administrative law or the Charter?
* Dickson goes with the Charter, and develops what is referred to (until *Dore*) as the ‘orthodox approach’. This approach has two steps:
1. Examine the decision to determine if it affects a Charter right
	1. If it does, proceed through the Charter analysis, including section 1 and the *Oakes* test.
		1. Dickson finds that the orders violated freedom of expression rights, but found that they were upheld by section 1.
2. If there has been no Charter infringement, a court can proceed to conduct an administrative law review.
	1. At this time, the substance of the decision would have been reviewed on the patent unreasonableness standard
* Lamer thought that administrative law principles should be used first to review the legality of the decision (jurisdiction, reasonableness, etc.). If this analysis is satisfied, then the Charter analysis should be conducted. Lamer finds that the positive order satisfies both the admin law analysis and the Charter analysis.
* Regarding the negative order, **Lamer** says that we must first determine whether the infringement comes from the legislation or from the decision:
	+ First determine whether the order was made pursuant to legislation that confers (either expressly or by necessary implication) the power to infringe a protected right.
		- If so, the legislation itself must satisfy section 1.
		- If, instead, the legislation provides broad or imprecise discretion and the authority to infringe a right is not express, then *the order itself* must be justified under section 1.

***Express Authority to Infringe vs. Imprecise Authority to Infringe***

* ***Dore*** affirmed the distinction that Lamer makes between *legislation* that violates rights and *orders* that violate rights.
* Following *Dore*, a person who has his or her rights violated by express legislative authority to do so appears to be in a different position than one who alleges an infringement based on the exercise of imprecise discretionary power.
	+ In other words, laws are reviewed under the *Oakes* analysis while administrative decisions (which involved discretio) are reviewed under *Dore.*
	+ Constitutionality of the rule is reviewed on correctness standard; individual discretionary decision will be reviewed on reasonableness/proportionality standard.
		- \*Why should there be two different approaches to reviewing administrative outcomes that depends on whether the order was expressly authorized by statute? Does it make a difference which path is chosen?
	+ Government has burden under s. 1; applicant has burden to prove unreasonableness.
* Following *Dore,* where a law expressly confers authority to infringe a protective right and this general authority can be justified under s. 1, it is only necessary to determine whether a particular exercise of that authority is *reasonable* in the administrative law sense.
	+ In ***Lake***, which preceded *Dore*, the Court had already concluded that the reasonableness standard can embrace constitutional values and that a strict application of the *Oakes* test is not necessary.
* In ***Multani***, a school board prohibited an orthodox Sikh student from wearing a Kirpan. Charon, for the majority, followed *Slaight* and applied a s. 1 analysis to the decision. In dissent, Deschampsand Abellarejected the *Oakes* analysis and said the matter should be resolved under administrative law in a manner that is consistent with the applicant’s Charter rights. Charon’s approach was explicitly rejected by *Dore*.
	+ Both the majority and concurring judgments reached the same conclusion: the school board’s decision could not stand (because it could not withstand s. 1 scrutiny or because it was unreasonable given the board’s failure to take M’s Charter rights into account)

## Agency Jurisdiction to Apply the Charter

* Do administrative agencies, as creatures of statute, have authority to interpret and apply the Charter to their enabling legislation and to refuse to give effect to provisions found in violation?
* Initially, the Court held that s. 52 permits agencies which have jurisdiction over the general law to apply the Charter to their enabling statute and to refuse to give effect to provisions deemed inconsistent; however, it does not give them the power to declare those laws invalid: ***Douglas College***
* In ***Cooper***, the question was whether the CHRT had the jurisdiction to apply s. 15 of the *Charter* to section 15(c) of the *Human Rights Act*, which said it was not discriminatory for employers to terminate individuals if they reach the normal age of retirement for their position.
	+ **Lamer** (Concurring): Concerned about the separation of powers; it is the courts – not the executive – who are charged with policing the constitutional boundaries of legislation; section 52 can only be used by the courts.
	+ **LaForest** (Majority): Some tribunals may have the authority to consider the Charter, but only when the legislation confers that authority expressly or implicitly; no express authority/lack of expertise regarding questions of law/not an adjudicative body.
	+ **McLachlin** (Dissent): In the absence of direction to the contrary, every tribunal charged with the power to decide issues of law has the power to apply the Charter—“the Charter belongs to the people.”
* Several years after *Cooper*, McLachlin’s dissent was partially vindicated in ***Martin***, which (along with ***Conway***) is now the **leading case** on whether agencies have the jurisdiction to apply the Charter.

***Nova Scotia v Martin*** (2002 SCC) – *administrative tribunals that have explicit or implicit jurisdiction to decide questions of law are presumed to have the jurisdiction to determine constitutional validity. Two-step test.*

**F:** Workers Compensation legislation excluded chronic pain sufferers from receiving benefits under the regular system, providing instead a four-week program beyond which no further benefits were provided. WCB decision to deny benefits was appealed to the Worker’s Compensation Appeals Tribunal, which held that it had jurisdiction to consider the applicant’s section 15 Charter argument and concluded that the statutory exclusion violated s. 15. It applied the legislation without giving effect to the exception, and the WCB appealed.

**A:**

* SCC held: administrative tribunals which have jurisdiction – whether explicit or implied – to decide questions of law arising under legislation are presumed to also have the jurisdiction to decide the constitutional validity of that provision. [*Cooper* overruled].
* Modified the prior restrictive understanding of what it means to have the authority to consider questions of law. The question is no longer whether the legislature *intended* the tribunal to be able to consider the Charter; rather, the test is as follows:
	+ 1) Does the empowering legislation **implicitly or explicitly** grant the tribunal the jurisdiction to interpret or decide ***any***questions of law?
		- If not explicit, may be inferred from several factors:
			* Statutory mandate of the tribunal, and whether the jurisdiction is necessary to fulfill the mandate effectively
			* Whether the tribunal is adjudicative in nature
			* Practical considerations, including the tribunal’s capacity to consider questions of law
			* Q: Did the legislature intend the tribunal to decide questions of law?
		- Inferred authority raises a **presumption** that may be rebutted by explicit or implicit statutory withdrawal of authority to determine constitutional questions.
			* E.g., the BC ***ATA*** expressly denies most BC tribunals the power to consider Charter issues.
* \*Does this decision go far enough? Should the legislature be able to instruct tribunals not to consider and apply the Constitution? How does this square with section 52?

***Remedies under Section 24(1)***

* ***Conway***: Does a particular tribunal have jurisdiction to grant *Charter* remedies generally?
	+ Apply the ***Martin*** test to determine if the board is a “court of competent jurisdiction”
		- If it is, the tribunal can access remedies under section 24, so long as the power to award a particular remedy is within the tribunals jurisdiction (according to statute).
			* Determined by legislative intent by looking at the board’s statutory mandate, structure and function.
* Tribunals have not yet been granted a statute-independent jurisdiction to do whatever is ‘appropriate’ in the circumstances. It appears that boards are restricted to granting remedies that are already available under the statute.

***R v Conway*** (2010 SCC)

F: Conway found not guilty of sexual assault by reason of insanity; since the verdict (1984) he has been detained in mental health facilities. Ontario Review Board concluded that C was a threat to public safety and ordered his continued detention. Board determined that it had no jurisdiction to consider Conway’s claim that the mental health centre in which he resided had violated his Charter rights, and that it could not order a discharge as a section 24 Charter remedy to such violations.

I: Does the Ontario Review Board have jurisdiction to grant remedies under Charter 24(1)?

A:

* If the *Martin* test for Charter jurisdiction is satisfied, the tribunal has the power to grant Charter remedies under section 24.
* Next, consider whether the tribunal can grant the particular remedy sought, given its statutory scheme.
	+ Exercise in determining legislative intent and whether the remedy sought “is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal.”
* The ORB can decide questions of law. Is an absolute discharge available to Conway as a remedy?
	+ The board’s purpose is to protect the public and ensure that patients are treated fairly.
	+ It only has the power to grant non-dangerous patients discharges.
	+ Parliament did not intend the board to be able to grant discharges to dangerous individuals, so this remedy is not available under the Charter.

D: Tribunal did have jurisdiction to consider Charter remedies, but not to grant a discharge to Conway.

# The Standard of Review: Development of the Law

## Introduction and Early Decisions

* In the 20th century, the expanding administrative state was often frustrated by judicial review (e.g., freedom of contract decisions frustrating labour reform efforts). **Privative clauses** were invented to prevent courts from interfering with administrative decision making and to promote efficiency.
* The privative clause pits the principle of parliamentary supremacy against the constitutionally entrenched inherent jurisdiction of the superior courts.
	+ Judges have never accepted the idea that privative clauses can oust the court’s ability to review on jurisdictional grounds.
* In the early days, the effectiveness of a privative clause depended on the ease with which courts could designate an **issue as determinative of jurisdiction**, therefore warranting judicial scrutiny. Two techniques:
	+ “**Preliminary or collateral question**” (***Bell***): SCC determined that whether the rental unit was a ‘self-contained dwelling’ (defined in the HRC) was a preliminary jurisdictional question and fit for JR.
	+ “**Asking the wrong question**”: if the decision maker engaged in a defective reasoning process, the court could determine that the board had lost jurisdiction: ***Metropolitan Life Insurance***
* Using the above two approaches, courts could transform almost any issue into a preliminary question or determine that the tribunal asked the wrong question. Thus transformed into a jurisdictional question, courts would then apply the correctness standard.

## CUPE: The First Paradigm Shift

* At the time of CUPE, there were only two standards of review: correctness and patent unreasonableness. Correctness was applied more commonly, whenever there was a jurisdictional question. Patent unreasonableness was applied only when the questions were within the tribunal’s jurisdiction.

***CUPE v New Brunswick Liquor*** (1979 SCC) – *New attitude of curial deference towards tribunals; Administrators have the ability to interpret their home statute and are deemed expert because of their position.*

F: Canadian Union of Public Employees went on strike. Section 102(3) of the *Public Service Labour Relations Act* said: (a) the employer shall not replace the striking employees or fill their position with any other employee. Section 101 contained a privative clause: “every award, direction, decision, declaration or ruling of the Board is final and shall not be questioned or reviewed in any court.” Board upheld the union’s complaint when the employer began using management to temporarily perform striking employee’s roles; Employer sought JR.

A:

* Dickson: The question of what is and what is not jurisdictional is very difficult to determine.
* The interpretation of 102(3) seems to lie at the heart of the specialized jurisdiction confided to the Board. The Board’s interpretation was not so patently unreasonable as to warrant interference.

D: Restores the order of the Board

* \**CUPE* establishes that administrative decision-makers are not merely ‘inferior tribunals’; rather, they are specialized bodies that possess a legislative mandate to apply their expertise and experience to matters before them. This represents a changed perspective on the role of JR.

## The Reasonableness Standard and the Pragmatic and Functional Approach

***Canada v Southam*** (1997 SCC) – *Birth of the reasonableness standard: unreasonable decisions are not supported by reasons that can stand up to somewhat probing examination (e.g., no evidence, flawed logic, etc.); “patently unreasonable” defects are obvious on the face of the decision.*

**F:** Competition Tribunal found that Southam’s acquisition of newspapers substantially lessened competition in the market.

**A:**

* Court concludes that middle-standard of reasonableness is required.
* An **unreasonable** decision is one that is not supported by any reasons that can stand up to somewhat probing examination.
	+ Defect might be in the evidentiary foundation or in the logical process by which conclusions are drawn.
* By contrast, ‘**patently unreasonable’** decisions have a defect that is obvious on the face of the reasons. If the defect requires some searching, it is not patently unreasonable.

**D:** The Tribunal’s finding is not necessarily the one that Dickson J. would have made, but it is not unreasonable.

***Pushpanathan v Canada*** (1998 SCC) – *Pragmatic and Functional Approach to reviewing administrative decisions*

**F:** Pushpanathan applied for refugee status but was convicted for conspiring to traffic in narcotics before his claim was heard; excluded under the *Immigration Act* on the basis that a conviction is an “act contrary to the purposes and principles of the United Nations.” No privative clause and no right of appeal.

**A:**

* Guiding question: “Did the legislator intend this question to attract judicial deference?” [In essence, this is still the guiding question under the SOR analysis]
* There are four categories of factors that are relevant to determining the legislative intent:
	+ (1) Privative clause
		- Full privative clause (ouster) is compelling reason for deference
		- If clause is partial or unequivocal, look to legislative intent
		- Availability of statutory JR and appeal avenues will suggest less deference owed
	+ (2) Expertise
		- **Most important factor** in determining standard of review
		- Lack of expertise can outweigh a privative clause
		- Compare the expertise of the courts vs. the tribunal in the particular area. Look at the statutory rule and context, not the qualifications or competence of individual DMs.
		- Boards with specialized knowledge (e.g., economic, financial or technical matters) will be shown greater deference.
	+ (3) Purpose of the Act as a whole and of the provision in particular
		- Where the statute is ‘polycentric’ – engaging and balancing multiple interests – more deference is warranted.
		- Disputes that resemble the judicial process require less deference.
	+ (4) Nature of the problem (question of law, mixed fact/law, or fact)

**D:** Standard should be correctness.

* \*Remains unclear whether/to what extent these factors exert influence post-***Dunsmuir***. [They are the same factors considered in the second part of the *Dusmuir* SOR analysis].
* \*Under the P&F approach, none of the factors are determinative; the goal is to determine the level of deference to be shown to the decision in question. This approach shifted the analysis away from the language of ‘preliminary’ and ‘jurisdictional’, etc.

## The New Approach to SOR Analysis: *Dunsmuir* and its aftermath

* Following ***Southam***, there was considerable uncertainty over when the three standards of review should be employed (particularly distinguishing reasonableness from patent unreasonableness). This lead to a lot of argument over the standard of review.
* In ***Dunsmuir***, the court acknowledged that it had moved from a highly formalistic and artificial “jurisdiction” based test that could be easily manipulated to a highly contextual “functional” test that was too indeterminate. The Court set out to simplify the SOR process.
* \*If the legislature has **expressly specified** an applicable standard of review, courts must apply it. The focus of the analysis is on the level of deference intended by the legislature.

***Dunsmuir v New Brunswick*** (2008 SCC) -- *Two standards of review, two-part test, 4 correctness exceptions.*

**F:** Dunsmuir was dismissed from his civil service position at the DOJ; received severance, argued he was also owed a duty of fairness prior to termination. Adjudicator determined that he had the jurisdiction to determine whether a discharge purportedly with notice or pay in lieu thereof was in fact a discharge for cause (as Dunsmuir was alleging). Adjudicator was satisfied that the termination was not disciplinary; the decision was based on the applicant’s performance and suitability. However, he concluded that the applicant was owed procedural fairness, and that the termination was void because of its absence.

**A:**

* P&FA is rebranded as the SOR analysis; three standards of review reduced to two—correctness and reasonableness. Focus is still on legislative intent.
	+ “Reasonableness” is concerned with the existence of **transparency, justification and intelligibility**. Does the decision fall within a range of possible, acceptable outcomes that are defensible?
	+ Situations in which reasonableness will typically apply:
		- Question of fact, discretion or policy or where legal and factual questions are intertwined.
		- Tribunal interpreting its own statute or statutes with which it has particular familiarity
		- Discrete and special administrative regime in which the DM has special expertise
* Two-Step approach:
	+ 1) Consider whether the **jurisprudence** has already determined in a satisfactory manner the degree of deference to be accorded
	+ 2) If no precedent exists, **apply the non-exhaustive factors in the SOR analysis.** The focus of this analysis is on determining **legislative intent regarding the level of deference owed**
		- Privative clause?
			* Not determinative, but highly relevant to deference
		- Purpose of the tribunal (gleaned from interpreting statute)
			* How is this applied in practice?
		- Nature of the question (i.e., fact, law, mixed, discretionary)
		- Expertise of the tribunal
			* Relative expertise (points to deference): economic matters; financial matters; technical matters; highly political matters; labour boards and adjudicators.
* Deference and reasonableness review is the starting point. Four situations in which a **standard of correctness** should apply:
	+ 1) Where the question of law is **both** ‘of central importance to the legal system as a whole **and** outside the adjudicator’s specialized area of expertise.’
	+ 2) In constitutional questions
	+ 3) In ‘true’ questions of jurisdiction (where the tribunal must explicitly determine whether it has the statutory power to decide a particular matter)
		- Interpretation of the home statute is not a ‘true’ question of J.
	+ 4) Questions regarding the jurisdictional lines between two or more competing specialized tribunals

**D:** Reasonableness is the standard: existence of privative clause, expertise of decision-maker, and question of law not of ‘central importance’.

* \*There is some ambiguity that arises out of the relationship between the reasonableness presumption and the “contextual” SOR analysis. If the presumption is reasonableness unless one of the four factors is met, why is a contextual approach also needed?
* \*\*On the exam, acknowledge that the correctness presumptions exist, but continue to apply the contextual analysis under the *Dusnmuir* framework. [In reality, the Court itself has not decided whether the presumptions should be determinative or whether the contextual analysis should be carried out].
* **\*\*\***Binnie says that a single standard of reasonableness cannot properly capture the ‘spectrum’ of deference that is owed to various ADMs acting in various contexts and various capacities.
	+ Binnie’s concerns were validated: Today, the reasonableness standard swings from one that is akin to patent unreasonableness to one that is approaching correctness.
		- In ***Khosa***, the court said that reasonableness is a single standard that takes its colour from the context.

***How do privative clauses relate to the new SOR analysis?***

* Up to and including ***CUPE***, the privative clause operated as the legislative signal for deference. Under the P&FA, it was one of many factors to be considered.
* In ***Dunsmuir***, Binnie thinks that the privative clause is an important factor, but that it is not determinative of the SOR. When presumption, reasonableness is the presumption.
* In ***Khosa***, Rothstein disagrees. He thinks that the presence or absence of a privative clause should be determinative of the SOR: when it’s absent, the standard is correctness; when it’s present, the standard is reasonableness.

***The (ir)relevance of true jurisdictional questions***

* In the early days, privative clauses were largely determinative, unless courts could re-cast the issue as one of jurisdiction. Following Dunsmuir, the court has been very hesitant to brand questions as true jurisdictional questions.
* In ***Alberta Teachers Association***, Rothstein questioned whether, for purposes of judicial review, the category of true questions of jurisdiction should be put to rest (but does not resolve the matter).
	+ **Rothstein** was unable to define this category, saying that, in one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or authority to do what it does.
		- Concludes that, unless the situation is exceptional, the interpretation of its home statute by a tribunal should not be considered a jurisdictional question.
	+ **Binnie** disagrees, holding that the concept of jurisdiction is fundamental to judicial review of ADMs and to the rule of law. The courts are mandated to police the boundaries of administrative action.
		- Argues that the limits of a tribunal’s powers may well be set out in the statute and, on this basis, exercises of interpretation could well involve true jurisdictional questions.
			* Concludes that, when a tribunal’s interpretation is within its expertise and does not raise issues of general legal importance, reasonableness will be the standard.

***Questions of Central Importance to the Legal System***

* Questions of “central importance to the legal system as a whole” are assigned to correctness review only if they are also “outside the specialized area of expertise of the administrative decision maker.’
* Court is hesitant to place questions in this category. In ***Domtar***, the court concluded that diverging interpretations of a common phrase by two bodies (under different statutes) did not supply an independent ground for stricter judicial scrutiny.

## Statutory Interpretation and the Standard of Review

* Assessment of what standard of review should be selected and how that standard should be applied is largely dependent upon statutory interpretation. This is because the focus of the SOR analysis is determining the level of deference intended by the legislature.
* The **Modern Approach** to statutory interpretation: ***Rizzo Shoes***
	+ The words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
* Despite general acceptance of the modern approach, there are competing models of statutory interpretation:
	+ **Static/Diceyan/Formalist approach**: Words have a single meaning that is stable over time; ‘strict constructionist’/plain meaning approach; Interpretation has only one right answer, and correctness review is the norm.
	+ **Dynamic/Normative/Pragmatic Approach**: contextual and purposive; open inquiry into competing values or social priorities; acknowledges that all interpretation involves discretion; multiple reasonable interpretations, therefore reasonableness review is the norm.
	+ **Skeptic/Legal Realist**: Interpretation is a wide-open exercise that has very few constraints; judges determine an outcome and work backwards to a result (e.g., see ***Insite***).

# The Standard of Review: Application of the Standards

## Correctness Review

* Correctness review concerns only questions of law.
* When applying correctness review, the reviewing court will not show deference to the decision maker’s reasoning process; it will undertake its own analysis of the question and determine whether the DM was correct: ***Dunsmuir***
* There are three rationales for correctness review:
	+ 1) Supervise the jurisdiction of administrative decision makers
		- Upholding the division of powers
	+ 2) Judge’s decisions should prevail when their expertise is superior to that of an administrative decision maker
	+ 3) Need for consistency and predictability in the legal system (where a single interpretation is necessary to the interests of justice)
* If correctness is becoming obsolete, how will these rationales and values be furthered?
* In the following cases, the application of the correctness standard reveals a tension between a positivist approach to statutory interpretation, which looks to the text as a closed system that is indicative of legislative intent, and a more normative approach, which views problems of statutory interpretation in light of background assessments of social facts and purposes.
	+ In *Mossop*, Lamer and LaForest take a positivist/strict approach to interpretation of the CHRC and pay no attention to the reasons of the tribunal. Conversely, McLachlin and Cory apply the same correctness standard and arrive at the opposite result, because they look to the changing social context and the reasons of the tribunal.

***Mossop v Canada*** (1993 SCC) – *Differing approaches to statutory interpretation can have a determinative effect on the outcome of correctness review;*

F: Mossop denied bereavement leave for his partner’s parent; leave only available for deaths of family members (including common-law spouses, defined as opposite-sex spouses). Discriminatory practice under Canadian Human Rights Act to differentiate adversely in relation to an employee based on sex, marital status, family status, etc. Does not identify sexual orientation. HRT finds that Mossop was discriminated against on the basis of family status (interprets family status).

A:

* 4 of 5 writing judges choose correctness. The absence of a privative clause and the fact that the decision turned on statutory interpretation (a question of law) was relevant. LHD chooses patent unreasonableness.
	+ KH: Unlikely that correctness would be selected today
* Four judges conclude that the HRT’s interpretation of ‘family status’ was incorrect, and that the statute does not prohibit discrimination on the ground of sexual orientation.
* Lamer, writing for the majority, pays no deference or attention to the tribunal’s reasons. He notes that, while it was considered, sexual orientation was not added to the prohibited grounds of discrimination. Finds this determinative and concludes that, in the absence of a Charter challenge, the law must be applied.
* LHD says the interpretation was reasonable; McLachlin and Cory conclude that it was correct.
	+ M and C argue that the statutory text must be read in light of the social context and changing social conceptions of the family.

***Northrop Gruman Overseas Services v Canada*** (2009 SCC) – *Authority over subject matter, parties and/or remedies are all proper jurisdictional questions.*

F: NG wanted to complain to the Canadian International Trade Tribunal (CITT) that Public Works Canada had not evaluated its contractual bid in accordance with the Agreement on International Trade (AIT); The CITT Act contemplated complaints from “potential suppliers” of procurement contracts under the AIT where certain threshold conditions were met. The CITT determined, upon analyzing its home statute, that non-Canadian potential suppliers could make complaints.

A:

* **Correctness** standard applied on two bases: 1) recent cases from Federal Court indicate that a CITT decision regarding its own jurisdiction will be subject to correctness review; 2) the issue is jurisdictional because it determines whether or not the CITT can hear a complaint.
	+ KH: Is this really a ‘true’ question of jurisdiction? Or is it a matter of interpretation of the home statute?
* SCC rejects the tribunal’s interpretation, citing language in the statute that refers to “Canadian suppliers” and procurement contracts made “within Canada.”
* Court concludes that if the government of a supplier did not negotiate access to the CITT for its suppliers (through the AIT), then there is no access for the.
* While the Court of Appeal considers the tribunal’s reasons in detail, the SCC does not engage with those reasons. This makes it difficult for the tribunal to understand why its reasoning was wrong.

***Canada (HRT) v Canada (AG)*** (2011 SCC) – *Example of a stringent form of reasonableness review that looks a lot like correctness review.*

F: The Canadian Human Rights Tribunal can order a person to compensate the victim for any “expenses incurred by the victim as a result of the discriminatory practice.” The Tribunal decided that “expenses” includes legal costs, and awarded those costs to Mowat, who brought sexual harassment allegations against her military employer. $47,000 was awarded for legal costs (the decision in Mowat’s favour only amounted to $5,000).

A:

* FCA applied the correctness standard and determined that the tribunal was incorrect in its conclusion that it had the power to award legal costs.
* Considers and applies the *Dunsmuir* framework:
	+ If the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, reasonableness will generally apply.
		- The question of costs is this sort of interpretive issue. **Reasonableness** must be the standard, as none of the four exceptions are satisfied.
* The SCC concludes that the Tribunal’s interpretation of the statute was not a reasonable one. The Court proceeds to conduct a full contextual analysis of the provision to demonstrate how that conclusion is not a reasonable one.
	+ “A liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament.”

D: Order of the Tribunal quashed.

* KH: Is this correctness review guised in the cloak of reasonableness?

## Reasonableness Review

* In *Dunsmuir*, the court endorses the statement in *CUPE* that statutory language may accommodate more than one reasonable interpretation. Tribunal decisions are owed deference so long as they fall within the ambit of reasonableness. The key question: **how are the limits of reasonableness discerned?**
* Pre-*Dunsmuir* cases suggest that reasonableness review requires the reviewing court to stick close to the reasons given by the ADM, rather than to engage in their own analytical process. In ***Southam***, Iaccobucci J. said:
	+ An unreasonable decision is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard MUST look to see whether any reasons support it.
		- A defect could be in the **evidentiary foundation** (e.g., no or very little basis in the evidence) or in the **logical process** by which the conclusions are drawn (e.g., invalid inference).
* Deference has traditionally be held to mean, in addition, that reviewing judges are prohibited from **re-weighing** the competing factors relevant to their decisions (i.e., competing values, interests, statutory purposes, etc,).
	+ A failure to consider a relevant factor is an objective legal defect. Conversely, judgements about weight are to be granted deference, because there is not necessarily a correct answer: ***Ryan***
		- But see LHD’s decision in *Baker* and Fish’s dissent in *Khosa.* Both judges come to a finding of reasonableness on the basis that the DM did not give sufficient weight to important factors.
* In ***Dunsmuir***, the Court says that reasonableness does not float on a spectrum. However, in that case Binnie J. argues that the reasonableness standard should indeed vary along a spectrum of deference that is assessed according to a number of variables.
	+ In ***Khosa***, the court suggest that reasonableness is a single standard that takes its flavour from context.
* The **ongoing challenge** posed by reasonableness review is about how the judicial commitment to supervising administrative decisions and to uphold the rule of law.
* **Reasonableness** will be the be the presumptive standard and the **conclusion** when:
	+ A specialized or expert tribunal
	+ Interprets its enabling or home statute or closely related statutes
	+ On a question of fact or mixed fact/law
	+ Or on a question of law involving interpretation of the home statute
	+ Correctly applies all legal principles or tests
	+ To construct an interpretation that falls within the range of reasonable outcomes
	+ And is supported by adequate reasons
	+ The **onus** is on the applicant to show that the decision is unreasonable and or to rebut the presumption and have correctness applied.

***Celgene v Canada*** (2011 SCC) – *When considering the reasonableness of a decision, courts should consider the surrounding legislative context and statutory purpose.*

F: Judicial review of Medicine Prices Review Board’s interpretation of it’s home statute. Interpretation re: whether a pharmaceutical product distributed by Celgene from its base in the US to Canadian purchasers could be considered a drug “sold in any market in Canada.” Board said yes, which meant the Board had the power to demand pricing information from Celgene to determine if prices were ‘excessive’.

A:

* Lower courts proceeded on correctness standard of review, but SCC said that reasonableness was the appropriate standard.
* Despite inconsistencies with the commercial use of the word “sold”, the Court determined that the board’s interpretation was reasonable. The Court acknowledged that the Board was driven by the consumer protection goals of its mandate, and that it’s interpretation was responsive to the surrounding legislative context and purpose.
* *Celgene* is a good example of deference as respect – the court engages with the tribunal’s reasons and show’s deference to its mandate.

**D:** Board’s decision was both correct and reasonable, given its mandate to balance consumer protection against the commercial interests of medicine patent holders.

***Catalyst Paper Corp v North Cowichan*** (2012 SCC) – *Municipal bylaw creation should be shown a large degree of deference; councillors are permitted to consider a variety of social, economic, and political factors when making decisions.*

F: Challenge to a municipal bylaw that imposed higher property tax rates imposed on industry (vs. residents). Catalyst argued that the rate differences were not reasonable, in that they could not be justified on objective criteria. Municipality argued that it can take a broad array of factors into account, and that reasonableness review should proceed on this basis.

A:

* The Court sides with the municipality, concluding that municipal politicians have broad discretion over bylaw making that can be informed by an array of social, economic, political, and other considerations.
* Courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that can be taken into consideration. The court sets out a test:
	+ “Only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside.”
* The Court also said that reasons are not required when municipalities exercise their legislative function (but see ***Homex***).

***CNR v Canada*** (2014 SCC) – *Dunsmuir framework applies when conducting a SOR analysis with respect to an adjudicative decision made by the Governor in Council;*

F: Governor in Council has the power to vary or rescind decisions of the Board of Railway Commissioners regarding freight rates. Contract between CN and PRC for coal shipping; contract specified a fuel surcharge that would apply when the monthly average diesel price hit a ‘strike price’. CN unilaterally created altered the strike price, but did not apply the higher strike price to PRC’s traffic. PRC applied to the CTA under 120.1 of the CTA for an order establishing a reasonable fuel charge to apply to its traffic. The agency dismissed the application, on the basis that it did not have jurisdiction to amend the contract under 120.1 for the benefit of PRC. CITA (association representing PRC) petitioned the Governor in Council to vary the Agency’s decision. The GIC rescinded the Agency’s decision and found the tariff scheme unreasonable. CN applied for JR.

A:

* The Governor in Council decided that a confidential contract is not an impediment to a shipper’s ability to bring a complaint under 120.1. This was a matter of statutory interpretation, which is a question of law that has a sizeable policy dimension.
* The GIC has the power, under s. 40, to decide a question of law. This authority is properly supervised by the courts through JR.
* The *Dunsmuir* framework applies when determining the SOR for an adjudicative decision of the Governor in Council.
	+ Considers the *Dunsmuir* factors and determines that the presumption of deference is not rebutted, and none of the 4 exceptions apply.

D: GIC’s interpretation of 120.1 was reasonable, supported by both the words of the provision and the provision’s purpose.

## The Standard of Review and Reasons

* Reasons are important because they contain the evidence of reasonableness (or correctness) of exercises of statutory authority.
* Assessing the reasonableness of a decision, post-*Dunsmuir*, involves assessing the **justification, transparency and intelligibility present in the reasons**. If they exhibit these features and permit the parties to understand why the tribunal made the decision and satisfy the reviewing court that the tribunal grappled with the live issues, then they will be found reasonable.
* In ***Newfoundland Nurses***, the court said that the *absence* of reasons is a matter of procedural fairness while the *adequacy* of reasons is a matter for substantive review.
	+ Adequate reasons (i.e., ‘reasonable’ reasons), according to Abella J.:
		- Permit the parties to understand why the tribunal made the decision
		- Facilitate the appeal process and JR
		- Satisfy the court that the tribunal grappled with the substantive live issues
		- Allow the court to understand how the outcome is within the range of reasonable outcomes
		- Unclear writing does not necessarily indicate deficiency in reasoning
		- Reasons need not be comprehensive or well-written and may contain errors
	+ Inadequate reasons (i.e., unreasonable reasons):
		- Bare conclusions with no supporting information
		- No intelligible path to conclusions
		- Glaring inconsistencies or lack of evidence
		- Irrelevant considerations present/relevant considerations omitted
	+ \*Can reasons be **so deficient** that they no longer count as reasons?
		- The standard set out by Abella is low, but it is still a standard.
	+ \*Can the reviewing court supplement the reasons to help them satisfy the reasonableness review?
		- In ***Alberta Information and Privacy Commission***, the court said that, when there is no duty to give reasons OR when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when **conducting a reasonableness review.**
	+ What is the practical ability of a reviewing court to supply the basis upon which a decision is reached?
	+ If reasons were reviewed under PF, it would pull the standard of review towards correctness, which could erase deference in may cases.
* How does the reasonableness standard apply to reasons?
	+ Dyzenhaus: “Reasonable means that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them.”

***Agraira v Canada*** – *Large amount of deference owed to ministers making discretionary decisions and interpreting their own statutes; “national interest” must have been interpreted in order for the minister to reach decision; court* ***implies the definition*** *and conducts a review on this basis. .*

F: Agraira found inadmissible due to his membership in the Libian NSF (terrorist organization); applied for ministerial relief under 34(2) of IRPA. Minister denied relief; Agraira seeks JR, arguing that minister interpreted “national interest” in 34(2) too narrowly (and that the SOR should be reasonableness). Minister gave very brief reasons for his decision, citing credibility issues with the applicant’s stories.

I: What is the appropriate standard of review to apply to the minister’s decision?

A:

* Court cites jurisprudence to conclude that SOR is reasonableness under 34(2). This is supported by the discretionary nature of the decision, and the deference that is owed when a minister interprets his/her home statute.
* Minister didn’t expressly define ‘national interest’; however, he denied relief on this basis, so it is necessary that he came to some interpretation of the phrase. The court sets out to consider the **reasons that *could* be offered** for the decision (pursuant to ***ATA***).
	+ Concludes that, if the minister *had* provided a definition, it would have been one that related predominantly to national security and safety.
	+ Court concludes that this “implied interpretation” is owed deference
* While the reasons were brief, they meet the “justifiable, transparent and intelligible” threshold.

D: Decision upheld.

* How can the large amount of deference, seen in this case, be reconciled with *Insite*?

***McLean v BC Securities*** (2011 SCC) -- *Resolution of unclear language in a DM’s home statute is best left to the decision maker; no reasons offered, but deference given to reasons that could have been offered.*

F: Securities proceedings can’t be brought more than 6 years after the events that give rise to the proceedings. Question as to whether “events” is defined as the underlying misconduct, or the settlement agreement. Commission determined the latter, and brought proceedings on that basis.

A:

* Reasonableness is the presumptive standard of review, unless one of the four categories are satisfied or if the contextual *Dunsmuir* analysis rebuts the presumption. The presumption is not rebutted here:
	+ The possibility that different provinces could come to different interpretations of their limitation periods is not sufficient. Each province has jurisdiction over its own securities law.
* The resolution of unclear language in a DM’s home statute is best left to the DM.
* Reviews ordinary meaning, context and purpose of the provisions to conclude that the interpretation is reasonable.
* No reasons were given, but (after submission from counsel) nothing would be gained by requiring remission for reasons.

# Review of Discretionary Decisions

* The concept of **discretion** refers to decisions where the law does not dictate a specific outcome, or where the decision maker is given a choice of options within statutorily imposed boundaries.
	+ Discretionary power is often indicated by permissive language (e.g., “may”), general or vague language (e.g., “national interest or “interests of the child”), and often has a subjective dimension (e.g., “reasonable grounds to believe”, “for proper purposes”, “in the minister’s opinion”, etc.).

## The Role of Discretion

* Discretion is an essential part of bringing the various legislative schemes that are put in place by the legislature down to the individual level. Parliament cannot foresee every individual case that is likely to arise and may not have the necessary expertise or knowledge to craft the norms that should apply in any given area of activity. For both of these reasons, ADMs are granted discretion.
	+ **Unforseeability** leads to the type of discretion seen in *Baker*and *Roncarelli****,*** where ADMs were given broad discretion to exempt refugee applicants or to cancel liquor permits.
	+ The legislature’s **comparative lack of expertise** leads to delegated discretion to make (binding) bylaws or regulations as well as (non-binding) directives, guidelines and manuals
* Dicey associated discretion with arbitrary power and insecurity for legal freedom. He thought that discretion was inconsistent with the rule of law.
* Others, typically supporters of the welfare state, perceived discretion as an instrument of welfare.

## The Evolution of Discretion in Canadian Law

* Until ***Baker***, the approach to judicial supervision of discretionary decisions operated under specific heads of review. This framework differed from that used for the review of administrative interpretations of the law. The traditional grounds were as follows:
	+ **Bad faith**
		- Malicious/fraudulent departure
		- *Roncarelli*
	+ **Dictation/influence**
		- The wrong decision-maker made the decision
		- *Roncarelli*
	+ **Unlawful delegation of powers**
	+ **Fettering**
		- Deciding in advance how discretion will be exercised. Most likely to occur where directives or guidelines are applied in a way that prevents the DM from exercising true discretion.
		- *Thamotharem*
	+ **Improper purpose or motive**
		- Departure from the authorized purpose of the statute
	+ **Unreasonable/irrational/illogical decision making**
	+ **Omission of relevant factors/consideration of irrelevant factors**
* In ***Roncarelli***, the court made it clear that, even at the highest levels of executive action, there is no such thing as absolute discretion. The case is also important for the views on discretion espoused by the various judges:
	+ Rand J.: Both Duplessis and the commission lacked any legal basis for acting; even with formal delegations of apparently unfettered discretion, there are always limits implied by the legitimate purposes of the statute. “No legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power.” Purposive approach to interpretation.
	+ Cartwright J: Thought that no wrong had been committed because the statute granted unfettered discretion that could not be interfered with by the courts. The tribunal was a “law unto itself.” Plain meaning approach to interpretation.
	+ Abott J.: Neither as premier nor as AG was Duplessis authorized to give an order regarding the exercise of discretion over permits.

***Thorne’s Hardware v Canada*** (1983 SCC) – *Quashing an order in council requires egregious grounds. Motives of GIC for passing the order are not relevant.*

F: Thorne’s acquired a water lot that was outside the territorial limits of the port of Saint John; the Governor in Council passed an Order in Council that extended the limits of the port to include Thorne’s lot, allowing the gov’t to claim harbour dues. Thorne’s argues that the Order in Council was passed for improper motives.

A:

* It is possible to strike down an order in council on jurisdictional or other grounds, but it would take an egregious case to warrant such action. Generally, decisions made by the Governor in Council on matters of policy are final and not reviewable.
* Court refuses the opportunity to consider the motives that the federal cabinet had for passing the order. Cabinet is not required to publish reasons.
* The harbour expansion was one of economics and politics; not one of jurisprudence.

***Thamotharem*** (2006 FCA) – *Guidelines that permit members to deviate from standard practice will not be considered an unlawful fetter*

F: Chairperson of IRB has power to issue both guidelines and rules. Rules have to be approved by GIC, but guidelines do not. Guideline 7 states that standard practice is for Officer to question claimant first, but that this may be varied in exceptional circumstances. Claimant argues that the guideline unlawfully fetters the discretion of RPD members to determine appropriate order of questioning.

A:

* Guideline is not an unlawful fetter: it permits the members to deviate from the standard order of questioning.
* Guidelines generally do not have the full force of law, so they cannot lay down a mandatory rule that must be followed. (However, in some contexts, guidelines have the full force of law – e.g., Human Rights Commission guidelines are akin to regulations/delegated legislation).

D: A reasonable person would not think that members discretion was unduly constrained by the guideline; therefore, no fettering.

## The Modern Approach to Discretion

* In ***Baker***, LHD said that administrative decisions can’t be sorted neatly into “discretionary” and “non-discretionary” categories. The modern approach to JR of discretionary decisions combines the traditional “heads” of review with the SOR analysis (e.g., was it reasonable to consider X a relevant factor, or to consider Y as the proper purpose of the statute). Other relevant holdings in *Baker* regarding discretionary decision making:
	+ Deference is owed to DMs making discretionary decisions. However, discretion must still be exercised in accordance with the boundaries imposed in the **statute**, the principle of the **rule of law**, the principles of **administrative law**, the **fundamental values** of Canadian society, and the **principles of the Charter**.
	+ LHD held that the manner in which the minister reached the decision was inconsistent with the **values** underlying the grant of discretion and with the nature and scope of the power (discretion was intended to be exercised in a humanitarian and compassionate manner – this is a legal requirement). The decision also failed to give “serious weight” to the interests of the children. Therefore, it was unreasonable.
* When reviewing a discretionary decision, can the court re-weight the factors taken into account by the decision maker?
	+ In ***Suresh***, the court says no; the reviewing court is not to re-weigh relevant factors. The Court says that *Baker* was decided on the grounds that the minister failed to consider and weigh implied limitations and/or patently relevant factors.
* \*See ***Dore***, above, for the methodology to apply when discretionary administrative decisions engage Charter values and rights.

***Suresh v Canada*** (2002 SCC) – *Courts must not reweigh the relevant factors when reviewing a discretionary ministerial decision; Minister’s decision should be set aside only if it was made arbitrarily or in bad faith, cannot be supported on the evidence, or if the minister failed to consider appropriate factors.*

F: Suresh facing deportation proceedings; Ministerial discretion to deport (even if life or freedom threatened) if the Minister is of the opinion that the claimant constitutes a danger to the security of Canada.

I: What standard of review should be adopted with respect to the minister’s decision that a refugee constitutes a ‘danger to the security of Canada’?

A:

* The minister’s decision should be set aside only if it was made arbitrarily or in bad faith, if it cannot be supported on the evidence, or if the minister failed to consider the appropriate factors. The court should not, however, reweigh the factors or interfere merely because it would have come to a different conclusion.
	+ Pre-*Dunsmuir*. Cites the *Pushpanthan* factors and determines that deference is owed to the decision (selects patent unreasonableness).

D: New trial (on *Charter* procedural fairness grounds, see above).

# The BC ATA and Patent Unreasonableness

* The BC ATA attempts to set out the standard of review for various issues. For example, it states that discretionary decisions must be reviewed on the standard of patent unreasonableness. Section 56(4) defines patent unreasonableness as:
	+ Decisions that are arbitrary or in bad faith
	+ Discretion exercised for an improper purpose
	+ Decision based entirely or predominantly on irrelevant factors
	+ Decision fails to take statutory requirements into account
* **Section 58** addresses the SOR when there is a privative clause; **section 59** addresses the SOR if there is no privative clause.
* The common law can’t overrule clear statutory direction regarding the standard of review. **Patent unreasonableness** under the ATA is defined by the common law prior to *Dunsmuir*:
	+ Evidently unreasonable or clearly irrational
	+ Based on no evidence (but not insufficient evidence)
	+ Applies to the result, no the reasons
	+ High degree of deference to reasons that could be offered
* In ***Khosa***, the court addresses statutes that incorporate the patent unreasonableness standard:
	+ In obiter, Binnie said that, despite *Dunsmuir,* patent unreasonableness will live on in BC; however, the content of the expression, and the precise degree of deference it commands, will be calibrated according to the common law.
* ML: Binnie’s obiter cannot be correct: patent unreasonableness will be assessed according to the pre-*Dunsmuir* common law standard and according to the statutory directions.

# Aboriginal Administrative Law

* Aboriginal administrative law is about the intersection of three bodies of law: administrative law, indigenous law (internal laws of indigenous peoples), and aboriginal law (Canadian state’s laws relating to aboriginal peoples).
* There are at least three contexts in which “aboriginal administrative law” is an important consideration:
	+ Developing administrative justice for aboriginal self-government
	+ Applying administrative law to aboriginal decision makers
		- Decision making by *Indian Act* band governments is typically reviewable by Canadian courts on administrative law grounds.
	+ Respecting aboriginal rights and jurisdictions (Duty to consult and accommodate regarding proven and unproven aboriginal rights claims)
* Under the **Royal Proclamation, 1763** the Crown agreed to protect aboriginal lands and to ensure that private citizens could not purchase lands directly from aboriginals (this was to ensure that “the Indians may be convinced of our justice and determined Resolution to remove all reasonable cause of discontent.”)
* Under **Section 91** of the Constitution Act, 1982, the Crown has jurisdiction over aboriginals and aboriginal land reserves.
* Under **Charter 35**, the existing aboriginal and treaty rights of aboriginal peoples are affirmed.
* The **Honour of the Crown** is an unwritten constitutional principle that gives rise to the duty to consult and other fiduciary duties owed to Aboriginal peoples.
* **Aboriginal decision-makers** are delegated statutory authority through the *Indian Act*. From the aboriginal perspective, this is inconsistent with their conception of self-governance and autonomy. Aboriginal administrative decisions can be subject to judicial review.
* The **role of the legal system** in promoting aboriginal rights and self-governance: convert moral and political duties into legal obligations; protect both proven and unproven Aboriginal rights; check the power of the Crown; promote reconciliation.

## Applying Administrative Law to Administrative Decision Makers

* In ***Sparvier***, the court applies *Gabriel*, where it was concluded that an Indian band council acting pursuant to customary election laws satisfied the definition of “federal board” and therefore fell within the jurisdiction of the Federal Court.

***Sparvier v Cowessess*** (1993 FC) *Aboriginal decision makers that fall within the Federal Court’s jurisdiction must meet a minimum level of procedural fairness; RAB test should be applied in a sensitive manner to DMs in close-knit aboriginal communities.*

F: Cowess Indian Reserve Elections Act, along with non-codified customs and traditions, govern elections for Band Chief and Counsellors. Sparvier was successful in the April 24 election; Lavallee appealed the election on the grounds that two of the five candidates were ineligible. Lavallee won the second election on May 22. Sparvier challenges the decision of the election appeal tribunal to nullify the first election results. Sparvier argues that there was a lack of procedural fairness: member of the Tribunal (who did not vote on the matter) made negative remarks about Sparvier; another tribunal member rented farmland to Lavalee; that there was insufficient notice (1 day). Respondent argued that procedural fairness requirements don’t apply to band councils following customary practices.

A:

* The election was not governed by the Indian Act but by the “Cowess Indian Reserve Election Act”, which was passed by the band and approved by an order in council.
	+ Indian band councils acting pursuant to the provisions of the Indian Act constitute a “federal board, commission or other tribunal” under Federal Courts Act.
	+ In ***Gabriel***, the court decided that an Indian band council was a federal board subject to the judicial review, even when the election under review was governed by to custom and not the Indian Act.
	+ Court applies *Gabriel* and concludes that the appeal tribunal is a federal board (no real analysis).
* Court: acknowledges importance of autonomous processes for electing band leaders, but concludes that **minimum standards of procedural fairness must be met**. This minimum content includes notice, opportunity to make representations, and an unbiased tribunal.
	+ Court finds a reasonable apprehension of bias resulting from the negative comments made about Sparvier.
	+ However, court said that a rigorous test for RAB should not be applied to aboriginal tribunals that stem from close-knit communities.

D: Invalidates tribunal’s decision.

***Canadian Pacific v Matsqui Indian Band*** (1995 SCC) *When considering the interpretation and application of aboriginal legislation, the purposes of the legislation must be kept in mind (e.g., self-governance);* ***Lamer****: however, this does not affect the common law RAB analysis;* ***Sopinka****: these considerations may have a considerable effect on the RAB analysis, and such analyses should not be conducted without facts.*

F: Amendments to the *Indian Act* allow Indian bands to create bylaws that allow taxation of real property on the reserve lands. Matsqui band sent notice of assessment to CP (rail lines) and to Unitel (fibre optic cables). CP sought judicial review, arguing that band does not have authority to tax CP’s land (which runs through the reserve but which was acquired from the Crown in 1891). Also argues that the appeal tribunals raise RAB. Band asks that the application for JR be struck because there were adequate avenues of appeal available within the band taxation system

A:

* Lamer: Taxation regime was intended to facilitate the development of Aboriginal self-government. This purpose must be kept in mind.
* Sets out a number of factors that a court should determine when deciding whether to grant JR or to require applicant to exhaust internal mechanisms:
	+ Convenience and adequacy of the alternative remedy; nature of the error; nature of the appellate body; etc. Cites ***Harlekin***.
* Was not unreasonable for FC judge to conclude that bypassing the internal appeal mechanisms would be detrimental to the self-governing purposes of the taxation powers.
* Concerns about bias: members of the band can be appointed to the appeal tribunals, and these members are tax exempt; non-Indian band members “may” be paid for remuneration and their appointments are at pleasure.
	+ Lamer concludes that the structure of the appeal tribunal gives rise to a **RAB at the institutional level**. Combined, the absence of security of tenure, the lack of a salary guarantee, and the adjudicative function of the tribunal violated the *Valente* independence principles. Finds a RAB.
	+ Sopinka disagrees, and he also thinks that the impartiality of the appeal tribunal should not be considered until a decision has been rendered. Places **more weight on self-governing considerations**, and thinks that these principles should influence the assessment of institutional bias.

D: Lamer concludes that a RAB exists and confirms CPs application to skip the internal mechanisms and head straight to judicial review.

## The Duty to Consult

***Haida Nation*:**

* Duty flows from the honour of the Crown. Overarching goal is the reconciliation of pre-existing Aboriginal sovereignty with *de facto* Crown sovereignty.
* Content of the **Crown’s duty**:
	+ Crown cannot act unilaterally, must hear the concerns of affected aboriginal communities, and must always consult.
	+ Duty cannot be sub-delegated and rests on both federal and provincial governments and agents/representatives
	+ Process must be fair and in good faith
	+ Actions must be justified and accommodation may be required
	+ No duty to agree
* Content of **Aboriginal people’s duty**:
	+ Good faith consultation
	+ Clarity of claims
	+ Evidence in order to assess severity of impact
	+ Not to frustrate the Crown’s good faith attempts at consultation
	+ No veto power
* How the duty works:
	+ Stage 1/Trigger:
		- (a): Crown has actual or constructive knowledge of potential Aboriginal right or title
		- (b) Crown contemplates action (including policy decisions)
		- (c) Conduct may adversely affect an Aboriginal right or claim (claimant must show causation)
	+ Stage 2/Scope of duty:
		- Scope must be proportionate with the strength of the Aboriginal claim, the potential impact, and other factors (E.g., public interest)
	+ Stage 3/Consultation:
		- Must be meaningful; threshold is **adequate consultation**
		- See “content of duties” above
	+ Stage 4/Accommodation:
		- May be required
* Procedural components of D2C:
	+ Timely notice; Crown has duty to inform itself of potential impact; Crown must provide disclosure; Crown must provide opportunity for Aboriginal groups to be heard; submissions and arguments in reply; written reasons; act in good faith; integrate concerns wherever possible.
* Standard of Review:
	+ D2C is a legal duty; however, it is a duty premised on assessment of the facts. Therefore, deference to the initial adjudicator may be warranted.
	+ When the question is purely one of law, the standard is correctness; when the legal question is “inextricably entwined” with the facts, the standard will likely be reasonableness.
	+ Process: reviewed on standard of reasonableness; perfection not required, reasonable efforts must be made.
	+ Impact or legal nature of claim: if misjudged by gov’t, may be reviewed on a standard of correctness.
* In *Haida*, the trial judge found that the government had a moral duty to consult, but not a legal one. At the SCC, the court said that the government has a legal duty to consult and accommodate, but that private companies have no such duty (independent from private law, that is).

***Beckman v Little Salmon*:**

* First post-*Haida* application of the D2C framework. Binnie held that duty can impose obligations that are in addition to the content of the treaty (i.e., the treaty is not a “complete code” with respect to the obligations of government). Consultation is not a matter of courtesy, Binnie says, it is a legal duty.

***Rio Tinto Alcan***

* Alcan built several industrial complexes in the Nachako Reservoir in the 50s. In the 2000s, BC Hydro enters into an energy agreement with Rio Tinto, which was approved by the Utilities Commission. Carrier Sekani wanted to be heard by the Commision, and challenged BC Hydro’s failure to consult. The Rio Tinto complex function by flooding an ancient burial ground of the Sekani.
* Under the BC ATA, the Utilities Commission is barred from considering constitutional questions (which are defined under the constitutional questions act – questions re: the constitutional validity or applicability of any law or an application for a constitutional remedy).
* How does the D2C relate to historic injuries or wrongs? McLachlin says that the key question is whether the present decision has continuing effects on current claims and rights. The duty to consult and accommodate does not correct for past injustices.
* McLachlin says that the question in front of the tribunal does not fall within the definition of “constitutional question” in the ATA.

***West Moberly***

* The building of the Bennett dam interfered with the territories of a species of Caribou and contributed to a near-extermination of the heard. West Moberly wants to be consulted and accommodated with respect to their demands regarding the preservation of the Caribou. First Coal (corporation) is negotiating with the province to determine if there is any viable coal seams that can be exploited. West Moberly argues that this would exterminate the herd.
* The Court notes that the band’s position is completely irreconcilable with the projects proposed by the corporation. The court says that, to be considered reasonable, the consultation process would have to provide an explanation to the petitioners that set out persuasive reasons as to why their position was rejected.