Liz Pan

Administrative Law Summary
(Mary Liston)

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ADMINISTRATIVE LAW

CHAPTER 1: INTRODUCTION TO ADMINISTRATIVE LAW

Public law refers to:

1. Laws that structure the relationship between the state and the individual
2. Laws that structure the relationship between state institutions
3. Laws that facilitates and constrains the exercise of public power

Key areas of public law:

1. Constitutional law
2. Criminal law
3. Administrative law
4. Aboriginal law
5. Statutory law
    i. Election law
    ii. Environmental law
    iii. Immigration law
    iv. Tax law

So, administrative law is a sub-category of public law. It may also be a form of constitutional law. It involves the judicial review of decisions and actions made by public actors in order to prevent the abuse or misuse of public power.

An administrative actor is:

1. A person or institution delivering a public program or engaging in government action
2. Acting through and controlled by legislation
3. Possessing delegated authority conferred by the legislature in order to implement the legislative scheme under the enabling statute

Examples of administrative actors include Cabinet, GIC, ministers and their delegates, municipal governments, school boards, agencies, boards, commissions, inquiries, and tribunals.

Typical actions include decisions, creation of subordinate legislation (regulations), adjudication, policy development, investigations, prosecutions, education, research, or the provision of advice.

Specifically, these administrative actors may regulate and restrict activities, control licenses, discipline, confer and distribute social benefits, adjudicate disputes, or confer/deny/revoke status (such as the HRC or the IRB).

Generally, courts become involved through:

1. Original jurisdiction, where the government is sued through ordinary civil law.
2. Appellate jurisdiction, where the statute creates a right of appeal.
3. Supervisory jurisdiction, upon judicial review. Remember, JR is not a right; leave must be granted.

Baker v Canada (Minister of Citizenship and Immigration), 1999 SCC

Framework for determining the content of the duty of fairness

Facts: Baker was a visitor from Jamaica who remained in Canada as an illegal immigrant. She was employed as a domestic worker for 11 years, and during that time, had four children. In 1992, she faced a deportation order. Immigration legislation required applicants for permanent residence to apply from outside Canada, meaning that she would have to apply from Jamaica. She applied for an exemption from this requirement under the *Immigration Regulations*, which authorized the immigration minister to grant discretionary exemptions on humanitarian or compassionate grounds.

Sources of law:

1. Domestic law
    a. Legislation: the *Immigration Act*
    b. Regulations: the *Immigration Regulations*
    c. Precedent and CL principles: such as the dual limbs of the duty of fairness: the duty to hear the other side and the right to an impartial decision maker
    d. Indirect influence of the Charter and Charter values
2. International law
    a. Jurisprudence from other jurisdictions: UK, Australia, NZ, India
    b. Convention on the Rights of the Child: BUT, not incorporated into domestic legislation (its influence was one of the points of dissent)

3. Soft law
    a. Immigration guidelines
    b. Fundamental values of Canadian society
    c. Articles by legal academics

Baker factors (five non-exhaustive contextual factors to determine the content of the duty of fairness, none of which are necessarily determinative):

1) **The nature of the decision and the process followed in making it.**
   Greater procedural protection is likely to be required in an adjudicative context.
   Less procedural protection is likely to be required in an administrative or regulatory context.
2) **The nature of the statutory scheme and the terms of the enabling statute/overarching statute.**
   Greater procedural protection is likely to be required if the decision is final.
   However, greater procedural protection may also be required if there is a right of appeal, to allow for meaningful participation in the second level of proceedings.
   Greater procedural protection is likely to be required if procedural safeguards are found elsewhere in the Act.
   Less procedural protection will likely be required if the decision is an exception to the general principles of the statutory scheme.
3) **Importance of the decision to the individual affected.**
   The greater the importance of the particular decision to the person it affects, the greater the procedural protection likely required.
4) **Legitimate expectations of the individual challenging the decision.**
   The content of the duty of fairness may be extended based on the conduct of public authorities in particular circumstances.
   Legitimate expectations of procedural protection may arise out of the conduct of public officials such as representations, promises, or undertakings, or out of the past practice or current policy of a decision-maker.
5) **Measure of deference to the administrative body's choice of procedure.**
   The less deference afforded, the more procedural protection required.
   The more deference afforded, the less procedural protection required.
   Consider if the statute confers the ability upon the administrative body to choose its own procedures, if the body has a particular expertise in determining the appropriate procedures, and if the body has any relevant institutional constraints that may reflect necessary compromises to allow decisions to be made within a reasonable time frame and at a reasonable cost.

❖ Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. … The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the **more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options**. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the **boundaries imposed in the statute**, the **principles of the rule of law**, the **principles of administrative law**, the **fundamental values** of Canadian society, and the **principles of the Charter**.

CHAPTER 2: THE RULE OF LAW IN THE ADMINISTRATIVE STATE

THE THEORY OF THE RULE OF LAW

The rule of law is characterized by three interrelated features:

1. A jurisprudential principle of legality
2. Institutional practices of imposing effective legal restraints on the exercise of public power
3. A distinctive political morality

THE PURPOSE OF THE RULE OF LAW

Laws, not individuals, should rule in a well-ordered political community

The concept of the rule of law stands for the supremacy of law over unconstrained political power.

All public officials must be both authorized and bound by law when exercising their functions and powers, and will be held legally accountable just like any other person.

The rule of law represents a normative standard by which the use of public power can be evaluated and challenged.

The principle is animated by the need to prevent and constrain arbitrariness in terms of:

1. Process.
   Arbitrariness often conveys an attitude of indifference by the decision maker about the procedures chosen to reach an outcome.
   Indifference about the procedures makes it more likely that the result will be unjust or unfair.
   Generally, government decisions should be made using processes that put relevant considerations before decision makers.
2. Jurisdiction.

If an ADM uses statutory powers outside the scope of its enabling statute, the decision will be found arbitrary and will be invalidated because it is incorrect or unreasonable.

3. Substance.
   A decision may be found arbitrary in substance if it is biased, illogical, unreasonable, or capricious. In other words, it will offend standards of reasonableness, rationality, or morality.
   Such a decision may exhibit a lack of care, concern, or good judgment toward the individual affected, or show mere opinion, preference, stereotyping, or discrimination, rather than a justified response.
   ADMs act arbitrarily when they treat individuals with a lack of respect, ignore dignity interests, or deny their equal moral worth.
   Arbitrariness may also suggest that an ADM possesses unconstrained discretionary powers, such that she alone can decide how to use them. Therefore, arbitrariness can be associated with unilateral decision making.
   Usually, arbitrariness is expressed as an untrammelled exercise of will, or the uncontrolled power, of a decision maker. If a decision is made so unilaterally that it becomes oppressive, it will be considered an abuse of power.

Canada (AG) v PHS Community Services Society, 2011 SCC [Insite]
Example of substantive arbitrariness
Legislation:
Controlled Drugs and Substances Act
S 4(1): Except as authorized under the regulations, no person shall possess a substance included in Schedule …
S 5(1): No person shall traffic in a substance included in Schedule …
S 56: The Minister **may**, on such terms and conditions **as the Minister deems necessary**, exempt any person or class of persons or any controlled substance … from the application of all or of any of the provisions of this Act or the regulations **if, in the opinion of the Minister**, the exemption is **necessary** for a **medical or a scientific purpose** or is **otherwise in the public interest**.
Facts: The minister decided not to renew the exemption protecting the provincial facility from federal drug laws concerning possession and trafficking in the *Controlled Drugs and Substances Act* (CDSA). The lack of an exemption would mean that Insite would have to close.
S 56 of the CDSA gave the minister a broad discretionary power to grant exemptions if, in his opinion, it was "necessary for a medical or scientific purpose or is otherwise in the public interest." The claimants argued this provision limited their s 7 rights, because the effect of the decision was to deny injection drug users access to potentially lifesaving medical care.
SCC: The Court held that although the CDSA engaged liberty and security interests, the possibility of an exemption acted as a safety mechanism. Nevertheless, the minister's actual exercise of discretion, in not granting the exemption, violated s 7. The decision was not in accordance with the POFJ because it was "arbitrary, disproportionate in its effects, and overbroad."
The Court considered all of the evidence before the minister, and found that his decision was inconsistent with the statutory objectives of public health and public safety of the CDSA. **The discretionary decision was arbitrary because it did not further the statutory objectives and lacked a real connection to the statutory purposes on the facts**: during its eight years of operation, Insite saved lives without undermining public health and public safety. In addition, denying Insite's essential services was disproportionate to the benefit of a uniform drug policy.
The CDSA granted the minister discretion in determining whether to grant exemptions, but that discretion had to be exercised in accordance with the Charter. This required the minister to consider whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the POFJ. The factors that the minister was required to consider included evidence, if any, on the impact on crime rates, the local conditions indicating a need for a supervised injection site, the regulatory structure in place to support its operation, resources available to support its maintenance, and expressions of community support or opposition.
The Court used the remedy of mandamus to order the minister to grant the exemption to Insite.

ATTRIBUTES OF THE RULE OF LAW

The rule of law is a foundational metaprinciple that organizes an open set of related principles, such as legality, separation of powers, responsible government, judicial independence, access to justice, POFJ, and the honour of the Crown.

The rule of law's core meaning is the principle of legality: law should always authorize the use of public power and constrain the risk of its arbitrary exercise.

The principle of legality restrains arbitrary power in three ways:
1. It constrains the actions of public officials
2. it regulates the activity of lawmaking
3. It seeks to minimize harms created by law itself

Three key legal theorists:
1. Dicey
2. Fuller
3. Raz

Dicey: CL model that offers institutional control of executive discretion through the judiciary

The rule of law possesses three features:
1. Absence of arbitrary authority in government

2. Formal legal equality so that every person (including public officials) is subject to the law
3. Constitutional law that forms a binding part of the ordinary law of the land

Judge made law combined with an unwritten constitution represents a better mode of legal constraint than written codes and constitutions because it is less vulnerable to executive attempts to suspend or remove rights.

Parliament is sovereign and supreme. Parliament is the source of all ordinary law and should be the source of all governmental power. If the use of public power was not authorized by Parliament, or if a decision maker acted outside of its scope, then this should be considered ultra vires by the courts.

Justification for judicial intervention:

1. Role of the courts as the principal external check on executive power
2. The task allocated to the courts to constrain administrative discretion by ensuring that administrative bodies do not overstep their legislatively conferred jurisdiction
3. Role of the courts to protect the private autonomy of affected individuals

One key consequence of the Diceyan model was that administrative bodies were viewed with distrust as almost inherently lawless forms of governance. They should be shown no deference by the courts on review.

In contrast to Dicey's CL model of judicial control of executive discretion, other theories recommend a legal system that aims for a set of formal and public characteristics that can guide the conduct of all legal subjects, including public officials.

A common set of principles has evolved over time and includes those articulated by Fuller and Raz: publicity, non-retroactivity, clarity, generality, consistency, stability, capability of being obeyed, and declared rules constraining executive discretion.

The virtue of these formal requirements rests on the belief that they permit individuals to predict legal responses to their behaviour by state officials, thereby avoiding sanctions and benefitting from a minimum ambit of freedom.

Fuller: procedural approach to understanding the principle of legality (the laws of lawfulness)

The rule of law is the enterprise of subjecting human conduct to the governance of rules in order to create and sustain a framework for successful social interaction.

Compliance occurs because citizens derive benefits from following the law. As such, lawmakers have an interest in optimizing the legal conditions for voluntary compliance and cooperation.

The relationship between the state and its citizens is of a reciprocal nature, as it respects people's autonomy. The enterprise of law is not simply a one-way projection of authority onto legal subjects.

Fuller's principles of legality aim to guide lawmakers in achieving this end.

Unlike Dicey, Fuller's conception of legality does not assume that administrative bodies are inherently lawless. Rather, if they follow the principles of legality, they may be more likely to engage in lawful activity an the courts may be obliged to show deference.

Raz: law must be capable of guiding the behaviour of its subjects

The rule of law, as the principle of legality, acts as a practical guide for effective lawmaking, thereby constraining the harms created by the law itself.

Raz's set of principles explicitly includes judicial independence to preserve the rule of law, access to justice, and the necessity for effective remedies so that legal subjects can vindicate their rights.

Because law in part creates the danger of the exercise of arbitrary public power, the rule of law acts to minimize this risk, thereby minimizing harms that the legal system might itself create. Ex: Overbreadth or vagueness are statutory deficiencies that make it more likely that the law will cause harm by inadequately constraining the use of power, not providing guidance for individual behaviour, or widening the potential to infringe a specific right.

The rule of law has an instrumental role as a means to realizing other important ends such as democracy, equality, and human rights: democratic legislation is critical to responding to the diversity of a pluralistic society.

A central requirement of the rule of law is the relative autonomy of law from politics, such as through the doctrine of the separation of powers and the principle of judicial independence as fundamental constitutional requirements.

Implementing the rule of law in modern government requires an elaborate institutional complex staffed by competent and relatively impartial officials, using predictable and fair procedures, in order to make reasoned and public decisions, that are subject to review by an independent judiciary.

RULING THE JUDGES

Dicey

The Diceyan model sees the judiciary as the guardians of CL checks on the arbitrary power of the executive, for the purpose of protecting individual rights. Courts do not need to show deference to the decisions made by administrative bodies that affect individual interests. This theory asserts the primacy of the correctness standard of review to scrutinize administrative decisions on their merits.

However, recall the concern about courts arguing that intervention was justified, based on the result of their statutory interpretation that the matter was one of jurisdiction, and therefore attracting judicial review. The approaches articulated by Fuller and Raz were aware of this concern. Their set of principles is intended to control judicial power and judicial exercises of discretion to prevent arbitrariness in the courts.

Fuller

Judges play a prominent role, ensured by the procedural practices available by virtue of the rule of law: rights to representation, cross-examine witnesses, etc.

Lawmaking is a shared and cooperative institutional enterprise among state actors and institutions. Law has the democratic potential to ensure accountability in government by facilitating participation of affected individuals in the decision making process.

Raz

Raz's theory supports institutional design such as revised procedures. The common set of principles is intended to inform the creation of effective statutory purposes, standards, and rules with the overall aim of providing guidance to decision makers and affected parties. His theory attempts to reconcile the rule of law with democracy.

The approach places a great deal of emphasis on the role of legislation in modern societies, but does not deny the role of the courts in making and developing public law.

Each institution mutually supports the other: legal institutions will be loyal to democratic legislation through interpreting intent while rejecting inconsistent purposes. Democratic institutions will in turn respect civil rights, legal coherence, and long term interests reflected in existing legal culture.

Dworkin

Dworkin's legal subject is an individual bearer of rights entitled to demand the resolution of disputes over the content of these rights through the legal system, specifically through the courts.

His theory grounds the "rights conception of the rule of law".

The rule of law necessarily entails the judicial determination of rights through principled interpretation in hard cases where a legal answer must be crafted by judges from existing legal sources such as statutes, regulations, and case law.

A principled interpretation must fit the existing positive law but it also must be compatible with principles from a larger political morality. For example, government respect for individual freedom and equality would be principled requirements of this larger political morality.

A key consequence of Dworkin's theory is that judges, not legislators are ultimately charged with guarding the moral integrity of the political order. As the chief political actors in the form of principle, they possess the knowledge and the skills honed through their unique access to the interpretation of the law, to be the better articulators of a constitutionalized public morality.

THE SCC ON THE RULE OF LAW

Legal and political theories often constitute the unstated background assumptions informing judicial understandings of the rule of law, and may appear either implicitly or explicitly in specific cases.

The SCC has expressed various features of the rule of law, but the Court has never set out a fully articulated conception.

BC v Imperial Tobacco, 2005 SCC

SCC on the principle of the rule of law

1. Law is supreme over private individuals AND government officials. There is one law for all.
   Government officials must exercise their power non-arbitrarily and according to law.
   Legislation enables and constrains the powers of government officials.
2. The rule of law requires the creation and maintenance of a positive order of laws. Legislation must exist.
3. The rule of law requires the relationship between the state and the individual to be regulated by law. The actions of officials must be grounded in law.

THE HEART OF THE CANADIAN RULE OF LAW

Roncarelli v Duplessis, 1949 SCC

Formal and substantive approaches to the rule of law; examples of the exercise of arbitrary power; illustrates one of the primary functions of the rule of law: control of executive arbitrariness

Legislation:

An Act Respecting Alcoholic Liquor

S 5: The exercise of the functions, duties, and powers of the QLC shall be vested in one person alone, named by the LGIC, with the title of Manager.

S 9(e): The Commission is authorized to "grant, refuse, or cancel permits…"

s 34: The Commission "may refuse to grant any permit"

S 35: The Commission may cancel any permit at its discretion"

Facts: Roncarelli owned a restaurant and was a JW. At the time, JWs were being persecuted by the QB government and the Catholic Church. Hundreds had been jailed for distributing pamphlets in violation of municipal bylaws. Roncarelli was posting bail for them, and continued to do so after Duplessis (who was both Premier and AG) publicly warned him to stop. Duplessis ordered the chairperson of the QLC, Archambault, to cancel his liquor licence, forcing him to shut down his restaurant.

Issue: Were the actions of Duplessis invalid?

Holding: Yes.

SCC: According to the unwritten principle of the rule of law, no public official is above the law. Duplessis was acting outside the scope of his authorized power as AG by ordering the revocation, and inappropriately exercised the power conferred upon the chairperson of the QLC by its enabling statute. Further, regardless of who actually made the decision, it offended the rule of law because the substance of the decision was incompatible with the purposes of the statute: status as a JW was irrelevant to the decision concerning the continuation of a restaurant liquor licence. The true nature of the decision was to punish Roncarelli for exercising his civil right to post bail.

- ❖ No public official is above the law.
- ❖ Public officials must act within the scope of their legislatively conferred authority.
- ❖ If the substance of a decision is incompatible with the purposes of the statute, it will offend the rule of law. In other words, a decision must be made pursuant to consideration of relevant factors, rather than used as a means to an improper end.

Note: There are two ways to understand the use of the principle of the rule of law in this judgment.

1. The **formal** Diceyan model.
   Administrative law concerns the written statutes, rules, and principles governing decision makers. Public decision makers must not act outside their authority and must not abuse their authority. Judicial scrutiny focuses on the limits of legislatively conferred authority.
2. The more value laden **substantive** constitutionalism, or what Dyzenhaus calls the "unwritten constitution of legality."
   Statutorily conferred authority is bound by the purpose and the terms of the statute, by regulations and guidelines, by the Constitution, and by written and unwritten principles of law. Formally valid exercises of discretion can offend the rule of law and can subsequently be found a legal wrong as an abuse of power.

On the formal Diceyan model, Archambault, who was the proper authority, had not made a decision at all. Rather, Duplessis substituted his decision, therefore exercising his power arbitrarily. Under the terms of the enabling statute, Duplessis, as AG, could only provide advice on the matter. On this view, the rule of law was offended through the violation of the principle of validity, which requires "every official act to be justified by law" or be found ultra vires: the decision was not valid because Duplessis did not have the power to cancel licences.

The problem with this view is that if the decision had been Archambault's, it would have been found valid. The enabling statute granted him seemingly unfettered discretion.

In contrast, Rand's concurring opinion was grounded in the theory of substantive constitutionalism. Public authorities, especially those with broad discretionary powers, are always constrained by the unwritten constitutional principle of the rule of law, even when the legislation contains no explicit or written constraints: "there is no such thing as absolute and untrammeled discretion." Therefore, even if Archambault had made the decision, he would have used his discretionary powers inappropriately because the decision would have contradicted the substantive content of the rule of law.

Cartwright, in dissent, was basically off his rocker, concluding that the legislature intended the QLC to be a law unto itself.

Note: Examples of arbitrary power include the existence of unlimited discretionary powers in an agency; a decision maker acting in bad faith; inappropriate responsiveness to an individual situation where important interests were at stake; consideration of irrelevant factors; disregard for the purposes of the statute; and substitution of the decision by an unauthorized person.

DEFERENCE AS RESPECT: THE CANADIAN MODEL OF ADMINISTRATIVE LAW

AN EXAMPLE OF DEFERENCE AS RESPECT

National Corn Growers v Canada (Import Tribunal), 1990 SCC
Contrasting approaches to the intensity of review: Gonthier (like Raz) and Wilson (like Fuller)
Legislation:
Special Import Measures Act
S 42: The Tribunal… shall make inquiry with respect to such of the following matters as is appropriate in the circumstances, namely… has caused, is causing, or is likely to cause material injury…
S 76(1): …every order or finding of the Tribunal is final and conclusive.
Canadian Import Tribunal Rules
S 36: …in considering any issue of material injury… the Tribunal … will wish to be informed about and will examine… the actual and potential volume of the dumped or subsidized goods imported into Canada
Federal Court Act
S 28(1): …the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order… made by a board, commission, or other tribunal, upon the ground that that the board, commission, or tribunal … based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.
General Agreement on Tariffs and Trade
S 6(a): No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product…. unless it determines that the effect of the dumping or subsidization… is such as to cause or threaten material injury to an established domestic industry…
Facts: The Canadian Import Tribunal (CIT) conducted an inquiry authorized under s 42 of the SIMA, and determined that continued importation of grain had caused or would likely cause injury to Canadian producers of corn grain. This decision reaffirmed the deputy minister's prior preliminary conclusions that material injury existed, and therefore provided support of his decision to impose a duty on American corn to protect Canadian corn growers.
However, the FCA allowed for JR on certain conditions, namely, if the tribunal had based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it. Because the tribunal's decision was based on a factual finding of harm, informed by its expertise, and the SIMA had a PC, this meant that the decision would be assessed on the standard of PU so that courts could best respect legislative intent. Issues on review:

1. Was it patently unreasonable for the tribunal to refer to the GATT in interpreting the SIMA?
2. Was the tribunal's interpretation of s 42 unreasonable?
3. Did the tribunal reach its decision without sufficient evidence to support its determination of material injury?

Held: The tribunal's decision was not patently unreasonable.
SCC: Gonthier, for the majority, and Wilson, concurring
Gonthier: The reasonableness of a tribunal's interpretation of its enabling statute cannot be assessed without considering the reasons underlying it.

- Courts should review both how the decision was reached as well as the decision's merits.
- Note: The modern standard of reasonableness closely mirrors Gonthier's approach.

Gonthier's opinion is consistent with Raz's theory. The courts have an active role in interpreting the law and in demanding public and principled justifications from the tribunal.
Wilson: Engaging in a probing examination of a decision sanctions judicial intervention, rather than the judicial restraint represented by CUPE. According to CUPE, courts should recognize that administrative bodies, not courts, bear primary responsibility for their statutory mandate in the area of regulation; administrative bodies possess expertise, experience, and contextual knowledge about which the courts know very little, and; statutory provisions do not necessarily result in one correct interpretation, but can sustain a variety of reasonable interpretations.
Where interpretive disagreement exists, the specialized tribunal has expert interpretation as part of its jurisdiction conferred by the enabling statute.
With the PU standard, review should be confined to the question of interpretation, and is not a detailed analysis.
Courts should review only if the tribunal's interpretation of its enabling statute appears patently unreasonable.
Wilson's opinion is consistent with Fuller's perspective. Where a reasonable range of policy choices exist, or when multiple reasonable interpretations of a statute are possible, or when a decision involves balancing competing interests, then these functions are best left with the expert tribunal.
Note: The basis for deference as respect, found in CUPE, is that the presence of a PC illustrates legislative intent that courts recognize the interpretive authority of the tribunal within its area of expertise, but that judges can exercise their rule of law powers of oversight on constitutional and jurisdictional matters.

THE ADEQUACY OF REASONS

Reasons and deference are strongly related.

Dunsmuir: Judicial deference to a decision is appropriate where the decision demonstrates justification, transparency, and intelligibility within the decision making process, and where the outcome falls within a range of possible, acceptable outcomes, defensible with respect to the facts and the law.

Reasons are generally understood to serve three functions:

1. They disclose expertise in the area of the home statute "using concepts and language often unique to their areas and rendering decisions that are often counterintuitive to a generalist" (NF Nurses)
2. They justify the decision using transparent, intelligible, and reasonable reasoning that all audiences can understand
3. They illustrate that the outcome is also reasonable when, as is often the case, more than one reasonable result Is possible

Reasons support the principle of deference because the reviewing court should defer to the ADM that provides legally valid reasons that support a reasonable outcome.

Newfoundland and Labrador Nurses v Newfoundland and Labrador (Treasury Board), 2011 SCC

The absence of reasons is a matter of procedural fairness; the adequacy of reasons is a matter for substantive review

Abella: Alleged deficiencies or flaws in the reasons do not constitute a breach of the duty of PF; their adequacy is not subject to correctness review.

- A breach of the duty of PF is an error in law. If reasons are required, and reasons are not provided, there has been such a breach. BUT, if reasons are provided, there is no such breach, and any challenge to the reasoning or the result of the decision should be made within the reasonableness analysis.
- **Even if the reasons do not seem adequate to support the decision, the court must first seek to "supplement them before it seeks to subvert them", and therefore improve on the reasons given.**
- Inadequate reasons are not analyzed under PF, but rather, reasonableness review.
- Framework for determining the adequacy of reasons: If an ADM must give reasons, the reasons should justify the decision, by showing that the ADM has considered relevant facts and law, applied legal principles and tests correctly, and is able to explain the decision in a way that the affected individual and the reviewing court can understand. Reasons must be transparent and show the basis for the reasonable outcome.
- However, reasons do not constitute a standalone basis for review. They do not have to be perfect, comprehensive, lengthy, or well written. Speed, economy, and informality may take priority given the day-to-day realities faced by ADMs.

Note: Bare reasons, without supporting information, or unsupported by principles, will be found unsatisfactory. Inconsistencies, irrelevant considerations, or the omission of relevant considerations, will be considered serious flaws. The ADM cannot simply write minimal reasons in order of for the decision to become immunized from review.

AB (Information and Privacy Commission) v AB Teachers' Association, 2011 SCC

Where there is no duty to give reasons or when only limited reasons are required, it is appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review

SCC (majority, per McLachlin): In this case, the reasonableness standard applies. The Commissioner was interpreting his own statute and the question was within his specialized expertise. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, unless the question falls into a category of question to which the correctness standard continues to apply.

The question does not fall into such a category: it is not a constitutional question, a question regarding the jurisdictional lines between competing specialized tribunals, a question of central importance to the legal system as a whole, nor a true question of jurisdiction or *vires*.

The category of true questions of jurisdiction is narrow and it may be that the time has come to reconsider whether this category exists and is necessary to identify the appropriate standard of review. The "true questions of jurisdiction" category has caused confusion to counsel and judges alike and without a clear definition or content to the category, courts will continue to be in doubt on this question.

- The category of true questions of jurisdiction is narrow and exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness.
- As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.
- The concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision: Dunsmuir.
- However, the direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a carte blanche to reformulate a tribunal's decision in a manner that ignores an unreasonable chain of analysis in favour of the court's own rationale. Moreover, this direction does not dilute the importance of giving proper reasons for an administrative decision.
- Deference under the reasonableness standard is best given effect when ADMs provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. Nonetheless, this is subject to a duty to provide reasons in the first place.
- **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.**
- In some cases, the reviewing court may not be able to adequately show deference without first providing the decision maker the opportunity to give its own reasons for the decision. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one.
- Reasons given by a tribunal in other decisions on the same issue can assist a reviewing court in determining whether a reasonable basis for an implied decision exists.

CHAPTER 3: REMEDIES IN ADMINISTRATIVE LAW

INTRODUCTION

What tools do the courts have to intervene when administrative agencies make decisions to ensure that they observe the rule of law and basic principles of justice? A preference for the authority of the courts often ignored the fact that tribunals themselves often have the power to provide a varied and creative set of remedies for claimants. An important theme here is the "dialogue" that courts and the legislatures engage in to steer the course and content of administrative law. ADMs are created by the legislature, but are arms of the executive. Legislatures prescribe limits both to administrative powers as well as court intervention (or at least they try) through e.g. privative clauses. Generally, JR is only available once all internal avenues for appeal have been exhausted. Until that time, however, the executive is in control of administering the statutory scheme in addressing common public issues.

REMEDIAL OPTIONS AT THE TRIBUNAL STAGE

Two key points from the outset:

1. Tribunals don't have "general jurisdiction" and cannot grant remedies unless the statute lets them
2. Tribunals' approach to remedies reflects the fact that they have a different mandate from courts, e.g.
    a. They have limited and deeper expertise in their area
    b. They can identify and address systematic problems as a matter of policy
    c. They are not constrained by court rules; for example, they can retain control over a dispute for a long period of time

STATUTORY AUTHORITY

A tribunal cannot make orders without authority from their enabling statute; if it does, the order will be void: **Inuit Tapirisat**. Many statutes set out express lists of orders that can be made, like the power to issue licences, impose fines, or as with the *Securities Act*, incarcerate people or have the Crown prosecute offenders. Other statutes give broad powers to order parties to do whatever the tribunal feels is appropriate to achieve compliance (*Ontario Human Rights Tribunal*. Fines, compensation, and costs will generally require express statutory authority. Tribunals do not have the equitable jurisdiction to, say, issue injunctions, although they can seek them to enforce a statute.

The issue of whether an agency can give Charter remedies is a separate matter. At common law, a tribunal can grant Charter remedies where it is empowered to determine questions of law and there is no apparent intention from the legislature to exclude this power: **Conway**. However, the BC ATA provides that most of the provincial tribunals do not have this jurisdiction.

NOVEL ADMINISTRATIVE REMEDIES

People generally engage ADMs in resolving disputes, enforcement or disciplinary proceedings, and a variety of other forms of hearings and applications. While remedies are meant to enforce rights and redress wrongs, keep in mind that agencies do have an inherent policy-making function, and are decidedly not courts. Legislatures regularly delegate detailed policy-making functions to administrative bodies. Their "legal" instruments can range from binding releases or regulations to non-binding administrative guidance, but they nonetheless have an impact on regulated entities. Thus, in their capacity of dispute regulation, administrative decision makers naturally take a broader view than a court would. In public law litigation, the suit is not self-contained, but focuses on the broad discussion of statutory and constitutional policy and relief from the courts is made on a case-by-case basis, but is ongoing and prospective in nature. The SCC acknowledged in **Pushpanathan** that ADMs often engage in polycentric disputes that involve the simultaneous consideration of numerous interests and the balancing of costs and benefits for many parties; as well, their view is less rights-focused and more forward-looking with a view to addressing systematic issues.

Tribunals are also more diverse (i.e. have lay members), have particular expertise and they are more likely to confer economic rather than legal remedies. Sometimes this is to reflect certain interest groups or stakeholders; the BC *Mental Health Act* required board membership from a person who is neither a doctor nor a lawyer. New public management theory and "new governance" points to a future or outsourced public policy implementations and public-private partnerships to save the bureaucratic state from its own flaws. The effect of this movement on the administrative state is to craft innovative remedies to address systematic problems such as involving third parties to rectify serious institutional problems.

Ontario v McKinnon, 2004 ONCA

McKinnon was a correction officer of aboriginal ancestry who was subjected to serious workplace discrimination at the Toronto East Detention Centre. In 1998, the OHRT made a number of order to combat the "poisoned atmosphere" at the prison: publication of the order, relocation of certain respondents, training programs, etc. The problems continued and the Ontario Court of Appeal affirmed that he OHRT could remain seized of the matter. The OHRT ordered the use of third-party consultants, more training, and external mediators, all at the Ministry's expenses.

- The remedies granted by the Tribunal were prospective, open-ended, and subject to ongoing revision and elaboration.

Years later, the situation still had not improved. In 2007, the OHRT found the orders were not being implemented in good faith and by 2011, it found a prima facie case that the Minister was in contempt of the Tribunal. It took 23 years for McKinnon to see real change. This case raises questions as to the ability of agency's to remain in control of issues and how it can fashion remedies in the face of true recalcitrance, in this case, on the part of a provincial ministry.

ENFORCING TRIBUNAL ORDERS AGAINST PARTIES

Tribunals may be required to get courts to enforce its orders if it is unable to impose tough sanctions for contempt under its statutory grant.

THE TRIBUNAL SEEKS TO ENFORCE ITS ORDER

It is common that tribunals cannot enforce its own orders; few, like the federal Competition Tribunal, can make an order for civil contempt, but this is only because its enabling statute specifically allows it. The BC ATA allows certain tribunals to dismiss applications if the claimant fails to comply with an order (s. 18) and certain others are entitled to make orders for costs (s. 47). More commonly, the tribunal must apply to have a court enforce its order and the court will presume the order to be valid if the subject failed to appeal or appealed and lost. Other bodies require leave of the court to have the order enforced. Conversion to a court order allows the usual methods for enforcement, e.g. contempt proceedings, or requiring payment into court pending the outcome of an appeal. The choice of a legislature is notable if, for example, it prefers to have judicial resources consumed in the enforcement of administrative orders rather than their review.

A PARTY SEEKS TO ENFORCE A TRIBUNAL'S ORDER

A party to an administrative dispute can also try to get a court to enforce the order, but success in this regard will ride largely on the court's discretion as to (1) whether it should enforce this type of order and (2) whether it should intervene despite the (possible) lack of statutory direction.

CRIMINAL PROSECUTION

Section 127(1) of the Criminal Code creates an offence for disobeying the lawful order of a provincial or federal tribunal; however, this is only applicable where no other punishment is provided in the tribunal's enabling statute.

CHALLENGING ADMINISTRATIVE ACTION

A claimant may challenge a decision on the basis of (1) jurisdiction, (2) procedure, (3) bias, (4) abuse of discretion, and/or (5) substance. JR is only one method of challenging a decision and may not get the claimant what she wants. For example, getting a court to quash a decision will usually send it back to the original decision maker and there is no guarantee of a different outcome.

INTERNAL TRIBUNAL MECHANISMS

Many statutes provide for preliminary rulings and that final decisions be written. Tribunals have the power to change their minds right up until a final decision is made; however, without express statutory authority, policy reasons favour finality of decisions and the tribunal will generally be *functus officio* (unable to review its decision). Some administrative regimes involves multiple tiers that allow for internal appeals: IRPA has an Immigration Appeal Division and provincial Securities Commissions will review the decisions of its staff. While there do not preclude JR, they must generally be exhausted first.

EXTERNAL NON-COURT MECHANISMS

Several non-court actors are authorized to investigate complaints, including complaints as to administrative matters. This includes human rights commissioners, provincial auditors and auditors general, and information and privacy commissioners. Ombudspersons are authorized by statute to investigate complaints in a wide range of areas, although they too are not authorized to investigate a tribunal's decisions until internal mechanisms have been exhausted.

USING THE COURTS: STATUTORY APPEALS

The two main ways to access the courts after exhaustive administrative measures are appeal and judicial review. Appeal mechanisms are the norm and are allowed by many statutes, but the statute may confine the scope of what can be appealed. Judicial review, on the other hand, is discretionary and requires leave of the court. JR pits the legal values of justice and the rule of law against both the democratic value of legislative intent as well as the bureaucratic values of efficiency and expertise.

IS AN APPEAL AVAILABLE?

1. Does the tribunal's enabling statute provide for a right of appeal?
    - Courts have no inherent appellate jurisdiction over administrative bodies; it must be provided for in the enabling statute
    - Courts cannot review interlocutory or intermediate rulings, only final ones that decide the merits of the issue
    - The statutory right of appeal will set out which court can hear the appeal
2. What is the scope of available appeal?
    - Unlike a judicial appeal, the scope of review will be dictated by the statute and can range from *de novo* review to narrow and generally applicable questions of law
    - It will generally be broad if the issues typically affect an individual's common law rights
    - Unlike with JR, courts on appeal will generally not defer to the tribunal's findings simply because the tribunal was designated as the DM of first instance
3. Is an appeal available as of right or is leave required?
    - The statute will specify whether leave is required and from whom, as well as what additional steps are requiring before leave will be granted

4. Is a stay of proceedings automatic or must one apply for it?
    - Typically, the reviewing court has the inherent authority to grant a stay pending the outcome of the appeal
    - However, the BC ATA specifies that an appeal does not operate as a stay unless the tribunal orders otherwise
    - The legislative choice to hold a tribunal's powers in abeyance pending review is a balance of efficiency and due process concerns and

USING THE COURTS: JUDICIAL REVIEW

The nature of JR is different from that of appeals because it is a manifestation of the courts' inherent jurisdiction to oversee and check administrative and executive action in the interests of the rule of law; this make JR a potentially sweeping remedy and the scope of review is not constrained.

DISCRETIONARY BASES FOR REFUSING A REMEDY

JR is fundamentally discretionary and courts must be mindful of the inherent tension between the rule of law and the foundational democratic principle when Parliament and the legislature create administrative bodies and confer broad powers on them: **Dunsmuir**. While the guard are the arbiters of the rule of law, they must remain within their sphere of authority.

The courts were long reluctant to interfere on matters of discretion unless abuse was alleged, but in **Baker**, they rejected the conceptual distinction between discretion and law. Reviewing courts can review discretion too under a flexible and contextual standard of review analysis and not just the traditional heads of abuse of discretion. In **Baker** and after, the SCC reaffirmed its rule as a guardian of the rule of law.

Five traditional common law grounds for refusing relief:
1. Adequate alternative remedies are available
2. The claim is premature
3. The claimant has unduly delayed or acquiesced in the outcome
4. The issues are moot
5. The claimant has not come with clean hands

Besides these, an overarching attitude of curial deference permeates the jurisprudence.

In **Domtar** and elsewhere, the Supreme Court of Canada has affirmed that courts do not have a monopoly on the rule of law and that neither the need for certainty in the law nor consistency in decision-making can justify broad intervention on rule of law grounds. However, in **Dunsmuir** and **Khosa**, the SCC seems to refer back to a hard-line approach to its rule-of-law jurisdiction. In **Khosa**, it held that deference to tribunals may be significant during review, but that it is not a free-standing basis on which to refuse leave; it was clear that courts, not legislatures, have the final say about JR. Courts also now consider "the balance of convenience" to the various parties. The result is that courts are returning to the old common law grounds for refusing JR, but is it ultimately still discretionary.

IS JUDICIAL REVIEW AVAILABLE?

Judicial review is available to check executive action, and a key threshold question is whether the agency being challenged is in fact a public body, i.e. subject to public law and "part of the machinery of government": **McDonald**. It will be reviewable in its actions under a statute, but probably not so if it is acting as a private party, say, in deciding to whom to grant a contract; this will almost certainly not be reviewable. A number of considerations may be involved like the sources of power and funding, the agency's functions, and whether the government controls the body directly or indirectly. This is straightforward for parties clearly subject to an administrative action, and standing may be available to a party having a collateral interest in the matter: **Globalive**. The choice of court will be dictated by the source of the executive authority as provincial or federal. Some statutes also contain deadlines for JR applications, e.g. 60 days under the BC ATA, but the courts may grant relief anyway where merited.

Finally, other means of review and relief must have been exhausted: **Harelkin**. This last requirement is not strict where, for example, the tribunal does not have the authority, the necessary findings, the power to grant the desired remedy, or where it is unwilling to cooperate. Mere claims of error, bias, lack of jurisdiction, or inadequate procedure will not suffice. The Federal Courts Act prohibits JR where an alternative appeal is available. While a court can still grant JR notwithstanding a right of appeal, this is rare.

REMEDIES ON JUDICIAL REVIEW

The remedies available have their roots in the ancient prerogative writs; while they are now unwieldy in general, the substance of what a court will grant is largely the same. Keep in mind that JR will not automatically stay the effect of a tribunal's decision.

INTRODUCTION TO THE PREROGATIVE WRITS

- Certiorari is the most common and requires a tribunal to produce a record for review of excess of jurisdiction. A successful application will quash or invalidate the decision, but the court does not generally have the jurisdiction to substitute its own decision, except in very exceptional circumstances.

- Prohibition is like a common law injunction and will prevent a lower court from exceeding its jurisdiction by preventing it from a given exercise of power. It is typically obtained for pre-emptive relief.
- Mandamus will compel a lower court or agency to perform a prescribed duty and is often combined with an order of certiorari. After a quashing, it can force a body to reconsider a decision with guidance it provides. Mandamus generally cannot compel an outcome, but discretion must always be exercised in conformity with the Charter.
- Declarations determine and state the legal positions of the parties; in public law, it will declare an action *ultra vires*, and in private law, it will declare a party's rights under a statute. This is less common now since mandamus is more available, but may be all that is available if the court cannot order, say, the exercise of prerogative power: **Khadr**
- Habeas corpus requires an appearance of a detainee before a court to answer to a charge and to ensure the detainment is not unlawful
- Quo warranto inquires into the authority of a public officer claiming a given power; this is very rare.

STATUTORY REFORM

Reforms have sought to abolish the arcane writ rules and to simplify the JR process through (1) simplified JR application, (2) simplified remedies, (3) greater clarity as to who can be a party to a hearing, (4) rights of appeal, (5) mechanisms to solve interlocutory and interim matters. For example, the BC ATA allows a stay in order to refer a constitutional question to a court of competent jurisdiction.

CONCLUSION

Ultimately, judicial review, which appears to be the focus of judicial review, is actually itself remedial and it is this remedy that substantially shapes administrative action. Tribunals develop remedies that are novel by court standards because of their different constitution and natural heterogeneity. JR as a remedy in itself engages all of the administrative law tensions and contests between both values and spheres of authority, but the courts primary means and justification for asserting itself is the rule of law.

Note: If a party has a fundamentally private law action arising from an administrative decisions and wants money damages, it must be pleaded as a private law action; money damages will not be a public law remedy: **TeleZone**.

CHAPTER 5: THE DUTY OF FAIRNESS: THRESHOLDS, CONTENT, AND THE ROLE OF JUDICIAL REVIEW

INTRODUCTION

The development of a duty of fairness is one of the great achievements of modern administrative law.

It promotes a better-informed decision making process, leading to better public policy outcomes and helps to ensure that individuals are treated with respect in the administrative process.

The duty is context-specific: its content is articulated having regard to the circumstances of the decision and the decision-making context to which it applies.

FROM NATURAL JUSTICE TO FAIRNESS: THE COMMON LAW DEVELOPMENT OF THE DUTY

The availability of procedural protection used to depend on the way that the decision was characterized.

Judicial and quasi-judicial decisions had to be made in accordance with the rules of natural justice:

1. *Audi alteram partem*: the decision maker must hear the other side before deciding (= the right of the affected individual to be heard)
2. *Nemo judex in sua causa*: the decision maker must not be a judge in his own cause (= the right of the affected individual to an unbiased (impartial) and independent hearing)

Administrative decisions, which were essentially all decisions that could not be categorized as judicial or quasi-judicial, had no such requirements. To obtain procedural protection, an applicant would have to convince the court that the decision was judicial or quasi-judicial.
The growth of the modern regulatory state made change inevitable. The increasing number of administrative decisions made it indefensible that important decisions could be made without any procedural protection simply due to their classification.

The SCC abandoned the all or nothing approach in Nicholson, which marked the beginning of the modern era of PF.

Nicholson v Haldimand-Norfolk (Regional) Police Commissioners, 1979 SCC
A general duty of procedural fairness applies to administrative decisions
Legislation:
Police Act Regulations
S 27: No… constable is subject to any penalty… except after a hearing and final disposition of a charge on appeal… but nothing affects the authority of a board or council … to dispense with the services of any constable within 18 months of his becoming a constable…

Facts: A probationary police office was summarily dismissed 15 months into service. He was not given a reason for his dismissal, nor was he given notice or allowed to make any representations prior to his dismissal. The regulations provided that officers could not be penalized without a hearing and a right of appeal, but that the Board had authority to dismiss officers within 18 months of becoming an officer.
Issue: Was the officer entitled to procedural fairness, as the matter was administrative, rather than judicial or quasi-judicial?
Holding: Yes.
SCC (Laskin, for the majority): The classification of statutory functions as judicial, quasi-judicial, or administrative is often difficult. To endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those affected, regardless of classification. The ability of the board to dismiss the officer for any reason (or no reason) was irrelevant. Although the officer could not claim the procedural protection afforded to those with 18 months of service, it does not follow that he must be denied any protection at all, and was entitled to be treated fairly, not arbitrarily. The officer was entitled to be told the reason for his dismissal and

- A general duty of procedural fairness applies to administrative decisions.
- As a principle of CL, the judicial and quasi-judicial sphere is subject to the rules of natural justice, while the administrative or executive sphere is subject to a general duty of fairness.
- Note: As a result of subsequent cases, there is no longer any reason to differentiate between the two spheres. The duty of fairness applies across the spectrum of decisions made by public authorities, although the requirements of the duty vary with the circumstances.

The duty of fairness = the duty of procedural fairness.

The duty of fairness is concerned with ensuring that public authorities act fairly in the course of making decisions, not with the fairness of the actual decisions themselves, and has nothing to say about the outcome of decisions, and does not require that the decisions of public authorities be considered fair.

The duty of fairness promotes sound public administration and the accountability of public decision makers by ensuring that decisions are made with input from those affected by them. Well-informed decisions are likely to be better decisions, and decisions made pursuant to transparent, participatory processes promote values of the rule of law. In this sense, fairness is a means to an end.

BUT, the importance of the duty transcends its instrumental purpose: it also ensures that people are allowed to participate meaningfully in decision making processes that affect them. The duty protects dignitary interests by requiring that people be treated with respect.

Both of these rationales support the Court's strict remedial approach when the duty is breached: procedurally unfair decisions are quashed and remitted to be made in accordance with the required procedural protection (Kent).

The duty of fairness provides individuals affected by an administrative decision with:

1. The right to be heard AND
2. The right to an impartial and independent hearing.

These rights are basically just a restatement of the protections afforded by the rules of natural justice.

- Fairness is a CL concept, and may be limited or ousted by legislation, subject only to Charter compliance. However, because of its importance, courts will require specific legislative direction before concluding that this has occurred.
- If the statute is silent, courts will presume that the legislature intended procedural protection to apply. The CL duty of fairness supplements existing statutory duties and fills the gap where none exist.
- The content of the duty is informed by the context in which a particular decision is made and varies in accordance with a number of factors. Therefore, the duty may be satisfied by different protection in different decision making contexts. Everything depends on what the duty is understood as requiring in the circumstances.
- S 7 of the Charter provides a constitutional basis for procedural protection, but this right applies in a narrower range of circumstances than the duty of fairness.

Kane v Board of Governors of UBC, 1980 SCC

- To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

Two questions arise when JR proceedings are brought, alleging a breach of the duty of fairness:

1. Has the **threshold** test been met? This will determine if a duty of fairness is owed.
2. If so, what is the **content** of the duty? This will determine what the duty of fairness requires in the circumstances.

Courts require decisions about the threshold and the content to be made correctly. If they are not, the substantive decision at issue will be remade in accordance with the appropriate procedures.

- An order quashing a decision for a breach of the duty of fairness does not, in theory, affect the substantive decision that may be made subsequently. It only means that the decision must be remade with the appropriate procedural protection in place.

- BUT, success on an application for JR on fairness grounds will give the applicant another chance to obtain a preferred substantive outcome, and ensure that the substantive decision will be made on a well-informed basis. Even if the same substantive decision is reached, it will have the same legitimacy.

THE THRESHOLD TEST: WHEN IS FAIRNESS REQUIRED?

RIGHTS, PRIVILEGES, AND INTERESTS

Cardinal v Director of Kent Institution, 1985 SCC

The threshold test: Is a duty of fairness owed?

Legislation*:*

Penitentiary Service Regulations

S 40(1) Where the institutional head is satisfied that

(a) for the maintenance of good order and discipline in the institution, or

(b) in the best interests of an inmate

it is necessary or desirable that the inmate should be kept from associating with other inmates, he may order the inmate to be dissociated accordingly, but the case of every inmate so dissociated shall be considered, not less than once each month, by the Classification Board for the purpose of recommending to the institutional head whether or not the inmate should return to association with other inmates.

(2) An inmate who has been dissociated is not considered under punishment unless he has been sentenced as such and he shall not be deprived of any of his privileges and amenities by reason thereof, except those privileges and amenities that

(a) can only be enjoyed in association with other inmates, or

(b) cannot reasonably be granted having regard to the limitations of the dissociation area and the necessity for the effective operation thereof**.**

Facts: Prisoners were allegedly involved in a hostage-taking incident at Matsqui. They were transferred to Kent, where they were placed in segregation on the Director's oral instructions, pursuant to s 40 of the Regulations, on the ground that it was necessary for the maintenance of good order and discipline in the institution. The Director did not make an independent inquiry into their alleged involvement, but relied on what he had heard from the warden at Matsqui.

The SRB reviewed the segregation monthly in accordance with s 40 of the Regulations and recommended their release into general population. The Director refused to follow the SRB's recommendation on the ground that their release would "probably" or "possibly" introduce an unsettling element into the prison population. The Director did not inform them of his reasons for refusing to follow the SRB's recommendation, nor did he give them an opportunity to be heard.

BCSC (McEachern): Their continued segregation, despite the SRB's recommendation, had become unlawful because of a breach of the duty of procedural fairness. They should be released into general population.

BCCA: The breach of the duty of procedural fairness, if any, was not of sufficient consequence to render their continued segregation unlawful. (Note: SCC says this is wrong. The denial of a right to a fair hearing will always render a decision invalid.)

Issue: Was the Director in breach of the duty of fairness, thereby rendering their continued segregation unlawful?

Held: Yes. By his failure to give them a fair hearing on the question of whether he should act in accordance with the SRB's recommendation, the Director rendered their continued segregation unlawful.

SCC: The Director was under a duty of procedural fairness in exercising the authority conferred by s 40 of the Regulations with respect to segregation. At CL, there is a duty of procedural fairness upon every public authority making an administrative decision that is not of a legislative nature and which affects the rights, privileges, or interests of an individual.

The duty of procedural fairness applies in principle to disciplinary proceedings within a penitentiary, and although administrative segregation is distinguished from punitive/disciplinary segregation in the Regulations, the effect is the same and gives rise to the duty to act fairly.

However, the extent to which procedural requirements are imposed in the prison setting must be approached with caution. The original imposition of administrative segregation was a lawful exercise of the Director's discretionary authority and was not carried out unfairly; the Director was not required to make an independent inquiry into the allegations. In light of the urgent or emergency nature of the decision, there was no requirement for prior notice or a hearing. BUT, with regard to the Director's decision to continue their segregation, despite the SRB's recommendation, procedural fairness required the Director to inform them of the reasons for his decision and to give them an opportunity, however informal, to state their case for release.

These minimal requirements of procedural fairness are fully compatible with the concern that the process of prison administration, because of its special nature and exigencies, should not be unduly burdened or obstructed by the imposition of unreasonable procedural requirements.

The denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice that any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

- At CL, there is a duty of procedural fairness upon every **public authority** making an **administrative decision** that is **not of a legislative nature** and **that affects the rights, privileges, or interests of an individual**.
- Note: There is little dispute about the meaning of the terms rights, privileges, or interests: they are not meant to limit the availability of fairness protection but to expand the range of decision subject to the duty of fairness.
- The denial of a right to fair hearing must always render a decision invalid, regardless of whether a reviewing court concludes that the hearing would have resulted in a different decision.

CONSTITUTIONAL PROTECTION

There is a much higher threshold to establish the infringement of a Charter right. If established, increased procedural protection will be available as a matter of Constitutional law.

LIMITATIONS ON THE APPLICATION OF THE DUTY OF FAIRNESS

THE DUTY APPLIES TO DECISIONS

The duty applies only when actual decisions are being made, not to investigative or advisory processes that occur prior to the formal decision making process.

However, the duty may apply if preliminary decisions have de facto finality.

The duty does not apply to:

1. Legislative decisions or functions:
   Note: The underlying rationale is that governments are elected to make policy decisions and must be allowed to do so, provided they comply with relevant constitutional requirements.
   - **Re Canada Assistance Plan (BC)**: The rules governing procedural fairness do not apply to a body exercising purely legislative functions.

   Cabinet and ministerial decisions, if they can be characterized as legislative in nature:
   - **AG of Canada v Inuit Tapirisat**: Although the line between legislative and administrative functions is not always easy to draw, where the executive has been assigned a task previously performed by the legislature, and where the subject matter is not an individual concern or a unique right, different considerations apply.
     Note: In this case, Cabinet was treated as though it was Parliament or the legislature.
   - **Re Canada Assistance Plan (BC)**: A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be subject to judicial supervision.
   - Note: In this case, purely ministerial decisions were treated as though they were made by Parliament or the legislature.

   Subordinate legislation:
   - Exception = **Homex Realty v Wyoming (Village)**: The passing of a municipal bylaw was made subject to the duty of fairness, because it was clear that the motivation for its passing was an ongoing dispute with a particular developer; the village was not permitted to couch its actions in a form designed to oust the application of the duty of fairness.

   Policy decisions, and decisions that are general in nature:
   - **Martineau v Matsqui**: A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection.
   - **Knight v Indian Head School Division**: Many administrative bodies have been required to assume duties traditionally performed by legislatures. There is a distinction between "decisions of a legislative and general nature" and "acts of a more administrative and specific nature."
   - **Wells v Newfoundland**: Legislative decision making (the passing of primary legislation) is not subject to the duty of fairness. Legislatures are subject to constitutional requirements for valid lawmaking, but within those boundaries, they can do as they see fit, and are subject to review only by the electorate.
2. Public office holders employed under contracts:
   a. **Dunsmuir**: If the terms of an individual's employment are governed by contract, then ordinary private law contractual remedies will apply in the event of dismissal, regardless of the public nature of the employment concerned.
3. Emergencies:
   a. **Cardinal v Kent Institution**: The process of prison administration, because of its special nature and exigencies, should not be unduly burdened by the imposition of unreasonable procedural requirements.

THE CONTENT OF THE DUTY OF FAIRNESS

Canada (AG) v Mavi, 2011 SCC

- The requirements of the duty are in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this central notion of the just exercise of power should not be obscured by jurisprudential lists developed to be helpful, but not exhaustive.

BAKER v CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

Knight v Indian Head School Division, 1990 SCC

- The duty of fairness is entrenched in the principles governing our legal system. However, the needs of ADMs must be respected.
- Every administrative body is the master of its own procedure and need not assume the trappings of a court.
- The aim is not to create procedural protection, but to achieve balance between the need for fairness, efficiency, and predictability of outcome.

Baker v Canada (Minister of Citizenship and Immigration), 1999 SCC

Framework for determining the content of the duty of fairness

Facts: Baker was a visitor from Jamaica who remained in Canada as an illegal immigrant. She was employed as a domestic worker for 11 years, and during that time, had four children. In 1992, she faced a deportation order. Immigration legislation required applicants for permanent residence to apply from outside Canada, meaning that she would have to apply from Jamaica. She applied for an exemption from this requirement under the *Immigration Regulations*, which authorized the immigration minister to grant discretionary exemptions on humanitarian or compassionate grounds.

Baker factors (five non-exhaustive contextual factors to determine the content of the duty of fairness, none of which are necessarily determinative):

1) **The nature of the decision and the process followed in making it.**
   The more the process provided for, the function of the tribunal, the nature of the decision making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.
   Greater procedural protection is likely to be required in an adjudicative context.
   Less procedural protection is likely to be required in an administrative or regulatory context.
2) **The nature of the statutory scheme and the terms of the enabling statute/overarching statute.**
   Greater procedural protection may be required if a second level of proceedings, such as a statutory right of appeal, is envisaged, in order to allow for meaningful participation in the second level of proceedings. Note: This will be indicative of a legislative intent for the ADM's decision not to be final, and to therefore warrant less deference.
   Greater procedural protection is likely to be required if procedural safeguards are found elsewhere in the Act, as this may be found to be indicative of legislative intent.
   Less procedural protection will likely be required if the decision is an exception to the general principles of the statutory scheme.
3) **Importance of the decision to the individual affected.**
   The greater the importance of the particular decision to the person it affects, the greater the procedural protection likely required.
4) **Legitimate expectations of the individual challenging the decision.**
   The content of the duty of fairness may be extended based on the conduct of public authorities in particular circumstances.
   Legitimate expectations of procedural protection may arise out of the conduct of public officials such as representations, promises, or undertakings, or out of the past practice or current policy of a decision-maker.
5) **Measure of deference to the administrative body's choice of procedure.**
   The requirements of the duty should also take into account and respect the choices made by the agency itself, particularly where the statute leaves the decision maker with the ability to choose its own procedures, or when the ADM has expertise in determining the appropriate procedures in the relevant circumstances.
   Although not determinative, important weight must be given to the choice of procedures made by the ADM itself as well as the institutional constraints that it may face.
   So, consider if the statute confers the ability upon the administrative body to choose its own procedures, if the body has a particular expertise in determining the appropriate procedures, and if the body has any relevant institutional constraints that may reflect necessary compromises to allow decisions to be made within a reasonable time frame and at a reasonable cost.
   The less deference afforded, the more procedural protection required.
   The more deference afforded, the less procedural protection required.

❖ **Decision-makers have a duty to give reasons whenever important interests are at stake.**

***Note: NF Nurses changes this, holding that assessment of the adequacy of reasons is not a matter of PF.**

THE LEGITIMATE EXPECTATIONS OF THE PERSON CHALLENGING THE RELEVANT DECISION

Canada (AG) v Mavi, 2011 SCC

Binnie: Where a government official makes representations, within the scope of 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.

SPECIFIC COMPONENTS OF THE DUTY OF FAIRNESS

NOTICE

Notice is the most basic aspect of the duty of fairness, as the starting point for participation in any decision making process.

Consider:

- Who is proposing to make a decision?
- What is the nature of the decision to be made?
- When will the decision be made?
- Where will the decision be made?
- Why is the decision being made?
- How is the decision going to be made?

The requirements of notice are often prescribed in an ADM's rules of procedure, or in legislation governing hearing procedures. If they are not, litigation may arise over the timeliness and sufficiency of notice:

- Was the notice provided timely, in the sense that it provided adequate time to respond?
- Did the notice provide sufficient information to allow an informed response?

The general rule is that notice must be adequate in all circumstances in order to afford a reasonable opportunity to present evidence and arguments, and to respond to evidence and arguments presented in opposition.

The requirement of notice is an ongoing duty: it arises before the decision is made and continues throughout the course of the decision making process.

A party whose rights, privileges, or interests are at stake is entitled to participate meaningfully in the decision making process, and in order to do so, must be kept apprised of any relevant issues that arise over the course of a hearing.

DISCLOSURE

Tribunals that hold oral hearings are likely to have disclosure obligations prescribed by the rules that govern their procedures or in legislation. However, there is considerable scope for the duty of fairness to require disclosure on an ad hoc basis.

It is often argued that disclosure obligations must be limited by the needs of the particular authorities or the rights of other individuals. Ex: In parole hearings or prison discipline cases, there may be concerns about the personal safety of informants and a need to keep their identity secret, or cases where sensitive national security information needs to be kept confidential.

BUT, the duty to disclose can be adapted to the needs of the particular circumstances: information can be vetted by a court to determine its relevance and materiality, and may be disclosed only to counsel, with instructions limiting its further dissemination.

Ultimately, the duty of fairness is satisfied if a party has sufficient information to make informed submissions regarding the matter at issue.

ORAL HEARINGS

Oral hearings are often demanded, but seldom required. They are not usually necessary to reaching an informed decision and there are good reasons for not granting them, including expense and delay.

However, oral hearings have been held to be required where a decision depends on findings of witness credibility:

- **Singh v Minister of Employment and Immigration**: The Court held that a person claiming refugee status was entitled to an oral hearing. Refugee status depended on whether a claimant had a "well-founded fear of persecution" in their homeland, and this was not something determinable based on a paper hearing. Claimants had to be given the opportunity to provide evidence in person, both because of the importance of the decision and because the decision makers could not determine factually disputed evidence without seeing and hearing the claimant.
- Note: In **Singh**, the legislation in question specifically denied an oral hearing, but one was required under s 7 of the Charter. Remember that if the statute is explicit, it stands, unless recourse to the Constitution is available.
- **Khan v University of Ottawa**: The ONCA required an oral hearing in the context of an improbable factual claim regarding a grade appeal.

RIGHT TO COUNSEL

There is no right to counsel in the context of administrative proceedings.

BC (AG) v Christie: Although a right to counsel may be recognized in specific and varied situations, there is no general constitutional right to counsel in proceedings before courts and tribunals.

RIGHT TO CALL EVIDENCE

The right to call and cross-examine witnesses is normally part of the right to an oral hearing.

However, the right is not absolute. Ex: S 38(2) of the BC ATA provides rights to cross-examination while permitting tribunals to limit examination and cross-examination to what they consider sufficient in the circumstances.

The guiding principle is that parties must be afforded a reasonable opportunity to present their cases.

TIMELINESS AND DELAY

ADMs are not usually under specific statutory timelines for holding hearings or making decisions.

Nor is there a Charter right to have an administrative matter heard or determined within a reasonable time; s 11(b) applies only to persons charged with a criminal offence.

Blencoe v BC (Human Rights Commission), 2000 SCC
Undue delay may breach the duty of fairness and may even rise to the level of a Charter breach
Facts: A former government minister sought an order staying human rights tribunal proceedings in complaints against him, over 30 months after the date the complaints were filed. During that time, his political career came to an end; he was dismissed from Cabinet and expelled by his caucus. He also suffered from depression.
Issue: Did the delay infringe s 7 of the Charter? Was the delay a breach of the duty of fairness?
Held: No. No.
SCC (majority, led by Bastarache): The Court recognized that Blencoe's career as a politician was finished, that he suffered clinical depression, that his finances were depleted, and that he had to move with his family twice to avoid the stigma from the outstanding complaints. However, even if it was assumed that the delay was the cause of his grief, "the state has not interfered with the respondent and his family's ability to make essential life choices", and so the state did not infringe his s 7 security interest.

- In some circumstances, delay in the administrative process may rise to the level of a deprivation of liberty or security of the person under s 7, which would result in a violation if the deprivation was not in accordance with the POFJ.
    - The liberty interest is engaged where state compulsions or prohibitions affect important and fundamental life choices; the s 7 liberty interest protects an individual's personal autonomy. However, if the state has not prevented an individual from making any important and fundamental life choices, the s 7 liberty interest is not engaged.
    - Security of the person protects the psychological integrity of an individual. In order for this right to be triggered, the psychological harm must result from the actions of the state and be serious. For s 7 to be engaged, there must be a sufficient causal connection between the state action and the harm suffered.
- Undue delay in an administrative proceeding may impair the fairness of a hearing, and may result in an abuse of process, even if the fairness of a hearing was not compromised. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at CL. There must be proof of significant prejudice compromising the ability to have a fair hearing.

THE DUTY TO GIVE REASONS

Historically, there was no duty on administrative decision makers to give reasons, until Baker.

Baker: In certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this, where the decision has important significance for the individual, or when there is a statutory right of appeal, or in other circumstances, some form of reasons would be required.

The scope of the duty established in Baker is limited. Reasons are not required for all decisions, they are required in "certain circumstances", reflecting the dignitary and instrumental rationales underlying the duty of fairness itself.

Reasons are required for if a particular decision has important significance for an individual, because public actors demonstrate respect for those affected by their decisions by justifying the decisions they make.

Reasons are also required if a statutory appeal process exists to facilitate the workings of that process. It is difficult or impossible to determine whether to appeal a decision and what kind of arguments to make on appeal, if no explanation is provided for the decision.

Two main concerns are likely to arise:
1) There may be a failure to provide reasons where a court concludes that reasons were required.
2) It may be argued that inadequate reasons are tantamount to no reasons at all, and therefore a violation of the duty of fairness.

However, the court rejected a bifurcated approach to procedural and substantive questions about the duty to provide reasons in NF Nurses.

NF Nurses: Reasons do not need to be provided in all cases. Baker does not establish that the quality of reasons is a question of procedural fairness. The threshold for satisfying the requirement to provide reasons is very low. The concept of deference to a decision requires respectful attention to the reasons offered or which could be offered in support of a decision.

So, courts will not be concerned with the adequacy or sufficiency of reasons in determining whether the duty has been met. The focus will be on the substantive question: do the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of reasonable outcomes?

CHAPTER 12: THE CHARTER AND ADMINISTRATIVE LAW

INTRODUCTION

The court's approach to both substantive and procedural review of administrative decisions changes when the administrative decision engages a Charter protected right. The Charter supplements, rather than replaces, the CL.

In terms of procedural review, the courts rely on the CL doctrine of procedural fairness to interpret the principles of fundamental justice set out in s 7 of the Charter.

In terms of substantive review, historically, when courts reviewed the substance of a decision that engaged a Charter right, they tended to use the Oakes test when assessing the validity of legislation. Now, the courts are moving toward an administrative law approach adapted to consider Charter values. However, the courts have yet to develop a consistent framework for determining when they will decide the merits with resort to the Charter, rather than administrative law principles, or administrative law principles, plus the Charter, so litigants have been left with no practical option but to argue both.

THE CL DUTY OF PROCEDURAL FAIRNESS AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE OF SECTION 7

The CL duty of procedural fairness in administrative law requires decision-makers to provide a fair hearing to individuals who are subject to their authority (the duty to hear the other side).

At a minimum, this means that decision-makers must hear the other side, and decide the matter impartially and independently. There is an implicit obligation of disclosure, unless there is a consideration to justify otherwise, such as national security, or privacy. Although the individual is not necessarily entitled to an oral hearing, the individual must receive notice and have an opportunity to respond to the information the decision-maker will be relying on. The individual may have a right to legal counsel. These safeguards are referred to as *participatory rights*, and they apply *prior* to the decision being made.

If the decision affects an important interest (such as continued residency in Canada, like in Baker), the decision-maker owes the individual reasons for the decision. *The duty to give reasons* applies *after* the decision has been made.

In addition to the CL duty of fairness, a duty of fairness may also be owed under the Charter. As per s 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." Within the Charter's substantive rights-conferring provisions, only the POFJ have been found to include procedural fairness, which is why s 7 is the primary source of procedural safeguards within the Charter.

To access procedural safeguards in the context of s 7, complainants must cross the threshold of establishing that their life, liberty, or security interests are engaged by the decision. If the individual cannot establish that an impugned decision affects a s 7 interest, procedural fairness may still be due as a matter of CL.
Right to life: the right to live and to be free of state conduct that increases the risk of dying.
Right to liberty: freedom from physical restraint and freedom to make fundamental life choices.
Right to security of the person: threat of physical harm or the imposition of severe psychological harm.

Legislation can determine the content of available procedures, and the CL does not empower the courts to impose procedures in the face of clear statutory language that dictates less stringent procedural safeguards. However, under s 7, the procedural requirements of the POFJ are constitutional requirements.

A majority of the SCC has never found an infringement of s 7 to be justified under s 1.

Lamer in NB (Minister of Health and Community Services) v G(J): The rights protected under s 7 are very significant, and "rarely will a violation of the PoFJ, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society."

ORAL HEARINGS AND THE SCOPE OF SECTION 7

Singh v Minister of Employment and Immigration, 1985 SCC
Review under the Charter can circumvent explicit legislation (generally an insurmountable obstacle to relief at CL)

Facts: Seven refugee claimants were given no opportunity to present their cases in oral hearings when the initial decision was made before the Minister, nor on appeal before the Immigration Appeal Board (IAB).
The statutory scheme provided for the possibility of an oral hearing, but only before the IAB on appeal, and inly if the IAB concluded, based on the claimant's written submissions, that there were reasonable grounds to believe that the claimant could make a successful claim at an oral hearing.
Therefore, the statutory scheme excluded the possibility of an oral hearing to claimants who failed to set out reasonable grounds. The CL of procedural fairness could not "supply the omission of the legislature", as there was no omission, but a clear exclusion.
Held: S 7 applied to Singh. Although he did not have a constitutional right to remain in Canada, he did have a constitutional right to have his claim determined in accordance with the PoFJ.

- Oral hearings are not always required. However, where credibility is at issue, fundamental justice requires an oral hearing.

- The interests protected under s 7 are of such importance that an oral hearing will generally be required when those interests are engaged.
- Resort to the Charter should be reserved for cases in which ordinary statutory interpretation cannot provide a remedy.
- The PoFJ include procedural fairness.
- *Everyone* in s 7 includes *any* person who is physically present in Canada, including non-citizens.

Note: As a result of the Singh decision, the government overhauled the statutory scheme and established the Immigration and Refugee Board to ensure that all refugee claimants will receive a fair hearing in accordance with the PoFJ.

INCORPORATION OF THE CL FRAMEWORK UNDER SECTION 7

Baker v Canada (Minister of Citizenship and Immigration), 1999 SCC

Framework for determining the content of the duty of fairness

Facts: Baker was a visitor from Jamaica who remained in Canada as an illegal immigrant. She was employed as a domestic worker for 11 years, and during that time, had four children. In 1992, she faced a deportation order. Immigration legislation required applicants for permanent residence to apply from outside Canada, meaning that she would have to apply from Jamaica. She applied for an exemption from this requirement under the *Immigration Regulations*, which authorized the immigration minister to grant discretionary exemptions on humanitarian or compassionate grounds.

Baker factors (five non-exhaustive contextual factors to determine the content of the duty of fairness, none of which are necessarily determinative):

3) **The nature of the decision and the process followed in making it.**
   Greater procedural protection is likely to be required in an adjudicative context.
   Less procedural protection is likely to be required in an administrative or regulatory context.
4) **The nature of the statutory scheme and the terms of the enabling statute/overarching statute.**
   Greater procedural protection is likely to be required if the decision is final.
   However, greater procedural protection may also be required if there is a right of appeal, to allow for meaningful participation in the second level of proceedings.
   Greater procedural protection is likely to be required if procedural safeguards are found elsewhere in the Act.
   Less procedural protection will likely be required if the decision is an exception to the general principles of the statutory scheme.
5) **Importance of the decision to the individual affected.**
   The greater the importance of the particular decision to the person it affects, the greater the procedural protection likely required.
6) **Legitimate expectations of the individual challenging the decision.**
   The content of the duty of fairness may be extended based on the conduct of public authorities in particular circumstances.
   Legitimate expectations of procedural protection may arise out of the conduct of public officials such as representations, promises, or undertakings, or out of the past practice or current policy of a decision-maker.
7) **Measure of deference to the administrative body's choice of procedure.**
   The less deference afforded, the more procedural protection required.
   The more deference afforded, the less procedural protection required.
   Consider if the statute confers the ability upon the administrative body to choose its own procedures, if the body has a particular expertise in determining the appropriate procedures, and if the body has any relevant institutional constraints that may reflect necessary compromises to allow decisions to be made within a reasonable time frame and at a reasonable cost.

Decision-makers have a duty to give reasons whenever important interests are at stake.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC

Suresh was a convention refugee detained on a security certificate for alleged links with the Tamil Tigers. The Federal court upheld the certificate. In the subsequent deportation hearing, the adjudicator found Suresh to be inadmissible as a refugee on grounds of membership in a terrorist organization.

Pursuant to s 53(1)(b) of the *Immigration Act* in force at the time, the minister issued an opinion that Suresh constituted a danger to the security of Canada and should be deported, notwithstanding the fact that Suresh would face the risk of torture upon his return to Sri Lanka.

Suresh challenged the decision on constitutional and administrative law grounds.

Held: The minister had breached the PoFJ protected by s 7 of the Charter by failing to provide Suresh with adequate procedural protection and reasons for the decision.

S 53(1)(b) of the IA did not require the minister to follow any particular procedure (note: unlike the statutory provisions under scrutiny in Singh). The minister notified Suresh that she intended to consider issuing a danger opinion and gave him the opportunity to make submissions. An officer considered those submissions, and then recommended in a memo to the minister that she issue an opinion that Suresh constituted a danger to Canada. Suresh did not get an opportunity to see or respond to the memo.

Without any statutory guidance, the SCC applied the Baker framework to assess the adequacy of the procedural protection afforded to Suresh.

Held: Suresh did not have a right to an oral hearing, but he did have the right to disclosure of the materials on which the minister would base her decision, including the memo, and the minister had an obligation to consider his submissions.

Deportation to torture will generally violate the PoFJ protected by s 7 of the Charter. However, this may occur in "extraordinary circumstances".

The right to disclosure may be subject to privilege or similar valid reasons for reduced disclosure, such as the protection of national security.

THE DUTY TO GIVE REASONS

Because the duty to give reasons is part of the duty of PF, courts have traditionally viewed it on a standard of correctness.

If reasons are provided at all, it seems that the duty has been complied with, and that the adequacy of the reasons will be assessed with the outcome of the decision in the substantive review, perhaps on a reasonableness rather than a correctness standard of review (p 417).

Is there a duty to give reasons? If there is no duty to give reasons, then the duty has not been breached.
If yes, were reasons given? If reasons were given, then the duty to give reasons has not been breached.
If not, the decision will be quashed, and sent back to the administrative body for re-determination in accordance with proper procedure.

UNDUE DELAY

Blencoe v BC (Human Rights Commission), 2000 SCC
Undue delay may breach the duty of fairness and may even rise to the level of a Charter breach
Facts: A former government minister sought an order staying human rights tribunal proceedings in complaints against him, over 30 months after the date the complaints were filed. During that time, his political career came to an end; he was dismissed from Cabinet and expelled by his caucus. He also suffered from depression.
Issue: Did the delay infringe s 7 of the Charter? Was the delay a breach of the duty of fairness?
Held: No. No.
SCC (majority, led by Bastarache): The Court recognized that Blencoe's career as a politician was finished, that he suffered clinical depression, that his finances were depleted, and that he had to move with his family twice to avoid the stigma from the outstanding complaints. However, even if it was assumed that the delay was the cause of his grief, "the state has not interfered with the respondent and his family's ability to make essential life choices", and so the state did not infringe his s 7 security interest.

- In some circumstances, delay in the administrative process may rise to the level of a deprivation of liberty or security of the person under s 7, which would result in a violation if the deprivation was not in accordance with the POFJ.
  - The liberty interest is engaged where state compulsions or prohibitions affect important and fundamental life choices; the s 7 liberty interest protects an individual's personal autonomy. However, if the state has not prevented an individual from making any important and fundamental life choices, the s 7 liberty interest is not engaged.
  - Security of the person protects the psychological integrity of an individual. In order for this right to be triggered, the psychological harm must result from the actions of the state and be serious. For s 7 to be engaged, there must be a sufficient causal connection between the state action and the harm suffered.
- Undue delay in an administrative proceeding may impair the fairness of a hearing, and may result in an abuse of process, even if the fairness of a hearing was not compromised. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at CL. There must be proof of significant prejudice compromising the ability to have a fair hearing.

EX PARTE, IN CAMERA HEARINGS

Ex parte and *in camera* hearings refer to closed-door hearings in which neither the person affected nor his counsel are present.

After the events of September 11, 2001, many liberal democracies, including Canada, enacted legislation to give police and security services added powers to investigate and prosecute terrorism.

However, Canada already had comprehensive legislation in place within the *Immigration and Refugee Protection Act* (IRPA) that permitted the detention of foreign nationals and permanent residents (non-citizens) suspected of terrorism or of having an association with terrorist organizations (note: *terrorism* nor *terrorist* left undefined in the Act). Under the IRPA, detainees are not charged criminally and so do not benefit from the presumption of innocence and other due process guarantees of the criminal justice system.

Charkaoui v Canada (Minister of Citizenship and Immigration), 2007 SCC
Facts: Canadian security agencies alleged that Charkaoui, among others, were involved with terrorist organizations. Charkaoui was a permanent resident, while the others were foreign nationals recognized as refugees. The minister of citizenship and immigration and the minister of public safety and emergency preparedness issued security certificates against them pursuant to s 77 of the IRPA, leading to their detention pending deportation.
Under ss 78-84 of the IRPA, detention and the reasonableness of security certificates are subject to review by the Federal Court. During the review process, prior to amendments made in 2008, *ex parte* and *in camera (*closed-door hearings in which neither the person named on the certificate nor his counsel are present) hearings were held at the request of the Crown if the judge believed that disclosure of the evidence on which the certificate was based could undermine national security. The judge then provided the named person with a summary of the evidence without any details that could compromise national security. The judge could rely on evidence that would otherwise be inadmissible in a court of law, and if the judge determined that the certificate was reasonable, there was no appeal or opportunity for further judicial review.
Held: McLachlin, for a unanimous Court, held that these proceedings engaged both the s 7 liberty interest (detention pending deportation) and the s 7 security interest (removal may be to a place where life or freedom threatened). The review procedure violated the PoFJ because it denied the named person a fair hearing.
Analysis: A fair hearing requires a judge to decide a case based on all relevant facts and law. Federal Court judges were required to decide the case without the benefit of having the evidence adequately tested, as the named person was precluded from raising legal objections to the

evidence or from basing legal arguments on it. The secrecy required by the statutory scheme also created a serious possibility that the named person would never know the case he had to meet, because it might be based on undisclosed material.
The SCC recommended that a special advocate (an independent, security-cleared lawyer) could be appointed to represent the named person during *in camera* proceedings. The Crown's failure to incorporate such a measure, or to otherwise correct the procedural defects, led the Court to conclude that the s 7 violation could not be saved by s 1 because the infringement did not minimally impair the right at stake.
*Note: The Court's endorsement of a special advocate system takes place in its s 1 analysis, rather than viewing it as a requirement of PF under s 7. This is the first time the Court has seriously entertained a s 7 infringement being saved by s 1.
*Note: The IRPA has since been amended to provide for a special advocate. However, the new procedure still creates procedural shortcomings.

United States of America v Khadr

CHAPTER 8: INDEPENDENCE, IMPARTIALITY, AND BIAS

INTRODUCTION

The related concepts of independence, impartiality, and bias concern the notion of fairness in the administrative decision-making process.
Independence: A means of achieving impartiality.
Impartiality: The ability to make decisions without improper influence.
Bias: The reasonable perception of partiality (undue preferential treatment).

Independence serves to preserve confidence in public decision-makers, the administration of justice, and the rule of law.

SOURCES OF THE GUARANTEE OF AN INDEPENDENT AND IMPARTIAL TRIBUNAL

The guarantee of a proceeding before an independent and impartial tribunal flows from the CL as well as from constitutional/quasi-constitutional sources.

COMMON LAW
The principles of natural justice are encapsulated in two central ideas:
1. **The rule against bias: *nemo judex in sua causa debet esse.***
   A decision maker should neither judge her own cause not have an interest in the outcome of a case before her.
   The rule aims to avoid circumstances in which the decision-maker acts as both prosecutor and judge, or decides for personal benefit.
2. **The duty to hear the other side: *audi alteram partem.***
   The decision-maker should hear the other side before making a decision.
   The rule seeks to encourage the decision-maker to focus her decision on the relevant facts/law rather than irrelevant considerations.

CONSTITUTIONAL/QUASI-CONSTITUTIONAL SOURCES
1. Canadian Charter of Rights and Freedoms.
   Preamble: Similar in Principle to that of the UK = unwritten constitutional principle of judicial independence.
   S 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*.
   S 11(d): Any person charged with an offence has the right… to be presumed innocent until proven guilty *according to law in a fair and public hearing by an independent and impartial tribunal*.
2. Canadian Bill of Rights.
   S 1(a): The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by *due process of law*…
   S 2(e): No law of Canada shall be construed or applied so as to… deprive a person of the right to a *fair hearing in accordance with the principles of fundamental justice* for the determination of his rights and obligations
3. Quebec Charter.
   S 23: Every person has a right to a *full and equal, public and fair hearing by an independent and impartial tribunal*, for the determination of his rights and obligations or of the merits of any charge brought against him.
4. AB Bill of Rights.
   S 1(a): The right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by *due process of law*.

TRIBUNAL INDEPENDENCE

Challenging administrative tribunals for lack of independence has become one of the most litigated issues in administrative law. Specific tensions include: the appointments process, the removal of members, tribunals as a function of policymaking, and the extent to which constitutional/structural guarantees of independence should do or should apply to tribunals.

Policy considerations:

To what extent should tribunals and other administrative bodies be independent of the branches of government that have created them? How can a tribunal best fulfill the often-competing functions for which it has been created while maintaining an appropriate distance from government, litigants, and other stakeholders?

Administrative decision-making bodies have been created in a way that leaves them connected to government. Most have a link with the executive branch through a minister of Cabinet under their enabling statutes. Examples of interactions required by statute include the duty to file annual reports or to provide advice to this minister. Further, this minister will almost certainly be involved in the process of appointing and removing members.

Given the political nature of the executive branch and its responsibility to create and promote the government's policies, there is an understandable risk that the public may be concerned about inappropriate interference flowing from the regular interactions between government departments and tribunals. This concern can be particularly acute where the government is frequently an opposing party before the tribunal, such as in immigration matters.

THE DEVELOPMENT OF THE LAW OF TRIBUNAL INDEPENDENCE

THE THEORY OF JUDICIAL INDEPENDENCE

At its core, *judicial independence* is a means of ensuring that judges act free from actual or apparent dependence on any persons or institutions.

Dickson, in **Beauregard v Canada**:
The core of the principle of judicial independence is "the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere with the way in which a judge conducts his or her case and makes his or her decision."

Three structural conditions necessary to guarantee independence (Valente factors):

1. *Security of tenure.*
   Under the Constitution, judges of superior courts shall hold office during good behaviour or until age 75. Further, they must be provided with an opportunity to respond to allegations.
   Prevents the government from removing a judge for such things as making decisions that the government disapproves of. At pleasure appointments, which allow judges to be removed at the request of Cabinet, without cause and without allowing the judge to be heard, are invalid.
2. *Financial security.*
   Under the Constitution, judges are guaranteed a fixed salary, and are promised that the amount they are paid will be sufficient to keep them from seeking alternative means of income.
   Prevents the government from altering a judge's pay for arbitrary reasons such as discontent with decisions rendered.
3. *Institutional control.*
   Addresses how the administration of the affairs of the court, such as budgetary allocations or the assignment of cases, should be divided between the judiciary and the other branches.
   Ensures that judges are not put in compromising situations where they may choose to make decisions to protect their own interests, rather than solely based on legal judgment.

Jurisprudence has also come to recognize another type of independence. *Adjudicative independence* ensures independence from interference in deliberations, or the ability of a decision-maker to decide free of inappropriate interference by other decision-makers, such as pressure to decide in a certain way or substitution of another's decision. Unlike the Valente factors, adjudicative independence is not structural in nature; it does not relate to the design of the institution by the government. It deals with relational matters and the internal process of deliberation by individual decision-makers.

Adjudicative independence is a guarantee of independence that is frequently called into question in the administrative state, especially as a result of institutional practices used to develop policy.

Policy: The purpose of judicial independence is to boost confidence in the justice system. The mere appearance of inappropriate interference with the decision-making process is enough to engender a loss of public confidence.

FROM JUDICIAL INDEPENDENCE TO TRIBUNAL INDEPENDENCE

Over time, the criteria guaranteeing judicial independence have served as a foundation from which courts have determined if administrative tribunals are also sufficiently independent.

In **Valente v The Queen**, it was suggested that the guarantees for judicial independence could also be applied to administrative tribunals. Since then, litigants have pushed for tribunals to be held to the same degree of independence as the courts, arguing that various constitutional safeguards (ss 7 and 11(d) of the Charter, the unwritten constitutional principle of judicial independence, and quasi-constitutional statutes like the Bill of Rights) guarantee tribunal independence.

Ocean Port Hotel v British Columbia (GM, Liquor Control and Licensing Branch), 2001 SCC

There is no constitutional guarantee of administrative tribunal independence

Administrative tribunals do not constitutionally require the same degree of independence as courts

Facts: The BC Liquor Appeal Board was a liquor-licensing body that could impose sanctions and remove licences upon finding that a licensee had contravened the province's *Liquor Control and Licensing Act*. The RCMP reported that OP had violated the Act, the regulations, and the terms of its liquor licence. The Liquor Control and Licensing Branch consequently imposed a two-day suspension on the licence. The LAB held a de novo hearing and confirmed the suspension. The Act indicated that the chair and the members were to serve at the pleasure of the Lieutenant Governing in Council.

BCCA: OP argued that the LAB lacked sufficient independence to render a fair hearing, due to the terms of appointment of the members of the LAB, and that the decision was therefore invalid. Relying on Régie, which was a judgment very similar to the facts in the case at bar, the BCCA held that members of the LAB required more security of tenure that what was offered by at pleasure appointments. The BCCA also found that the decision to suspend a licence closely resembled a judicial decision and that the penalty was of serious economic consequences.

*Note: Régie was distinguished because in Quebec, all adjudicative bodies were subject to the Quebec Charter, which required them to possess a greater degree of independence than tribunals in BC.

Issue: Do at pleasure appointments provide an adequate degree of independence for decision-makers sitting on tribunals that impose penalties?

Held: Yes.

Issue: Do administrative tribunals exercising adjudicative functions require the same degree of independence as the courts?

Held: No.

SCC: **There is no constitutional guarantee of administrative tribunal independence.** Judicial independence has historically developed to protect the judiciary from interference from the executive branch of government. By contrast, administrative tribunals are not intended to be separate from the executive branch. Tribunals are created precisely for the purpose of implementing the policies of the executive branch. Their primary function as policymakers and their status as extensions of the executive branch make the degree of their independence a matter to be determined by Parliament.

- **It is up to Parliament or the legislature to determine the structure, responsibilities, and degree of independence required of any particular tribunal.**
- **Tribunal independence is a CL principle of natural justice, and can therefore be ousted by express statutory language, as long as the statute is constitutionally valid.**

Statutory presumptions:

- If the statute is silent, courts will infer that the legislature intended procedural fairness, and will import the procedural safeguards demanded by the CL.
- If procedural fairness is clearly ousted by express statutory language, then the statute will prevail, unless a constitutional challenge is made.

Keen v Canada (AG), 2009 FC

At pleasure appointments are valid in the context of administrative tribunals

The government is not legally prevented from removing members of administrative tribunals for the decisions they make

Facts: Keen was President of the Nuclear Safety Commission, which regulates nuclear facilities and activities, but does not have jurisdiction over health care. The NSC reports to Parliament through the minister of natural resources, then Lunn. Keen was removed from her job over a decision to keep a nuclear power plant closed for its failure to meet safety standards. The reactor was also a primary source of medical isotopes used in health care, and the closure caused a severe shortage. Lunn was concerned that the NSC had not reopened the plant, so used the statutory directive power under the *Nuclear Safety and Control Act* to require the commission to take the health of Canadians into account (BUT, the directive power allowed only for directives of general application on broad policy matters, not specific decisions), and brought about the emergency enactment of legislation that would force the reactor to remain open for a period of time. Lunn wrote to Keen, questioning her judgment and whether she was duly executing the requirements of her position, indicating that he was considering asking the GIC to remove her, and asking her for her comments. Keen responded to the letter, refuting his assertions, and was scheduled to appear before a parliamentary committee to explain her position, but was terminated the night before the hearing. The order in council that removed Keen stated that the GIC had considered her letter, but that she had failed to demonstrate the necessary leadership to address the isotope crisis. Keen applied to the FC for judicial review.

Issue: Did Keen receive adequate procedural fairness in the manner of her dismissal?

Held: Yes. The circumstances of her termination were sufficient to satisfy the requirements of fairness for at pleasure appointments, and the GIC's dismissal was upheld. It was enough that Lunn had written to Keen advising her he was contemplating recommending her dismissal, that he had provided her with reasons for his concern, and had offered her an opportunity to respond. The order in council terminating her position stated that the GIC had carefully considered her submissions.

*Note: ML thinks this case was decided wrongly, that Keen was dismissed arbitrarily, and that she worries that a trend is developing toward increased executive influence.

Canadian Pacific Ltd v Matsqui Indian Band, 1995 SCC

Test for adequate tribunal independence/Reasonable apprehension of bias test

Test for adequate tribunal independence: Whether a reasonable, well-informed person having thought the matter through would conclude that an administrative decision-maker is sufficiently free of factors that could interfere with his or her ability to make impartial judgments.

When the independence of an administrative tribunal is challenged, the guarantees of tribunal independence should be applied in a flexible way to account for the functions of the tribunal under scrutiny.

While administrative tribunals are subject to the Valente principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (ie 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 such as oaths of office. The majority held that the test should be deferred until the tribunals had been up and running in order to have the benefit of knowing how they operated in practice.

REASONABLE APPREHENSION OF BIAS

Allegations of reasonable apprehension of bias (RAB) exist in two major forms:

1. Perceptions of individual bias, which deal with the impartiality of individual decision-makers, and
2. Perceptions of institutional bias, which deal with whether reasonable perceptions of partiality regarding the decision-making body as a whole can be raised in a substantial number of cases.

Concerns center around the appearance of perceived attitudinal bias in the decision-making process and concern about the practices used by administrative bodies to promote consistency and efficiency within their work, such as the use of full board meetings and lead cases.

THE RULE AGAINST BIAS

Remember, the rule against bias, along with the duty to hear the other side, are the two central CL principles of natural justice.

The rule against bias aims to maintain public confidence in the administration of justice, by ensuring that decision-makers are not reasonably perceived to be deciding matters that will benefit them or those with whom they have significant relationships, and by preventing decision-makers from making decisions based on factors that are irrelevant to the decision-making process.

All administrative actors required to meet the standards of PF are subject to the rule against bias.

An allegation of perceived bias must be brought to the decision-maker on the first available occasion. If the claim is successful, its effect will be to quash any decisions made and have the proceedings reheard by a newly constituted panel.

REASONABLE APPREHENSION OF BIAS TESTS

The test for bias relies on perception. Whether bias exists is not the question; to have the decision quashed, it is sufficient that a reasonable person with an informed understanding of how the tribunal functions perceives that the decision-making is biased.
The standard for bias will vary, depending on context. The difference is explained by the central idea behind PF: the nature and context of the decision-making process drives the content of PF, including what constitutes impartiality.

If the relevant statute is silent, the procedural safeguards required, including the degree of independence and impartiality, may be determined through an analysis of the non-exhaustive list of factors from Baker.

TEST FOR REASONABLE APPREHENSION OF INDIVIDUAL BIAS

Committee for Justice and Liberty v National Energy Board, 1978 SCC
Test for determining reasonable apprehension of individual bias
DeGrandpré, in dissent (however, test has been used consistently by the courts):

- Would a reasonable, well-informed person, having thought the matter through, would conclude that an ADM is sufficiently free of factors that could interfere with her ability to make impartial judgments?

The grounds for the apprehension of bias must be substantial; a real likelihood or probability of bias should be demonstrated. Mere suspicion of bias is insufficient for the test to be met

TEST FOR REASONABLE APPREHENSION OF INSTITUTIONAL BIAS

Geza v Canada (Minister of Citizenship and Immigration), 2006 FCA
Two-part test for determining reasonable apprehension of institutional bias (systemic bias in a substantial number of cases)

1. Considering a number of factors including, but not limited to, the potential for conflict between the interests of tribunal members and those of the parties who appear before them, will there be a reasonable apprehension of bias in the mind of a fully informed person in a **substantial number of cases**?
2. If the answer is no, the allegations of apprehension of bias cannot be brought on an institutional level, BUT, may be dealt with on an ad hoc basis, using the test for individual bias.

PERCEPTIONS OF INDIVIDUAL BIAS

Four situations in which a reasonable apprehension of *individual* bias may arise (Note: Allegations may be brought on more than one ground):

1. **A pecuniary or material interest in the outcome of the matter being decided.**
   A direct monetary interest, or any other type of benefit, such as deciding a case dealing with the circumstances in which the government could terminate a decision-maker's appointment.
2. **Personal relationships with those involved in the dispute.**
   Includes relationships with the parties, as well as others involved in the matter, such as counsel or witnesses. Consider whether the relationship presents a significant enough interest to the decision-maker and the whether the relationship is current enough to reasonably pose a significant threat to impartiality.
3. **Prior knowledge or information about the matter in dispute.**
   In deciding whether a RAB exists because of a decision-maker's prior involvement with a matter, consider the nature and extent of the previous involvement.
   Wewaykum Indian Band v Canada (2003 SCC): Justice Binnie's previous employment as associate deputy minister of justice was challenged as giving rise to RAB. The Court examined the context and held that Binnie's previous involvement in the matter was not sufficiently material to substantiate the allegation of RAB.
4. **An attitudinal predisposition toward an outcome. *DIFFERENT TEST***
   May flow from comments and attitudes of decision-maker in the course of the hearing and outside the proceedings, such as antagonism toward litigants, irrelevant or vexatious comments, *ex parte* communications, or taking on the role of an advocate.
   The test should be whether the adjudicator has a closed mind: Whether the decision-maker is amenable to persuasion or whether his comments indicate a mind so closed that any submission by the parties would be futile.
   BUT, see Chrétien v Canada, where the RAB test was used to evaluate comments made to the media.

Chrétien v Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)
Attitudinal predisposition toward an outcome – RAB test applied (but today would be closed-mind test?)
Facts: An application for JR was made in respect of the report of the Commission of Inquiry into the Sponsorship Program. Commissioner Gomery was given a mandate to investigate and report on the program, and make recommendations based on his factual findings.
Gomery made a number of comments to the media, including: "I simply confirmed the findings that Sheila Fraser had made, which I think I am in a position to do after three months of hearings." and "The very answer he gave me was the only answer that counted… with this answer I had everything I needed." His comments on the record, to the media, and after the inquiry had concluded, viewed cumulatively, not only indicated that he prejudged issues but also that he was not impartial toward the applicant.
The applicant alleged that Gomery's conduct gave rise to the RAB. Gomery insisted that his mind remained open.
Held: There was more than sufficient evidence to find that an informed person, viewing the matter realistically and practically and having thought the matter through, would find that Gomery breached the duty of procedural fairness by demonstrating a RAB. The findings in the report were set aside.

PERCEPTIONS OF INSTITUTIONAL BIAS

The need for institutional policymaking, collaboration, and consistency distinguishes administrative tribunals from courts. Apprehensions of bias may arise in response to institutional practices developed by tribunals for these purposes.

BIAS, ADJUDICATIVE INDEPENDENCE, AND POLICY MAKING

Policymaking is generally accepted as central to tribunal existence. McLachlin, in **Ocean Port**: Every tribunal, no matter how adjudicative it appears, has some role in implementing a government policy.

Tribunals create policy in three ways:
1. Decision-making.
2. Informal rule making through the use of soft law such as guidelines, bulletins, and manuals.
3. Formal rule making through delegated legislation.

Generally, the policies that administrative bodies make serve to:
1. Further the law under the statute that the tribunal has been mandated to administer,
2. Promote consistency in the decisions rendered by the tribunal's various members, and
3. Make the tribunal more efficient in its decision-making process.

Allegations of bias may arise when the methods used by the tribunals in their policymaking activities appear to infringe on the adjudicative independence of a decision-maker. There is often tension between the need for tribunal members to collaborate to further the law as an institution and the need to give each decision-maker space to render her own decision.

(**Beauregard**: The concept of adjudicative independence embodies the ability of a decision-maker to decide free of inappropriate interference by others decision-makers, such as pressure to decide a certain way or substitute another's decision for one's own.)

The tools used to promote consistency often involve the input of tribunal members other than those charged with determining a specific claim. As a consequence, litigants may become concerned that the adjudicators deciding their claims have based their decisions on considerations that

they did not come across in the course of their adjudications. Full board meetings and lead cases are two examples of practices used by tribunals to promote consistency and efficiency that have given rise to RAB.

FULL BOARD MEETINGS

International Woodworkers v Consolidated Bathurst, 1990 SCC
Guidelines for full board meetings to follow in order to avoid compromising adjudicative independence
Facts: The ON Labour Relations Board held a meeting of the full labour board to discuss the draft reasons of one of its three-member panels. The purposes of such meetings were to facilitate understanding of policy developments and to evaluate the practical consequences of proposed policy initiatives. In this particular meeting, the decision discussed dealt with whether a legal test the board had established through its jurisprudence should be replaced by another.
No express statutory authority existed for this. However, the meeting was conducted in accordance with the LRB's longstanding and usual practice, which required that discussion be limited to the policy implications of a draft decision, that the facts be accepted as contained in the decision, that no vote or consensus be taken, that no minutes be kept, and that no attendance be recorded.
Issue: Do full board meetings breach the principles of natural justice that i) the adjudicator be independent and unbiased (that she who decides must hear), and ii) the right to know the case to meet (*audi alteram partem* rule)?
Held: No.
Analysis: Full board meetings are a practical means of calling upon the collective experience of board members when making an important policy decision and obviate the possibility of different panels inadvertently deciding similar issues in a different way. The rules of natural justice should reconcile the exigencies of decision-making by tribunals with the procedural rights of the parties.
As practiced by the LRA, the holding of full board meeting does not impinge on the ability of panel members to decide according to their opinions so as to give rise to a RAB or lack of independence.
In terms of independence, the presence of other LRB members at the full board meeting does not amount to participation in the final decision by members who had not heard the parties. A discussion does not prevent a decision-maker from adjudicating in accordance with her own conscience.
In terms of the *audi alteram* partem rule, there is a distinction between discussions on factual and legal/policy issues. On factual matters, the parties must be given the opportunity to respond. The right of the parties to state their case and to answer contrary arguments does not encompass the right to repeat arguments every time the panel convenes to discuss the case. The policy decided on was the subject of the hearing in which the parties had full opportunity to respond.
The test for independence is the freedom to decide according to one's conscience and opinions, not the absence of influence.
The relevant issue is whether there is pressure on the decision-maker to decide against her own conscience and opinions.
Generally, the use of full board meetings will not breach the principles of natural justice if:

1. **Discussions are limited to law or policy, and not factual issues, and**
2. **The parties are given an opportunity to respond to any new ground arising from the meeting.**

Appropriate checks and balances include not keeping minutes, not keeping attendance, not holding a vote, not requiring consensus, and having attendance be voluntary.

LEAD CASES

Geza v Canada (Minister of Citizenship and Immigration), 2006 FCA
The use of lead cases does not support an allegation of reasonable apprehension of bias
Facts: The Immigration and Refugee Board instituted a procedure through which it attempted to select one of several similar refugee claims to create a full evidential record for all. The IRB was facing a large influx of refugee claims by Hungarian Roma. The purpose of the lead case initiative was to enable the IRB to have one case in which there were informed findings of fact and a thorough analysis of the relevant legal issues. Although many Roma had not yet had their claims heard, the claim chosen was to be representative of the issues that arose when the Roma were seeking refugee status.
The minister was invited to participate in the hearings, counsel for the applicants actively participated, the applicants consented to participation, and the panel members were chosen for its familiarity with the relevant issues. However, one of the original panel members was replaced by Bubrin, a member of the IRB Europe team.
The appellants argued that the lead case initiative was designed to reduce the number of successful Roma refugee applications, and therefore showed bias.
Held (Evans): The evidence did not prove that the perceived decline in acceptance rates was a direct result of the lead case. Even if a direct result could be established, this would not support an allegation of apprehension of bias.
Analysis: If IRB members appropriately cite the lead case in deciding on the merits of a particular refugee claim, there can be no complaint. If IRB members apply the lead case inappropriately, this does not contribute to a finding of apprehension of bias; it is simply erroneous decision-making subject to JR.

CHAPTER 9: STANDARD OF REVIEW

INTRODUCTION

Courts reviewing the interpretation or application of a statutory provision by an ADM will usually determine that the decision made merits deference, and therefore, will be subject to reasonableness, rather than correctness review.

Baker: "Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision."

The amount of deference owed to the ADM's decision will determine the standard of review applied to the impugned decision.

If the decision attracts deference, then it will be subject to reasonableness review (aka deferential review).

If the decision does not attract deference, then it will be subject to correctness review.

Pre-Dunsmuir:

1. Correctness.
   An incorrect decision is one that is different from the one arrived at by the reviewing court.
2. Reasonableness simpliciter.
   Southam: An unreasonable decision is one that is not supported by any reasons that can stand up to a somewhat probing examination, or in other words, if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. This determination requires an inquiry into the evidentiary foundation or the logical process on which the conclusion is based.
3. Patent unreasonableness.
   Ryan: A patently unreasonable decision is one that suffers from a serious and obvious defect, one so flawed that no amount of deference can justify letting it stand.

Dunsmuir:

1. Made the standard of review analysis more coherent and workable, by merging the two deferential standards into one reasonableness standard.
2. Simplified the selection of the appropriate standard of review, by creating a two step framework called the standard of review analysis to replace the pragmatic and functional analysis.

THE PREQUEL

Judicial review is ordinarily available for breaches of procedural fairness, errors of law, abuse of discretion, or factual findings made in the absence of evidence.

Privative clauses were originally intended to prevent courts from interfering with the substantive outcomes of administrative action. Motives include directing the judiciary to respect the relative expertise of the administrative body, resolving disputes promptly and conclusively, and rationing scarce judicial resources.

Privative clauses generally include:

1. A grant of exclusive jurisdiction over the subject matter,
2. A declaration of finality with respect to the outcome, and
3. A prohibition on any court proceedings to set the outcome aside.

Privative clauses present a conundrum for the traditional conception of the rule of law:

1. A legislative grant of authority is always circumscribed by the terms of the statute. The CL presumes that citizens will have access to the courts to ensure that ADMs do not exceed or abuse the power granted to them. In this way, ADMs, as government actors, can be held accountable to the courts.
2. BUT, the doctrine of parliamentary supremacy dictates that the legislature enacts the law, and the court must interpret and apply the law in accordance with legislative intent.

Privative clauses put these two principles in opposition with each other by stating that the legislature intends to oust the courts from supervising the actions of the ADM.

Historically, judges circumvented privative clauses by reasoning that the jurisdiction of ADMs is demarcated by statute, so actions that exceed jurisdiction purport to be decisions, but are in fact nullities. Therefore, actions that exceed the jurisdiction granted to an ADM do not qualify as decisions insulated by a privative clause.

If a college of surgeons purports to suspend a dentist's licence to practice dentistry, this would clearly be outside the jurisdiction of the college, and therefore, not protected by a privative clause. However, few cases present such obviously deviant administrative behaviour.

Usually, the issue will relate to:

1. The interpretation of a statutory provision,
2. Inferences from evidence that depends on a particular statutory construction, or
3. The exercise of discretion.

Judges would determine whether the issue fell "within jurisdiction", and therefore within the ambit of the privative clause, or, was a "jurisdictional question" that determined the outer boundary of the ADM's authority, and therefore reviewable. At this point, before the emergence of variable standards of review, correctness was the only standard. Either the issue was determined to be a jurisdictional question, or it was virtually inoculated from judicial oversight.

So, the effectiveness of privative clauses depended on the ease that courts could designate an issue as jurisdictional, and therefore warranting strict judicial scrutiny.

The courts used two techniques:

1. Preliminary or collateral question doctrine: If an ADM determines a preliminary question, the answer to which would determine the ADM's scope of authority.
   Bell v Ontario (HRC): Ascertaining the meaning of "self-contained dwelling" was preliminary to the question of whether the landlord had engaged in discrimination contrary to the HRA.
2. Asking the wrong question doctrine: If the ADM employs a faulty reasoning process.
   Metropolitan Life v International Union of Operating Engineers: The Board failed to deal with the question remitted to it and instead decided a question that was not.

These techniques were criticized as devised by the courts to interfere where the legislature had deliberately excluded them. With little effort, courts could transform almost any issue into a preliminary or collateral question, or depict the tribunal as asking the wrong question.

These techniques have been generally discarded, but the language of jurisdiction lives on. The jurisprudential history of privative clauses and jurisdiction remains important for two reasons:

1. The sources of judicial anxiety about jurisdiction, rooted in the rule of law, remain salient.
2. Arguably, traces of the two doctrines remain.

THE BLOCKBUSTER

CUPE v New Brunswick Liquor Corporation, 1979 SCC
Shift toward curial deference: beginning of the end of the Diceyan model for administrative law in Canada
Facts: CUPE went on strike. Under the terms of the NB Public Service Labour Relations Act, striking employees were prohibited from picketing, and employers were prohibited from using replacement workers. The Act contained a privative clause. Both the employer and the union complained to the NB Public Service Relations Board that the other party was acting contrary to the Act. The board upheld the complaints of both parties.
Issue: How should the Act be interpreted? The employer argued that management personnel were not employees as defined in the Act, so their use to replace striking employees did not constitute a breach. The union argued that the Act precluded the temporary replacement of striking employees with management personnel.
SCC (Dickson): The interpretation of the Act was at the heart of the specialized jurisdiction conferred upon the board. Therefore, the court should only interfere (by labeling as jurisdictional error) with an interpretation that is so patently unreasonable that its construction cannot be rationally supported by the relevant legislation. The provision was capable of supporting multiple plausible interpretations, and as such, the interpretation of the board should be given deference.

- The presence of a privative clause indicates legislative intent to empower an ADM to decide certain matters (in this case, labour relations issues).
- ADMs are not merely "inferior tribunals", but specialized bodies that possess a legislative mandate to apply their expertise and experience to matters that they may be better suited to address than an ordinary court.
- The question of what is and what is not jurisdictional is often very difficult to determine. The courts should not classify matters as jurisdictional, and therefore subject to broader curial review, that are doubtfully so.
- Deference is required in the proper circumstances, considering the relative expertise of the ADM and the legislative intention in creating the ADM. In cases of statutory ambiguity, where there are multiple interpretations that are reasonable, a reviewing court should defer to the interpretation of the expert tribunal.
- If ADMs are acting within their jurisdiction, the standard of review is patent unreasonableness: Short of a patently unreasonable interpretation of a statutory provision, courts should not interfere with the result reached by an ADM.
- If ADMs are not acting with their jurisdiction, the standard of review is correctness.

Note: This decision was a major shift in the approach to judicial review, by i) reconfiguring the application of the doctrine of jurisdictional error, and ii) recognizing that ADMs may possess expertise and a statutory mandate that make them better suited to the interpretive task than the generalist judge.

THE SEQUELS

UES, Local 298 v Bibeault, 1988 SCC
Pragmatic and functional analysis

Issue: What is the test for determining what constitutes a jurisdictional question, subject to correctness review, and questions that are within an ADM's jurisdiction, subject to patent unreasonableness review?
SCC (Beetz): A pragmatic and functional analysis should be undertaken to distinguish between jurisdictional questions from questions that are within an ADM's jurisdiction, to allow the court to determine the appropriate standard of review. The central issue is not whether the question is preliminary or collateral, but whether the legislature intended the question to be within the jurisdiction conferred on the tribunal.

- A pragmatic and functional analysis should be engaged to determine the appropriate classification of the impugned decision and the corresponding standard of review. The analysis focuses on whether the legislature intended the question to be within the jurisdiction conferred upon the ADM, and requires an examination of:
    - The wording of the legislation conferring jurisdiction on the ADM (including the presence or absence of a privative clause).
    - The nature of the problem before the ADM.
    - The purpose of the statute creating the ADM (the reasons for the ADM's existence).
    - The expertise of the ADM.

Note: By framing the question in terms of legislative intent, Beetz retains a formal commitment to parliamentary supremacy and rejects a contextual statutory interpretation.
Note: Identifying the ADM's expertise as a relevant factor is consistent with CUPE's call for judicial humility and an attitude of curial deference, where warranted. However, the SCC quickly concludes that the impugned decision was a jurisdictional question, arguably disregarding Dickson's warning from CUPE against labeling issues as jurisdictional in order to subject them to the more stringent correctness review.

IS JUDICIAL REVIEW CONSTITUTIONALLY PROTECTED?

A central CL principle of statutory interpretation is that it should express the intent of the legislature. If the judiciary accepts the doctrine of parliamentary supremacy, a given interpretation is defensible to the extent that the legislature is free to amend the statutory provision if judicial interpretation does not accurately capture the intended meaning. So, in theory, the legislature could revise and refine a privative clause to better effectuate the ousting of the courts. However, several years after CUPE, in Crevier, the SCC obviated the possibility of entirely insulating ADMs from judicial review.

Crevier v AG (Quebec) et al, 1981 SCC
Judicial review of jurisdictional questions is constitutionally protected, and cannot be precluded by a privative clause

- Confiding final and unreviewable authority to an ADM violates s 96 of the CA, 1967, by precluding federally appointed, s 96 judges of a quintessential judicial function.
- Therefore, privative clauses cannot preclude judicial review for jurisdictional questions.

Pasienchyk v Saskatchewan (WCB), 1997 SCC
ADMs are not free to determine which matters are jurisdictional and which come within the board's jurisdiction

- LDB: Since, as a matter of constitutional law, a legislature may not, however clearly it expresses itself, protect an ADM from judicial review of jurisdictional matters, it also cannot be left to decide freely which matters are jurisdictional and which come within the board's exclusive jurisdiction.

BEYOND PRIVATIVE CLAUSES

Canada (Director of Investigation and Research) v Southam, 1997 SCC
The addition of reasonableness simpliciter as a middle ground between correctness and patent unreasonableness
Facts: Southam acquired a number of small newspapers. The Competition Tribunal held that Southam's acquisitions within a given advertising market substantially lessened competition, contrary to the *Competition Act*. As a remedy, the tribunal ordered Southam to divest its interest in one of two newspapers. The Act provided for a right of appeal. Southam appealed the decision.
Issue: What is the appropriate standard of review?
SCC (Iacobucci): Some considerations warranted deference (question of mixed fact and law, purpose of the *Act* is broadly economic and therefore better served by the exercise of economic judgment, the application of competition law a matter within the tribunal's expertise), while others suggested a more stringent form of review (statutory right of appeal, presence of judges on the tribunal). The appropriate standard of review falls between the existing standards of correctness and patent unreasonableness. As the tribunal's expertise, which is the most important consideration, suggests deference, a review more deferential than exacting is warranted.

- Reasonableness simpliciter: An unreasonable decision is one that is not supported by any reasons that can stand up to a somewhat probing examination, or in other words, if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. This determination requires an inquiry into the evidentiary foundation or the logical process on which the conclusion is based.
- Factors suggesting deference:
    - The presence of a privative clause. Indicative of legislative intent to confer final decision-making authority upon the ADM.
    - Questions of mixed fact and law based on the balancing of interests. Courts should be reluctant to reexamine the evidence.
    - An interpretation of the purpose of the relevant legislation that is more policy-based, and therefore well suited to the ADM.
    - Field-specific expertise of the ADM (most important factor). Courts may be required to defer to the skill and judgment of ADM's where warranted.
- Factors suggesting more exacting review:

- The existence of a statutory right of appeal from decisions of the ADM. Indicative of legislative intent not to confer final decision-making authority upon the ADM.
- The presence of judges in an ADM. Suggests a decision that is more adjudicative in nature.

❖ The presence or absence of a privative clause is not necessarily determinative of the standard of review. Note: The courts accepted that a privative clause amounted to a statutory direction from the legislature to defer to the ADM's expertise, but the courts also claimed the authority to identify and demarcate the scope of that expertise.

PRAGMATIVE AND FUNCTIONAL REDUX

Pushpanathan v Canada (Minister of Citizenship and Immigration), 1998 SCC

Factors to consider in determining the appropriate standard of review (reformulation of pragmatic and functional analysis)

Facts: A provision in the *Immigration* Act excludes persons "guilty of acts contrary to the purposes and principles of the United Nations" from refugee status. Pushpanathan had made a refugee claim. Before his claim was heard, he was convicted of conspiracy to traffic in a narcotic, and was subsequently excluded from refugee protection based on the conviction. At issue was whether "acts contrary…" included a conviction for drug trafficking in the country of asylum. The *Act* (like in Baker) did not contain a privative clause or a right of appeal. Judicial review could only commence with leave of a judge of the FC, and no reasons were required if leave was denied. If leave was granted and the case heard, the losing party could only appeal to the FCA if the TJ certified a "serious question of serious importance".

SCC (Bastarache): The pragmatic and function inquiry from Bibeault should be reformulated to ask whether the legislature intended the question to attract judicial deference, with consideration to be given to four elements.

❖ To determine the appropriate standard of review, the relevant inquiry is whether the legislature intended the question to attract judicial deference, considering:
- The presence or absence of a privative clause.
- The ADM's relative expertise (most important factor). Three steps in evaluating expertise:
  - Characterize the expertise of the ADM.
  - Consider its own expertise relative to that of the ADM.
  - Identify the nature of the issue before the ADM relative to this expertise.
- The purpose of the act as a whole, and of the provision in particular.
- The nature of the problem (question of law, fact, mixed fact and law).

Note: A year after Pushpanathan, Baker expanded the reach of the standard of review inquiry to include judicial review of discretion, as well as questions of fact, law, and mixed fact and law.

PRIVATIVE CLAUSES

Pushpanathan furthered the detachment of the rationale of deference from privative clauses.

Although under the pragmatic and functional test, the presence of a privative clause weighed in favour of deference, it was never determinative, because the designation of a matter as a jurisdiction question (correctness) or a question within jurisdiction (patent unreasonableness) was still subject to the outcome of the court's assessment of expertise as per the other three factors.

The courts accepted that a privative clause amounted to a statutory direction from the legislature to defer to the ADM's expertise, but the courts also claimed the authority to identify and demarcate the scope of that expertise.

Lack of expertise could outweigh a privative clause, but a privative clause could not outweigh a lack of expertise.

EXPERTISE

Pushpanathan: Where the ADM possesses broad relative expertise that it brings to bear in some degree on the interpretation of highly general questions, the court would show considerable deference, despite the generality of the issue:

1. **Southam** (Iacobucci): The objectives of the *Competition Act* were more economic, and therefore policy-based, than legal. Business people and economists possess greater expertise than a typical judge who is more likely to have difficulty understanding the economic and commercial ramifications of the ADM's decisions and therefore less able to fulfill the purpose of the *Act* than the ADM.
2. **Corn Growers** (LHD): Labour relations, telecommunications, financial markets, and international economic relations are examples where courts may not be as well equipped as ADMs to deal with issues that the legislature has chosen to regulate through bodies exercising delegated power.

Labour boards, often protected by privative clauses, are in some ways the paradigmatic example of expert ADMs. However, labour boards tend not to benefit as consistently from the principle of deference than some other bodies:

1. Labour arbitrators are considered less expert than labour boards, because arbitrators are usually appointed on an ad hoc basis, and
2. The arbitrator's task is confined to the interpretation and application of a particular collective agreement, rather than the administration of an entire regime.

The ad hoc nature of the appointment usually also counts against the expertise of HR tribunals. Further, the court avoids deferring to HR tribunals because both are charged with similar tasks, but rights adjudication lies at the heart of judicial function. The courts accordingly find it difficult to concede anything but a narrow compass of relative expertise.

Chamberlain v Surrey School District No 36 (McLachlin): Because the decision in question had a HR rights dimension, in which courts are more expert than ADMs, less deference is owed.
However, Gonthier, in dissent, commented that courts should be reluctant to assume that they possess greater expertise than ADMs with respect to all questions having a HR component, especially in the context of a local democracy.
And LeBel, also in dissent, challenged the premise that expertise should be the basis for deference toward elected officials in their legislative, rather than adjudicative, capacity. Elected officials merit deference because they represent the will of the majority, not because of any expertise they may possess.

Note: In **Baker**, the court found that the fact that the formal decision-maker was the Minister was a factor militating in favour of deference. But, the basis of deference is unclear, given that a delegate made the actual decision.

Note: Although the SCC prioritized expertise in formulating the standard of review, its inquiry is limited to the statutory role of the administrative actor, rather than the particular individual occupying it. Courts will look to evidence of expertise from relevant statutes and surrounding context, but will not look to the qualifications, competence, training, or experience of a particular decision-maker. Therefore, while standard of review examines formal indicators of expertise, it does not address actual competence.

PURPOSE OF THE STATUTE AS A WHOLE AND THE PROVISION IN PARTICULAR

Pushpanathan:

1. Where the statute or provision can be described as polycentric, and therefore engages a balancing of multiple interests, constituencies, and factors, contains a significant policy element, or articulates legal standards in vague or open-ended language, more judicial deference is owed. Rationale: Judges have less relative expertise.
2. Disputes that more closely resemble the bipolar model of opposition between discrete parties and interests attract less deference. Rationale: Judges have more relative expertise.

Note: Discretionary decisions (such as the H+C decision in **Baker**) may directly affect only a single individual or identifiable group, while conventional polycentric provisions will give rise to more diffuse benefits and burdens. Courts have also identified provisions that confer positive discretion (a beneficial exemption from a rule) as attracting more deference.

THE NATURE OF THE PROBLEM

Questions of law = Less deference, more relative expertise.

Questions of mixed fact and law = Neutral, neutral.

Questions of fact = More deference, less relative expertise.

Determining the nature of the problem may not be straightforward, and is complicated by the fact that characterizing an issue as a question of law does not necessarily preclude the possibility that the ADM may possess greater relative expertise in interpreting the relevant statute, especially if the court otherwise regards the ADM as highly expert, and the question relates to an interpretation of a provision in the ADM's enabling statute.

To assist in distinguishing legal questions that would be better resolved by an ADM over the courts, judges have looked to the extent to which the determination will have precedential value in subsequent cases. The greater the precedential impact, the greater the assessment tilts toward the courts as the holder of greater relative expertise.

Examples where the court has concluded that the legal issue was one in which it held itself to have superior expertise:

1. A pure question of law: Barrie Utilities.
2. A concept derived from the CL: Mossop.
3. A issue that is not scientific or technical: Mattel.
4. A HR issue: Pushpanathan.

In **Pushpanathan**, the SCC relied on the unique provision in the *Immigration Act* whereby a FC judge must certify a "serious question of general importance" in order for the parties to proceed to the FCA. This statutory requirement allowed the court to assert that the provision would be incoherent if the standard of review was anything but correctness, because the use of the words "a serious question of *general* importance" were seen as determinative of legislative intention as to the standard of review.

In **Baker**, one year later, the court reiterated that the same provision inclined away from deference, but that fact was only one of the factors involved in determining the standard of review. The fact that the decision was discretionary seemed to exert the most significant influence in favour of deference, and the court determined the appropriate standard to be reasonableness simpliciter.

AND THEN THERE WERE TWO

Dunsmuir v New Brunswick, 2008 SCC

Deference, and the application of the reasonableness standard, will generally apply, unless the question falls into a category to which the correctness standard continues to apply
Return to a two standard system of review: correctness and reasonableness
From a pragmatic and functional approach to a standard of review analysis
Facts: Dunsmuir was a non-unionized lawyer employed by the DOJ under the *Civil Service Act* (CSA), and appointed at pleasure. The DOJ was dissatisfied with Dunsmuir's performance and terminated his employment with four months of pay in lieu of notice. The DOJ did not allege cause for termination. Under the CSA, terminations were governed by the ordinary rules of contract.
Dunsmuir filed a grievance, arguing that he was owed a duty of fairness that had been breached: he had not been notified of performance concerns, and consequently not given him an opportunity to respond to them, he had been terminated without notice, and that the notice period was insufficient. The DOJ dismissed his grievance, so Dunsmuir appealed to have the matter adjudicated under the *Public Service Labour Relations Act* (PSLRA).
As a preliminary matter, the adjudicator interpreted the relevant statutory provisions in a manner that entitled him to determine the "real reasons" for termination, and if termination was for cause, to substitute another penalty for the discharge. This substitution was a remedy to which unionized employees were entitled under the PSLRA.
The adjudicator determined that although the DOJ had not terminated Dunsmuir for cause, it had breached its obligation of procedural fairness. The adjudicator ordered Dunsmuir's reinstatement, or in the alternative, an extension of the notice period. NB sought judicial review of the adjudicator's award to the CQB.
Applying the pragmatic and functional approach, the CQB characterized the preliminary matter as a question of statutory interpretation, subject to correctness review. The adjudicator had incorrectly concluded that the PSRA authorized him to inquire into the reasons for dismissal. The CQB held that the reinstatement order was unreasonable, but upheld the alternative award extending the notice period. Dunsmuir appealed to the CA.
The CA dismissed the appeal. Applying the pragmatic and functional approach, the appropriate standard of review was reasonableness simpliciter, given the full privative clause in the PSLRA and the labour adjudicator's relative expertise in the employment context. The adjudicator's interpretation of the PSLRA on the preliminary matter was unreasonable, and the DOJ's election to dismiss Dunsmuir without notice precluded the substitution of a lesser penalty. Dunsmuir appealed to the SCC.
Issue: What should be the standard of review for the question of law concerning the adjudicator's authority to inquire into the reasons for dismissal?
SCC (Lebel and Bastarache): The framework for substantive review is in need of reform. The existence of two deferential standards is problematic because i) there is no meaningful way to distinguish between an unreasonable and a patently unreasonable decision, and ii) upholding an unreasonable decision because its irrationality is not obvious enough seems inconsistent with the rule of law. **The two deferential standards of review (reasonableness simpliciter and patent unreasonableness) should be merged into one reasonableness standard.**
Held: In the case at bar, the standard of reasonableness should apply: there is a full privative clause, and the adjudicator possessed relative expertise in administering a specialized labour regime that provided for timely and binding settlement of disputes. Although a question of law was engaged, it was not one of central important to the legal system.
SCC (Binnie, concurring): The majority decision does not resolve how a single, invariant standard of deference/reasonableness will manage the diverse range of actors, issues, statutory provisions, and expertise that the pragmatic and functional approach previously identified and calibrated according to two standards of deference.
By streamlining the standard of review analysis and reducing deference to a single standard, the court has not resolved the challenge of operationalizing deference in the multitude of contexts in which it may be warranted.
Rather, the new approach simply transfers the task from the selection of the appropriate level of deference (reasonableness simpliciter or patent unreasonableness) to the next stage of judicial review: the application of correctness or reasonableness review to actual decision.
The new reasonableness standard will inevitably devolve into a spectrum of deference that will vary according to factors previously identified in the pragmatic and functional approach.
The existence of a privative clause is not necessarily determinative, but it is more than one factor to be considered equally among others. The existence of a privative clause should presumptively foreclose judicial review on the basis of outcome on substantive grounds, unless the applicant can show that the clause permits it or there is a legal reason why it cannot be given effect. **The existence of a privative clause is a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review, by signaling the level of deference that must be shown.**

- Reasonableness review: A court conducting a review for reasonableness inquiries into the *qualities that make a decision reasonable*, referring both to the *process* of articulating the reasons and to *outcomes*.
    - In terms of *process*, reasonableness is concerned mostly with the existence of *justification*, *transparency*, and *intelligibility* within the decision-making process.
    - In terms of *outcome*, reasonableness is concerned with whether the decision falls within a *range* of possible, acceptable outcomes that are *defensible*, in respect of the facts and the law.
- The two deferential standards of reasonableness simpliciter and patent unreasonableness are now combined into one reasonableness standard.

- The appropriate standard of review should be determined by using a two step framework:
    1. The court must first determine whether past jurisprudence has already determined the degree of deference to be accorded with regard to a particular category of question. If so, the inquiry is complete. If not, the court must proceed to the next stage of inquiry.
    2. The court must perform a contextual standard of review analysis articulated around relevant factors, including those identified by the pragmatic and functional approach, with the help of the following guidelines.

       Deference, and therefore reasonableness review, *must* apply to:
        - Legal and factual issues that are intertwined and cannot be easily separated.

       Deference, and therefore reasonableness review, *usually* or *may* apply to:
        - Questions of fact, discretion, or policy.
        - Where an ADM is interpreting its home statute or statutes closely related to its function, with which it has particular familiarity.
        - Where an ADM has developed particular expertise in the application of a general CL rule in relation to a specific statutory context.
        - Where there is a privative clause, as it is a statutory legislative direction indicating the need for deference.

       Correctness review *must* apply to:
        - Constitutional questions, as they are necessarily subject to correctness review.
        - The determination of "true questions of jurisdiction", which arise where a tribunal must "explicitly determine whether its statutory grant of power gives it authority to decide a particular matter.
        - Questions of general law both of central importance to the legal system as a whole and outside the ADM's specialized area of expertise.
        - Questions regarding the jurisdictional lines between two or more competing specialized ADMs.
- In the context of applying the reasonableness standard, deference requires courts to give due consideration to the determinations of ADMs. A policy of deference recognizes that ADMs may have a considerable degree of expertise with regard to the various nuances of field-specific considerations.
- Deference requires respect for the legislative choices to leave some matters to ADMs, for the determinations that draw on particular expertise, and for the different roles of the courts and ADM within the Cdn constitutional system.
- A standard of correctness will continue to apply to questions of procedural fairness. The only metric is whether the proceedings were conducted fairly. Note: Remember, ML calls this akin to correctness, because of the way that there is some deference accorded within the analysis of the specific content of the duty of fairness.
- Rather than becoming preoccupied on selecting the appropriate standard of review, the courts should focus on the core work of substantive review, by applying the standard to answer the question of whether the challenged decision should stand or fall, as a matter of law.

Note: The standard of review analysis appears to resemble a defeasible rule: Deference, and therefore reasonableness review, will apply, unless one of the exceptions requiring correctness review applies.

PRIVATIVE CLAUSES

Up to and including **CUPE**: The privative clause operated as the legislative signal for deference.

Under the pragmatic and functional approach, as seen in **Southam** and **Pushpanathan**: The existence of a privative clause was demoted to one factor among many that a reviewing court would consider in determining the appropriate standard.

In **Dunsmuir**: The default position is deference, unless one of the exceptions applies, and a privative clause will not trump any of the exceptions. **Note**: Recall Binnie's concurring judgment, where he outlined the special role that should be assigned to a privative clause in calibrating the precise level of deference afforded.

In **Khosa**: The majority did not resolve the question of whether unique weight should be assigned to a privative clause. The decision also created uncertainty as to the weight that a statutory right of appeal would exert against the weight of a privative clause. **Note**: Rothstein, concurring, asserted that unless there is a privative clause, or a provision stipulating deference in relation to a particular ground of judicial review (as in errors of fact under the *Federal Courts Act*), the default standard should be correctness.

JURISDICTION

Historically, the courts used the "jurisdictional question" as a method of circumventing privative clauses. Decisions of ADMs that exceeded their jurisdictional boundaries conferred by statue were considered nullities, and therefore, not legitimate decisions that would be insulated by judicial review through the use of privative clauses.

After **Southam**, courts could justify the application of deference in the absence of a privative clause, and justify the application of the correctness standard in the presence of a privative clause.

In **Pushpanathan**, the "jurisdictional question" became merely a label affixed to the outcome reached by a judicial balancing of the four factors of the reformulated pragmatic and functional approach.

Dunsmuir revived the formal idea of jurisdiction as a concept of boundary demarcation that could rebut the presumption of deference. However, the majority also endorsed the principle from CUPE that the courts should exercise restraint in labeling an issue as jurisdictional and therefore subject to the stricter standard of correctness. Note: The court could have easily transformed the question "Does the statute authorize the adjudicator to inquire into the existence of cause for dismissal?" into "Does the adjudicator have jurisdiction to inquire into the existence of cause for dismissal?" yet refrained from doing so. The fact that the adjudicator had jurisdiction over the parties and the subject matter sufficed.

Northrop Grumman v Canada (AG), 2009 SCC
Facts: Northrop, a US supplier, submitted a bid in response to a Canadian request for proposals. When another bidder was awarded the contract, Northrop filed a complaint with the Canadian International Trade Tribunal (CITT), alleging that the bids had not been properly evaluated. CITT agreed to hear the complaint, and Northrop's standing to file the complaint was challenged on the grounds that Northrop was not a "Canadian supplier". The CITT decided that Northrop, as a US supplier, had standing to make a complaint. On judicial review, the FCA quashed the ruling, holding that the CITT's jurisdiction under the *Agreement on Internal Trade* (AIT) was limited to complaints brought by Canadian suppliers.
Issue: What standard of review should be applied?
SCC (Rothstein, for the majority): The court applied **Dunsmuir**: An exhaustive standard of review analysis is not required in every case if the relevant standard of review jurisprudence has already determined, in a satisfactory manner, the degree of deference to be accorded with regard to a particular category of question. In this case, it was not necessary to go beyond the initial step in the Dunsmuir analysis, as the case law had established that a CITT decision on whether something was within its jurisdiction is subject to review on a correctness standard.
Held: The issue on the appeal was jurisdictional in that it went to whether the CITT could hear a complaint initiated by a non-Canadian supplier under the AIT, and accordingly, the standard of review is correctness. Non-Canadian suppliers do not have standing before the CITT to bring complaints under the AIT. The appeal should be dismissed.

PATENT UNREASONABLENESS

At some point after **Southam**, some statutes were enacted that directed the court on the legislature's intended standard of review by explicitly stating whether a reviewing court should apply correctness, reasonableness simpliciter, or patent unreasonableness.

The **BC Administrative Tribunals Act (ATA)** itemizes grounds of judicial review applicable to the tribunals subject to the ATA and matches each ground with a standard of review. In the case of judicial review of the exercise of discretion, the ATA also lists factors relevant to determining whether discretion was exercised in a patently unreasonable way.

Dunsmuir did away with the two deferential standards of reasonableness simpliciter and patent unreasonableness, subsuming them into one unified standard of reasonableness. This left unresolved the question of how statues incorporating patent unreasonableness should be interpreted.

In **Khosa**, Binnie (although obiter) stated that the ATA could only be sensibly interpreted in the CL context. Despite Dunsmuir, patent unreasonableness would live on in BC, but the content of the expression, and the degree of deference it commanded, would continue to be calibrated according to general principles of administrative law. However, the legislature is directing courts to afford a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.

Jensen v Workers' Compensation Appeal Tribunal, 2010 BCSC
Facts: Jensen sought judicial review of a decision of the Workers' Compensation Appeal Tribunal (WCAT), which upheld a compensation decision of the WCB, affirmed by the Review Division, concluding that Jensen's work injury did not cause or aggravate his arthritis, and therefore, that the arthritis was not compensable. Jensen argued that the decision of the WCAT was patently unreasonable.
Issue: What is the content of the patent unreasonable standard, within the context of the ATA?
BCSC: Under s 58(1) of the ATA, if the tribunal has a privative clause, it is considered to be an expert tribunal in relation to all matters within its exclusive jurisdiction. Under s 58(2) of the ATA, matters involving a finding of fact or law over which the tribunal has exclusive jurisdiction under a privative clause must not be interfered with unless patently unreasonable. In the case at bar, questions of entitlement to compensation are within the WCAT's exclusive jurisdiction, and the standard of review is therefore patent unreasonableness.

- In BC, the CL approach to determining the standard of review has been supplanted by the ATA, with respect to ADMs that are subject to it.
- Despite Dunsmuir, patent unreasonableness lives on in BC with respect to the provincial administrative tribunals to which the ATA applies.
- Where a tribunal falls under the ATA, a reviewing court must apply the standard of review as set out therein.
- The ATA does not define patent unreasonableness outside the context of s 58(3), which applies only to discretionary decisions. Therefore, the content of the standard for questions of mixed fact and law is determined by reference to the CL: The patent unreasonableness standard is to be defined by the CL as it existed pre-Dunsmuir. However, it is not frozen as such, and will continue to be calibrated according to general principles of administrative law.
- Principles informing the standard of patent unreasonableness:
    - Defined by CL immediately prior to Dunsmuir
    - Continues to be calibrated according to general principles of administrative law (Khosa)
    - Decisions that do not accord with reason or are clearly irrational
    - Privative clauses require the highest level of deference
    - Courts are not to reweigh the evidence, second guess conclusions, substitute different findings of fact, or conclude that the evidence is insufficient to support the result

- The review should be applied to the result, not to the reasons leading to the result
- Decisions should only be set aside where the ADM commits a jurisdictional error
- Decisions based on no evidence are patently unreasonable, but decisions based on insufficient evidence are not
- A high degree of deference is required regarding the reasons offered or that could be offered in support of the impugned decision

Note: Remember that this is only for matters that are not delineated in the ATA.
Note: S 58(3) defines a patently unreasonable discretionary decision.

QUESTIONS OF CENTRAL IMPORTANCE TO THE LEGAL SYSTEM AND OUTSIDE DECISION-MAKER'S AREA OF EXPERTISE

The standard of review approach in Dunsmuir does not place expertise in the foreground as a discrete focus of the evaluation, unlike earlier jurisprudence. However, this an be understood by viewing the tilt toward deference as the default position presupposes the expertise of ADMs in interpreting and applying their home statutes, absent some indication to the contrary. In a way, **Dunsmuir** deems ADMs as experts in applying their constitutive statutes, unless one of the exceptions applies.

Questions of jurisdiction and constitutionality might be understood as illustrations of matters that lie outside the expertise of ADMs. 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 ADM".

Dunsmuir was also concerned about precedent. Because of their impact on the justice system, such questions require uniform and consistent answers.

Note that Binnie, in his concurring judgment in **Dunsmuir**, expressed concern that the exceptional justification for intensified judicial scrutiny for such questions would create unnecessary and distracting debate in the lower courts. However, so far, few cases in which the parties disputed whether a legal question fit within the exemption have made their way to the SCC.

In **Domtar**, the SCC ruled that inconsistent interpretations of a statutory provision do not supply an independent ground for stricter judicial scrutiny where the standard would otherwise be deferential.

But note the comments of Feldman, adopted by the FCA in **Abdoulrab v ON (Labour Relations Board)**: In order to accord with the rule of law, a public statute that applies equally to all affected citizens should have a universally accepted interpretation (and therefore, point to the need for the application of a correctness standard).

SPINOFFS

THE CHARTER, DISCRETION, AND THE STANDARD OF REVIEW

Segmentation arises whenever one ground for review attracts a different standard of review than another.

In **Suresh**, the intersection of discretion and the Charter illustrated some of the complexities of segmentation.
Facts: A provision of the Immigration Act (IA) grants the minister discretion to deport a non-citizen who is deemed to be a threat to national security. The s 7 constitutional issue was whether the minister could exercise this discretion where that person faced a substantial risk of torture. A deportation decision in this context consisted of various sub-questions:

1. What is the meaning of national security?
2. Is the non-citizen a threat to national security?
3. What does torture mean?
4. Does the non-citizen face a substantial risk of torture?
5. Does deportation of the non-citizen to torture violate s 7?

The SCC stated that questions 2 and 4 attracted deference, while question 5 is explicitly subject to correctness.
If the court had said "yes" to question 5 (that deportation to torture violated s 7), then the following determinations could have proceeded sequentially and discretely from one another. If the answer to question 4 was "yes" (that the non-citizen faced a substantial risk of torture), deportation would violate s 7, and if the answer to question 4 was "no" (that the non-citizen did not face a substantial risk of torture), deportation would not violate s 7. Either way, that would have determined the matter conclusively.
BUT, the courts answer to question 5 was "no, unless there are exceptional circumstances". The court constrained, but did not eliminate, the discretion to deport to torture, resulting in the *Suresh exception*.
The Suresh exception directed the minister to consider the following additional question:

6. Do the benefits to Canada's national security of deporting the non-citizen outweigh the harm of deporting the non-citizen to torture?

The SCC does not answer the question as to what standard of review would be applicable at this stage.
On the one hand, the decision not to prohibit deportation to torture means that a decision-maker, in certain circumstances, possesses the discretion to deport to torture. The exercise of balancing multiple factors usually attracts deference because of its indeterminacy, the interplay of factors, and reluctance to reweigh evidence on review.
On the other hand, each balancing exercise under the rubric of exceptional circumstances risks the most extreme violation of Charter rights, should the decision-maker be mistaken. It seems inimical to the normative and institutional foundation of the Charter to defer to a minister's own determination of whether his or her discretionary decision violates an individual's Charter rights.

In **Doré v Barreau du Quebec**, the SCC held that when Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts, which, as per Dunsmuir, should attract deference.
The courts should recognize the distinct advantage held by ADMs have in applying the Charter to a specific set of facts and in the context of their enabling legislation.
Rather than use the s 1 Oakes test with regard to the exercise of case specific discretion, a proportionality analysis is required that balances i) the severity of the interference with the Charter interest and ii) the statutory objectives. If the outcome of that balancing falls within a range of possible, acceptable outcomes, then it will merit deference.
So, if, in exercising statutory discretion, the ADM has properly balanced the relevant Charter values with the statutory objectives, the decision will be found to be reasonable.

Note: Although the SCC has repeatedly claimed to eschew the reweighing of factors in deferential review of discretion, it is difficult to conceive of a proportionality analysis that does not inquire into the appropriate weighing of the Charter right against other interests.

REASONING ABOUT REASONS

The duty to give reasons is a component of the duty of fairness. Reasons serve a number of purposes, including communicating that the ADM has genuinely heard and considered the evidence and arguments.

Lake v Canada (Minister of Justice): Providing reasons serves two purposes. First, it allows the individual to understand why the decision was made. Second, it allows the reviewing court to assess the validity of the decision.

Arguably, reasons that do not adequately communicate the basis of the decision do not meet some minimal threshold that qualifies the test as "reasons", and should fail as a matter of form.

Reasons also disclose the findings of fact, interpretations of law, applications of law to the facts, and exercises of discretion that make up the substance of the decision. Reasons contain the evidence of the reasonableness/correctness of those exercises of statutory authority. Post-**Dunsmuir**, measuring the substantive reasonableness of a decision includes assessing the justification, transparency, and intelligibility of the reasoning process.

There is a potential for overlap between:
1. Assessing the formal adequacy of reasons, as a matter of procedural fairness, where the standard of review is akin to correctness, and
2. Evaluating the substantive content of reasons as a matter of substantive review, where the default standard of review is reasonableness, unless one of the exceptions or the ATA applies, mandating a different standard of review.

This overlap created uncertainty in the lower courts, until **Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)**, where Abella, writing for the court, explicitly minimized the scope of the duty to give reasons to bare form.

Reasons and deference are strongly related.

Dunsmuir: Judicial deference to a decision is appropriate where the decision demonstrates justification, transparency, and intelligibility within the decision making process, and where the outcome falls within a range of possible, acceptable outcomes, defensible with respect to the facts and the law.

Reasons are generally understood to serve three functions:
4. They disclose expertise in the area of the home statute "using concepts and language often unique to their areas and rendering decisions that are often counterintuitive to a generalist" (NF Nurses)
5. They justify the decision using transparent, intelligible, and reasonable reasoning that all audiences can understand
6. They illustrate that the outcome is also reasonable when, as is often the case, more than one reasonable result Is possible

Reasons support the principle of deference because the reviewing court should defer to the ADM that provides legally valid reasons that support a reasonable outcome.

Newfoundland and Labrador Nurses v Newfoundland and Labrador (Treasury Board), 2011 SCC
The absence of reasons is a matter of procedural fairness; the adequacy of reasons is a matter for substantive review
Abella: Alleged deficiencies or flaws in the reasons do not constitute a breach of the duty of PF; their adequacy is not subject to correctness review.
- A breach of the duty of PF is an error in law. If reasons are required, and reasons are not provided, there has been such a breach. BUT, if reasons are provided, there is no such breach, and any challenge to the reasoning or the result of the decision should be made within the reasonableness analysis.
- **Even if the reasons do not seem adequate to support the decision, the court must first seek to "supplement them before it seeks to subvert them", and therefore improve on the reasons given.**
- Inadequate reasons are not analyzed under PF, but rather, reasonableness review.

- Framework for determining the adequacy of reasons: If an ADM must give reasons, the reasons should justify the decision, by showing that the ADM has considered relevant facts and law, applied legal principles and tests correctly, and is able to explain the decision in a way that the affected individual and the reviewing court can understand. Reasons must be transparent and show the basis for the reasonable outcome.
- However, reasons do not constitute a standalone basis for review. They do not have to be perfect, comprehensive, lengthy, or well written. Speed, economy, and informality may take priority given the day-to-day realities faced by ADMs.

Note: Bare reasons, without supporting information, or unsupported by principles, will be found unsatisfactory. Inconsistencies, irrelevant considerations, or the omission of relevant considerations, will be considered serious flaws. The ADM cannot simply write minimal reasons in order of for the decision to become immunized from review.

AB (Information and Privacy Commission) v AB Teachers' Association, 2011 SCC

Where there is no duty to give reasons or when only limited reasons are required, it is appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review

SCC (majority, per McLachlin): In this case, the reasonableness standard applies. The Commissioner was interpreting his own statute and the question was within his specialized expertise. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, unless the question falls into a category of question to which the correctness standard continues to apply.

The question does not fall into such a category: it is not a constitutional question, a question regarding the jurisdictional lines between competing specialized tribunals, a question of central importance to the legal system as a whole, nor a true question of jurisdiction or *vires*.

The category of true questions of jurisdiction is narrow and it may be that the time has come to reconsider whether this category exists and is necessary to identify the appropriate standard of review. The "true questions of jurisdiction" category has caused confusion to counsel and judges alike and without a clear definition or content to the category, courts will continue to be in doubt on this question.

- The category of true questions of jurisdiction is narrow and exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness.
- As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.
- The concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision: Dunsmuir.
- However, the direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a carte blanche to reformulate a tribunal's decision in a manner that ignores an unreasonable chain of analysis in favour of the court's own rationale. Moreover, this direction does not dilute the importance of giving proper reasons for an administrative decision.
- Deference under the reasonableness standard is best given effect when ADMs provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. Nonetheless, this is subject to a duty to provide reasons in the first place.
- **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.**
- In some cases, the reviewing court may not be able to adequately show deference without first providing the decision maker the opportunity to give its own reasons for the decision. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one.
- Reasons given by a tribunal in other decisions on the same issue can assist a reviewing court in determining whether a reasonable basis for an implied decision exists.

CHAPTER 10: DEFERENCE AND NON-DEFERENCE IN ACTION

INTRODUCTION

In Dunsmuir, the SCC suggested that rather than becoming preoccupied on selecting the appropriate standard of review, the courts should focus on the core work of substantive review, by applying the standard to answer the question of whether the challenged decision should stand or fall, as a matter of law.

However, the content of the analysis driving substantive review was not entirely certain, particularly where deference was warranted.

To determine the meaning and application of the standard of review, it is necessary to understand what is required of ADMs in order to satisfy the expectations of substantive legality.

Significant tensions exist in this area of law. From CUPE in 1979 to Dunsmuir in 2008, the jurisprudence has been animated by disputes wherein the **legislatively conferred authority and sector-specific relative expertise of ADMs** has come into conflict with the **constitutional responsibility of a judiciary charged with ensuring that administrative action remains within legal limits**.

There are several approaches to the interpretation of these underlying tensions:

1. **Romantic account of substantive review (dominant view).**
   Substantive review has been modeled as an expression of a constitutional project shared among the legislative, judicial, and executive/administrative branches, rather than as a matter of the courts patrolling the legal limits of administrative action.
   This constitutional project is for the purpose of public justification: ensuring that state action is grounded in law, and therefore publicly justified. (Remember that the overarching principle of the rule of law is that state action must be grounded in law.)

The romantic account of substantive review expresses a model of constitutional ordering referred to as constitutional pluralism, where all three branches participate in working out the significance of the legal norms governing the exercise of state power.
A plurality of legal sources informs this shared project of public justification: statute, the Constitution, CL, IL, soft law, and "the fundamental values of Canadian society" (from Baker).
The pluralist model of constitutional ordering insists that the public justification of administrative action must take the interests of the individuals directly affected by the state action into account.

2. **Diceyan account of substantive review (major competing approach).**
   There must be a strict separation of powers among the legislative, judicial, and executive/administrative branches in constituting the administrative state:
   i. The legislature is the proper source of the laws conferring authority on ADMs.
   ii. ADMs execute or exercise the authority so conferred.
   iii. The courts interpret the law to ensure that administrative action remains within the limits of legislative intent.

   However, these strict Diceyan dividing lines are difficult to maintain, particularly when it comes to administrative discretion. The Diceyan judge will be caught between the conflicting requirements of:
   i. Respecting parliamentary supremacy and legislative intent by ceding decision-making authority to ADMs, and
   ii. Ensuring that ADMs remain within the limits of the law.

   According to Dyzenhaus, the result is instability between two extremes of judicial conduct on review:
   i. Abdication, which seeks to express respect for parliamentary supremacy and legislative intent through non-interference with the merits of administrative decisions, and
   ii. Supremacy, which seeks to affirm the supervisory powers of the judiciary by closely hedging administrative authority within judicially ascertained legal or jurisdictional limits.
3. Skeptical account of substantive review.
   Standards of review do not resolve the irreconcilable differences between:
   i. The legislative branch, and with it, ADMs democratically mandated to advance legislative policy, and
   ii. The judicial branch, with its exclusive claim to determining the limits of law.

   The doctrine of substantive review masks a judicial discretion so wide that judges are able to deploy their final say however they like, by overturning decisions that conflict with their values or policy preferences, and upholding decisions that do not.

STATUTORY INTERPRETATION AND SUBSTANTIVE REVIEW: WORKING THEORIES

The competing approaches to statutory interpretation imply competing models of the separation of powers: conceptions of the proper work of the legislative, judicial, and executive/administrative branches. Therefore, the adoption of a certain approach may influence or determine the outcome of substantive review.

The modern principle of statutory interpretation, from Driedger's *Construction of Statutes*:
The words of an Act are to be read in their **entire context**, in their **ordinary and grammatical sense**, **harmoniously with** the **scheme of the Act**, the **object of the Act**, and **the intention of Parliament** [using a textual, contextual, and purposive analysis].

Models of statutory interpretation:

1. Romantic: normative/pragmatic model.
   - Interpretation is inherently contestable.
     - Legal meaning is frequently ambivalent and/or ambiguous.
   - Contextual, purposive, and dynamic interpretation.
     - Open inquiry into competing values or policy priorities.
     - Acknowledges that all interpretation involves discretion.
   - Multiple reasonable interpretations exist.
     - Who is best placed to decide?
     - Reasonableness review is the norm.
     - Potential for maximum deference.
   - Problems:
     - Sniff test approach
     - Assertion of plain intent
   - All branches participate in a public law culture of justification.
     - All branches should give reasons for their decisions.
   - Informed by ideas of constitutional pluralism and institutional dialogue.
2. Diceyan: formalist/intentionalist/positivist/textualist model.
   - Words have a single meaning that is stable over time.
     - Law dictates the answer qua legislative intent.
   - Strict focus on text.
     - Situate text in context.
     - Plain meaning.
     - Appearance of little judicial discretion.
   - One right answer.
     - Correctness review is the norm.

        - Little to no deference.
    - Problems:
        - Privative clauses
        - Smuggling in value-driven choices
    - Judges do not necessarily need to be transparent in the exercise of their discretionary powers or in the reasons they give.
    - Informed by ideas of judicial monopoly and strict separation of powers.
3. Skeptical: cynical model.
    - Judges make it all up.
        - Judicial review is arbitrary and indeterminate.
        - Judge's game.
            - Figure out the desired result and work backwards to justify the outcome.

THE STANDARDS OF REVIEW IN THEORY AND PRACTICE

The two rule of law imperatives placed on judges engaged in substantive review:
1. Respect administrative decisions, while
2. Supervising the substantive legality of them.

A CONTESTED CORRECTNESS

CORRECTNESS REVIEW IN THEORY

Correctness review is the standard of review most expressive of the institutional authority of the judiciary.

As per **Dunsmuir**, a correctness standard will presumptively apply in certain cases:
1. Those that raise constitutional questions
2. True questions of jurisdiction or *vires*
3. Questions about the relative jurisdictional scope of different tribunals
4. Questions of law that are of central importance to the legal system as a whole and outside the ADMs specialized area of expertise

Dunsuir v New Brunswick, 2008 SCC
- ❖ When applying the correctness standard, a reviewing court will not show deference to the ADM's reasoning process. Rather, it will undertake its own analysis, which will bring the court to decide whether it agrees with the ADM's decision. If so, the ADM's decision was correct. If not, the court will substitute its own view and provide the right answer.
- ❖ The underlying rationale of the correctness standard is to promote just decision and to avoid inconsistent and unauthorized applications of law.

Note: Three related rationales
1. Jurisdiction. Certain matters fall within an ADMs legislatively conferred scope of authority. If courts defer to ADMs on the interpretation of the scope of their authority would arguably be tantamount to allowing the executive/administrative branch to usurp the legislature. Further, superior court judges, constitutionally vested with superintendent powers and independence from the executive, are uniquely equipped to supervise ADM jurisdiction.
2. Expertise. ADMs should not command deference in matters over which they cannot claim expertise superior to that of the generalist judge. Traditionally, the interpretation of law was thought to be one of these matters. However, that Diceyan tenet has been progressively eroded acknowledgements of the capacities of ADMs to interpret law.
3. Consistency and predictability in the legal system. Judges, as legal generalists with the institutional capacity to produce binding precedents, are best placed to resolve competing interpretations of law where this is essential to the even handed administration of justice, even where there may be a range of reasonable alternative interpretations that fit within the administrative scheme.

Dunsmuir reduced the reach of correctness review by:
1. Narrowing the scope of the broad category of questions of "general" law that previously attracted this standard, and
2. Indicating that a narrow approach should be taken to the category of jurisdictional questions.

Dunsmuir also indicated that there is no need to modify what it means to apply the correctness standard from what has held the field since CUPE. However, the meaning of a "correct decision" and the method by which this is evaluated has been contentious.

Law Society of New Brunswick v Ryan, 2003 SCC
- ❖ Where a correctness standard is warranted, the court may undertake its own reasoning process to arrive at the result it judges correct.
- ❖ Note: Implies that the court is not required to put any effort into assessing the ADM's reasons or casting those reasons in their best light. This is in contrast to a key feature of deferential review, which is that judges must make an effort to consider the ADM's reasoning on its own terms.

CORRECTNESS REVIEW IN PRACTICE

Canada (AG) v Mossop, 1993 SCC

A majority of the SCC overturned a decision of the Canadian Human Rights Tribunal (CHRT) on the basis that the prohibited ground of "family status" could not be interpreted to extend protection to a same-sex couple. The majority, as well as two judges dissenting on the result, adopted a correctness standard of review. LHD wrote a dissenting judgment adopting a patent unreasonableness standard.

Lamer, Sopinka, and Iacobucci (majority, Diceyan/positivist approach to statutory interpretation): The court is bound by context indicating that "family status" was not intended to encompass same-sex relationships. Sexual orientation was not included in the statute's prohibited grounds of discrimination, contrary to a recommendation by the Canadian Human Rights Commission. The failure of Parliament to act on the recommendation amounted to a refusal to do so. The legislative intent is clear, so the Charter cannot be used as an interpretive aid.

- ❖ Absent a constitutional challenge, when legislative intent is clear, courts and ADMs are not empowered to do anything but apply the law. If ambiguity exists, the courts should seek out the purpose of the legislation, using the usual rules of statutory interpretation. If more than one reasonable interpretation is consistent with that purpose, the one that is most in conformity with the Charter should prevail.
- ❖ Deference should not be shown by courts to human rights tribunals with respect to "general questions of law".

La Forest and Iacobucci (concurring, Diceyan/positivist approach to statutory interpretation): The ordinary rules of statutory interpretation require the words used in the statute to be given their usual and ordinary sense, having regard to their context, and to the purpose of the statute. The dominant, and therefore ordinary sense of the word "family", or that which represents the consensus of the Canadian public, is "the traditional family". This is the meaning that must be understood to have been Parliament's intent.

Note: La Forest does not emphasize the clear purpose of the *Canadian Human Rights Act*: eradicating discrimination, and instead focuses on his view of the "ordinary" meaning of "family".

LHD (dissenting, normative approach to statutory interpretation): Even if Parliament intended a specific idea of the scope of "family status", in the absence of a definition in the Act that embodies this scope, concepts of equality and liberty that appear in human rights documents are not bound by the precise understanding of those who drafted them. Human rights codes embody fundamental principles that permit the understanding and application of those principles to change over time, leaving ample scope for interpretation.

The patent unreasonableness standard should be applied. The ADM has a legitimate role in identifying and prioritizing fundamental values. Careful attention should be paid to the reasons of the ADM.

- ❖ The interpretation of human rights statutes must be informed by fundamental principles of human rights, which may be curtailed only by the most explicit expressions of legislative intent.

Note: Under this model, statutes are understood as requiring interpretation in light of the animating principles and values of the wider social and legal tradition, rather than as closed systems.

Since **Mossop**, and the introduction of the unified standard of reasonableness from Dunsmuir, the SCC has shown an increased willingness to accept that deference to HR tribunals on matters involving the interpretation of HR statutes may be warranted in certain circumstances, such as where the matter is "fact-intensive" (**Pushpanathan**, para 45).

This is further supported by **Doré**, which held that the exercise of adjudicative discretion involving the balancing of Charter values with other legal values should generally attract deference.

In **Pushpanathan**, the SCC applied a correctness standard of review to a decision of a division of the Immigration and Refugee Board involving the interpretation of a provision in the *Immigration Act*. The central matter in dispute was held to be the interpretation of a "general legal principle", and the board was found not to have the requisite experience or expertise. The selection and application of correctness review was predicated on the idea that judges hold a unique institutional capacity to adjudicate general legal principles of broad importance, particularly those affecting human rights, more than on the idea that the question would give rise to one correct answer.

Northrop Grumman v Canada (AG), 2009 SCC

Facts: Northrop, a US supplier, submitted a bid in response to a Canadian request for proposals. When another bidder was awarded the contract, Northrop filed a complaint with the Canadian International Trade Tribunal (CITT), alleging that the bids had not been properly evaluated. CITT agreed to hear the complaint, and Northrop's standing to file the complaint was challenged on the grounds that Northrop was not a "Canadian supplier". The CITT decided that Northrop, as a US supplier, had standing to make a complaint. On judicial review, the FCA quashed the ruling, holding that the CITT's jurisdiction under the *Agreement on Internal Trade* (AIT) was limited to complaints brought by Canadian suppliers.

Issue: How should correctness review be applied?

SCC (Rothstein, for the majority): The court applied **Dunsmuir** to determine the standard of review: An exhaustive standard of review analysis is not required in every case if the relevant standard of review jurisprudence has already determined, in a satisfactory manner, the degree of deference to be accorded with regard to a particular category of question. In this case, it was not necessary to go beyond the initial step in the Dunsmuir analysis, as the case law had established that a CITT decision on whether something was within its jurisdiction is subject to review on a correctness standard.

A close analysis of the provisions of the AIT and the associated statutes supported the court's conclusion that the ADM's decision should be quashed. **The court found that legislative intent was clear and unambiguous.**

The court found that Article 502(1) of the AIT, which states that the AIT applies to procurement contracts within Canada, specifically contemplates contracts between gov parties and suppliers with a base of operations in Canada. This interpretation was sensitive to an express purposes clause, describing the section in question as seeking to "establish a framework that will ensure equal access to procurement for all Canadian suppliers."

The consequences for Canada's international trading relationships if foreign corporations were to gain rights under the AIT were also taken into account.

Held: The issue on the appeal was jurisdictional in that it went to whether the CITT could hear a complaint initiated by a non-Canadian supplier under the AIT, and accordingly, the standard of review is correctness. Non-Canadian suppliers do not have standing before the CITT to bring complaints under the AIT. The appeal should be dismissed.

The way that correctness review has been applied has illustrated the tensions between:

1. A positivist approach to statutory interpretation, which looks to the text (sometimes text and context) as a closed system indicative of a determinate legislative intent, and
2. A normative approach to statutory interpretation, which views problems of statutory interpretation in light of background assessments of social facts and competing values.

Arguably, the normative approach begins to erode the idea that courts need not accord any weight or deference to the justificatory efforts of ADMs, even on matters attracting correctness review. This is further supported by the idea that that it is difficult, if not impossible, to achieve a total separation of fact and law or policy and law.

The foundation of correctness review is the concept of jurisdiction: the idea that ADMs do not have unlimited authority and do not have final authority on questions going to the scope of their mandate.

Correctness review also reflects the rule of law concern for consistency and predictability in law, particularly with respect to matters of general legal significance outside of the ADM's realm of expertise.

However, the correctness standard does not fit easily with the aspiration of integrating the work of ADMs more fully into the constitutional order.

REVIEW FOR REASONABLENESS

The question at the foundation of reasonableness review is how the imperatives of deference and supervision should be integrated where judges are tasked with reviewing the substantive legality of administrative decisions.

ENDURING QUESTIONS FROM THE PRE-DUNSMUIR CASE LAW

The pre-Dunsmuir jurisprudence illustrates two main areas of controversy about deference on substantive review that continue to have relevance:

1. The method or conduct of judicial reasoning on review that is most consistent with deference, and
2. The substantive indicators of reasonableness or unreasonableness.

The Conduct of Deferential Review

Dunsmuir v New Brunswick, 2008 SCC

- The principle that statutory language may accommodate more than one reasonable interpretation is fundamental to the law of deference (CUPE).

There may be good reasons for courts to defer to the interpretations of ADM's where those interpretations fall within the ambit of reasonableness. BUT, this requires the determination of how the limits of reasonableness should be discerned, in a way that is consistent with deference.

Law Society of New Brunswick v Ryan, 2003 SCC

- A basic principle of deference is that the reviewing judge must not measure the decision against her sense of the "correct" decision.
- Judges should "stay close to the reasons" for an administrative decision, while searching for a "line of analysis within those reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.
- A decision may satisfy the reasonableness standard if it is supported by a tenable explanation, even if this explanation is not one that the reviewing court finds compelling.
- Judges should assess the basic adequacy of a reasoned decision, and refrain from focusing on one or more mistakes or elements of the decision that do not affect the decision as a whole.
- The reasonableness standard does not require further gradations of deference on the spectrum of standards of review. Increasing efforts at fine-tuning, when identifying the standard, would only distract judges from the central work of determining if the challenged decision is supported by any reasons that can bear a somewhat probing examination.

Canada (Director of Investigation and Research) v Southam, 1997 SCC

The addition of reasonableness simpliciter as a middle ground between correctness and patent unreasonableness
Facts: Southam acquired a number of small newspapers. The Competition Tribunal held that Southam's acquisitions within a given advertising market substantially lessened competition, contrary to the *Competition Act*. As a remedy, the tribunal ordered Southam to divest its interest in one of two newspapers. The Act provided for a right of appeal. Southam appealed the decision.
Issue: How should reasonabless simpliciter be applied?

- Reasonableness simpliciter: An unreasonable decision is one that is not supported by any reasons that can stand up to a somewhat probing examination, or in other words, if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. This determination requires an inquiry into the evidentiary foundation or the logical process on which the conclusion is based.
- The standard of reasonableness instructs reviewing judges to accord considerable weight to the views of ADMs about matters with which they have significant expertise.
- However, the expert status of an ADM will not constitute a standalone justification for deeming a decision reasonable, absent reasons verifying the application of expertise to the matter at hand.
- Substantive indicators: A court reviewing a conclusion on the reasonableness standard must look to whether any reasons support it. The defect, if there is one, could be in:
    - The evidentiary foundation itself, such as an assumption or conclusion that has no basis in evidence, or
    - The logical process on which conclusions are drawn, such as a contradiction in the premises or an invalid inference.
- Reviewing courts should refrain from revisiting the relative weight placed by ADMs on the competing factors of relevance to their decisions, although they may insist, as a matter of law, that the ADM consider all factors of mandatory relevance [typically identified by a purposive interpretation of the statutory scheme].

REASONABLENESS, POST-DUNSMUIR

The case law on deference has not been entirely consistent, and the historical instability between the impulses toward either judicial supremacy or judicial abdication remains.

Three judgments that are illustrative of this spectrum:

1. Dunsmuir, as an example of judicial supremacy.
2. Celgene Corp v Canada (AG), as a middle ground, and an example of close and respectful attention to the reasons of an ADM.
3. Khosa, as an example of judicial abdication.

Dunsmuir v New Brunswick, 2008 SCC

Despite the majority's stated commitment to deference to ADMs' field-sensitive interpretations of statutes they frequently encounter, its application of the reasonableness standard to the ADM's decision proceeded fairly quickly to the conclusion that it was unreasonable.
The arbitrator determined that the two statutes could be read so as to give a non-unionized public employee a right to inquire into whether a purported no-cause dismissal was in fact dismissal for cause, thereby triggering a greater range of remedies than would be available under the CL of employment. This suggested a favouring of the statutorily protected employment interests of non-unionized public employees over the statutorily protected expectations (including CL rights) of their employer.
According to the SCC, this conclusion was unsupportable. The majority entered into an analysis of the statutory scheme, and focused on a term preserving the CL of contract in the public employment relationship, and held that the arbitrator's decision would disrupt this statutory guarantee of an employment relationship structured in accordance with private law, in the absence of a clear statutory basis.
Note: What appeared to drive the majority's reasoning was a prioritization of traditional CL values to the exclusion of the competing values that the ADM privileged in his interpretation of the statute. Arguably, the arbitrator's decision was not rightly construed as outside the range of reasonableness, as determined by reference to the reasoning process and the outcome. It seems possible that the decision was not upheld because of its starkly different weighting of the purposes reflected in the statutory scheme than that preferred by the SCC.
Note: Dunsmuir would have been a better decision if the prioritization of the values and interests driving the decisions had been more explicit both at the administrative level and at the level of judicial review.

Canada (Citizenship and Immigration) v Khosa, 2009 SCC

Facts: The Immigration Appeal Division (IAD) denied Khosa humanitarian and compassionate relief from removal following his conviction of criminal negligence causing death. The SCC assessed the decision in light of the mandatory considerations relevant to such decisions, known as the *Ribic* factors:

1. The seriousness of the offence leading to the removal order
2. The possibility of rehabilitation
3. The length of time spent, and the degree to which the individual facing removal is established
4. The family and community support available
5. The family in Canada and the dislocation to the family that removal would cause
6. The degree of hardship that would be caused to the individual facing removal to his country of nationality

The ADM considered that the last four *Ribic* factors were not particularly compelling for or against relief. As to the first two factors, the ADM found that the offence was "extremely serious" and expressed particular concern over Khosa's refusal to accept the finding that he had been street racing, considering this to "reflect a lack of insight into his conduct." The ADM decided that there was insufficient evidence one way or another with regard to Khosa's prospects for rehabilitation, but even if he had good prospects for rehabilitation, "balancing all the relevant factors… the scale does not tip in his favour." Accordingly, the relief was denied.
SCC (majority, McLachlin and Binnie, LeBel, Abella, and Charron): Dunsmuir generally requires a measure of deference to be accorded to administrative exercises of discretion. Although the legislature has the power to specify a standard of review, if it manifests a clear intention to do so, s 18.1 of the *Federal Courts Act* (FCA) deals essentially with the grounds for review of administrative action, not standards of review. Therefore, Dunsmuir principles should be applied to determine the appropriate approach to judicial review.

The relevant factors in a standard of review analysis point to a reasonableness standard: the presence of a privative clause, the purpose of the IAD as determined by its enabling legislation (determines a wide range of appeals under the IRPA and decisions reviewable only if the FC grants leave to commence judicial review), the nature of the question (the legislatively conferred power to grant relief calls for a fact dependent and policy driven assessment by the IAD), and the expertise of the IAD dealing with immigration policy.
The courts should not reweigh the evidence, but determine if the outcome falls within a range of reasonable outcomes. The question was one that Parliament confided to the IAD, not the courts. The IAD's reasons clearly disclose the considerations both for and against relief.
Held: In light of the deference properly owed to the IAD, there is no basis to interfere with its decision to refuse relief. The decision did not fall outside the range of reasonable outcomes.

- S 18.1 of the *Federal Courts Act* (FCA) deals essentially with the grounds for review of administrative action, not standards of review.
- Deference is the presumptive approach to judicial review of administrative action.
- The presence of a privative clause signals greater deference.
- Courts are not to reweigh the evidence or substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within a range of reasonable outcomes.
- Reasonableness is a single standard that takes its colour from the context. There may be more than one reasonable outcome. However, as long as the process and the outcome accord with the principles of justification, transparency, and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

Rothstein (concurring): The language of s 18.1 of the FCA makes clear that findings of fact are to be reviewed on highly deferential standard. The necessary implication is that where Parliament did not provide for a deferential standard, its intent was that no deference should be shown.
Courts must give effect to legislated standards of review, subject to any constitutional challenge.
The absence of a privative clause signals correctness as the presumptive approach.
The presence of a privative clause signals relative expertise and a Dunsmuir standard of review analysis.
The applicable standard of review should be reasonableness, and the IAD's decision was reasonable.
Deschamps (concurring): Agrees with Rothstein that s 18.1 of the FCA sets legislated standards of review, which oust the CL. The applicable standard of review should be reasonableness, and the IAD's decision was reasonable.
Fish (dissenting): The IAD's task was to look at all the circumstances of the case to determine if relief was warranted. Despite abundant evidence that Khosa was extremely unlikely to reoffend, and had taken responsibility for his actions, the IAD focused on Khosa's denial that he was street racing, and based its refusal largely on that fact.
While a criminal court's findings are not necessarily binding upon an administrative tribunal with a distinct statutory purpose and a different evidentiary record, it was incumbent upon the IAD to consider those findings and to explain the basis of its disagreement with the sentencing judge's decision. The IAD's conclusion that there was "insufficient evidence" upon which a determination could be made that K does not represent a risk to the public is not only incorrect, but also unreasonable.
The applicable standard of review should be reasonableness, and the IAD's decision was unreasonable.

CHAPTER 12: REVIEW OF ADMINISTRATIVE DECISIONS UNDER THE CHARTER

APPROACHES TO REVIEW UNDER THE CHARTER

Slaight Communications v Davidson, 1989 SCC

Facts: An adjudicator ordered an employer to give an unjustly dismissed employee a letter of recommendation with specific content, and to answer any request for information about the employee only by sending that letter.
Issue: Did the orders infringe the employer's s 2(b) guarantee of freedom of expression? If so, was it justified under s 1?
Held: Yes. Yes. The orders infringe s 2(b) but are justified under s 1.

- Dickson and Lamer's orthodox two-step approach:
    1. Establish whether the administrative decision infringes a Charter right. Administrative law is relevant to the analysis of jurisdiction, purpose of the statute, determination of the facts, and application of the law.
        *If the complainant does not establish infringement, the s 1 analysis does not occur, and the court can review the decision using administrative law principles.
    2. Turn to s 1 review for the more critical justification analysis. Resolve contending values. If a Charter right has not been infringed, the administrative tribunal has exceeded its jurisdiction.
        *Oakes test: 1) Pressing and substantial objective, 2) Proportionality analysis: means chosen must be rationally connected to the objective, means chosen must be minimally impairing, and there must be proportionality between the infringement and the objective. The legislature is permitted a margin of appreciation regarding the level of impairment.
- Lamer's mixed approach:
    1. Use administrative law principles to review the legality of the decision: jurisdiction, fact, and application/interpretation. Ask whether discretion was exercised unreasonably. If yes, order is set aside.
    2. If the decision survives the administrative law analysis, turn to s 1 analysis.

Multani v Commision scolaire Marguerite-Bourgeoys, 2006 SCC

- Majority, per Charron: the orthodox approach. Following Slaight, s 1 provides the proper methodological framework.
    - An administrative tribunal exceeds jurisdiction if it makes an order infringing the Charter.
    - The standard of review for administrative decisions that apply and interpret the Charter is correctness
        - The Charter may be infringed by: 1) Invalid legislation, and 2) Invalid action taken pursuant to legislative authorization (ie, applying legislation, interpreting legislating, making a decision with respect to an individual case)

        - Both are "prescribed by law" and subject to analysis under s 1
    - If a discretionary decision is not exercised according to its enabling legislation, then it is not prescribed by law and cannot be justified under s 1
    - If a discretionary decision is at issue, the court must determine if the decision falls "within a range of reasonable alternatives" (para 51)
- Deschamps and Abella: the administrative law approach. Same conclusion, but different methodology.
    - **Decisions and orders are not norms of general application; "Law" means only statutes or regulations**
    - The analytic tools developed by each area of law need to be maintained, especially with regard to the attention to expertise
    - An approach that begins with constitutional review must be avoided
    - The changes in the standard of review analysis cannot be disregarded simply because the decision involves human rights
    - The pragmatic and functional approach should be used to determine the standard of review

REASONABLENESS AND PROPORTIONALITY

Doré v Barreau du Québec, 2012 SCC

An administrative decision is not a law (rule or norm of general application) that can be justified as a reasonable limit of a Charter right under s 1

Charter/Oakes analysis compared to administrative law/standard of review analysis

- Oakes: Does the law interfere with a Charter right more than is reasonably necessary to achieve the objectives?
    - If not, then it is a proportionate and reasonable limit under s 1.
- SOR: Has the ADM disproportionately and unreasonably limited a Charter right?
    - In not, then the right is not unreasonably limited, and an appropriate balance between the right and the objectives is recognized.
- An ADM must apply Charter values in the exercise of statutory discretion by:
    - Balancing the Charter value with the statutory objective
    - Asking how the Charter value will be protected best, in light of the statutory objective
    - Engaging in a proportionality analysis: balancing the severity of the interference with the statutory objectives
    - Choosing the outcome that "falls within a range of possible, acceptable outcomes" and is explained by reasons exhibiting "justification, transparency, and intelligibility"
- A court reviewing a discretionary decision that affects a Charter right should:
    - 1) Look to past jurisprudence to see if the particular category of question was satisfactorily addressed with regard to the level of deference owed
    - 2) If the particular category of question was not satisfactorily addressed, contextually analyze the factors using the standard of review analysis (it is not necessary to consider all the factors):
        - Privative clause
        - Purpose of the tribunal from the interpretation of its enabling legislation
        - The nature of the question
        - The expertise of the specialized tribunal
            - Administrative bodies empowered and required to consider Charter values within their scope of expertise (para 36)
            - Administrative bodies with skills to recognize that Charter values are fundamental and can weigh/balance them in relation to specific facts and statutory purposes

TRIBUNAL JURISDICTION OVER THE CHARTER

Cooper v Canada (Human Rights Commission), 1996 SCC (overruled by NS v Martin)

The authority of tribunals to determine the constitutional validity of provisions in their enabling statutes under the Charter

Legislation:

Canada Human Rights Act

S 15(c): It is not a discriminatory practice if… an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual…

Constitution Act, 1982

S 52(1): The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Facts: Airline pilots were being retired at age 60, pursuant to their collective agreement. They filed a complaint with the CHRC, alleging age discrimination, as most employees in Canada were not required to retire until age 65. The employer argued that the age stipulation was a BFOR. The CHRC recommended dismissal of the complaints. If the CHRC referred the matter to a tribunal, s 15(c) of the CHRA would effectively be struck down as contrary to the Charter. The pilots applied for JR, requesting an order to quash the CHRC's decision and to direct the CHRC to appoint a tribunal to inquire into their complaints. The motion was dismissed, and that dismissal was upheld on appeal.

Issue: Did the CHRC, or a tribunal appointed by the CHRC, have the power to determine the constitutionality (ie, the constitutional validity) of a S 15(c) of the CHRA?

Held: No.

SCC: Because the tribunal did not have explicit or implicit jurisdiction to refer Charter questions, the tribunal did not have the power to consider the referred question.

La Forest, Sopinka, Gonthier, and Iacobucci (for the majority): Neither the CHRC, nor a tribunal appointed by it, had jurisdiction under the CHRA to subject the CHRA to constitutional scrutiny. Its jurisdiction was limited by the Act and no administrative tribunal has an independent source of jurisdiction pursuant to s 52 of the CA, 1982. The enabling statute must grant jurisdiction either explicitly or implicitly.

While every administrative body has to have the power to interpret and apply its enabling statute, determining jurisdiction over a given complaint through reference to the provisions of the Act is conceptually different from subjecting the same provisions to Charter scrutiny and would contrary to Parliament's intent.

As a non-adjudicative body, the CHRC cannot be considered a proper forum to address constitutional issues and the CHRC has no special expertise with respect to questions of law.

- The power to decide questions of law may include the power to decide the validity of laws under the Charter. Express terms are not required to confer this power. As long as the tribunal is acting within its legislatively conferred jurisdiction, it may consider and decide Charter issues as questions of law.
- These decisions will be reviewed on the standard of correctness.

Lamer: Mere creatures of legislature, whose existence can be easily terminated, whose members usually serve at pleasure, and whose decisions are properly governed by guidelines established by the executive, are not suited to this task. S 52 belongs to the courts, not to administrative tribunals; the courts have a monopoly on the power to decide the validity of laws under the Charter, including provisions in the tribunal's home statute.

McLachlin and LHD (dissenting): The CHRC did not have the power to consider the Charter, but the CHRT did.

The Charter is not some holy grail; it belongs to the people. Many more citizens have their rights determined by these tribunals than by the courts. If the Charter is to be meaningful to ordinary people, it must find its expression in the decisions of these tribunals.

If Parliament confers the power to decide questions of law on a tribunal, that power must, in the absence of evidence of a contrary intent, be taken to extend to the Charter, and to the question of whether the Charter renders portions of its enabling statute unconstitutional. Explicit authority is not required.

Note: The dissent expresses a vision of democratic constitutionalism that respects the legitimacy of the administrative state and that has been subsequently affirmed in NS (WCB) v Martin.

Note: The ability of administrative tribunals to question unconstitutional enabling provisions not only provides an economical and efficient resolution of a rights dispute, by avoiding the courts, but is also in conformity with the institutional dialogue and deference as respect models.

NS (WCB) v Martin; NS (WCB) v Laseur, 2003 SCC

Test to determine whether a tribunal has jurisdiction to consider Charter challenges to legislative provisions in their enabling statutes: 1) Look to enabling statute for explicit intent (found in the terms) or implied intent (found by looking at the statute as a whole) on the part of the legislature to confer jurisdiction to interpret questions of law, 2) If such jurisdiction is found, the concomitant jurisdiction to determine constitutional questions is presumed, 3) The onus of rebutting the presumption then rests on the party challenging the tribunal's jurisdiction

Facts: The appellants suffered from chronic pain pursuant to work-related injuries. The workers' compensation legislation excluded chronic pain from the purview of the regular system. In lieu of the benefits normally available to injured workers, the legislation provided a four-week functional restoration program, beyond which no further benefits were available.

The appellants appealed decisions of the Workers' Compensation Board (WCB) to the Workers' Compensation Appeals Tribunal (WCAT) on the ground that the legislation infringed s 15(1) of the Charter. The WCB challenged the WCAT's jurisdiction to hear the Charter argument.

The WCAT affirmed its jurisdiction to apply the Charter and held, inter alia, that the legislation violated s 15 of the Charter and was not justified under s 1. The WCB appealed.

The CA allowed the WCB's appeal, and held that the WCAT did not have jurisdiction to consider the constitutional validity of the legislation and that, in any event, the chronic pain provisions did not demean the human dignity of the claimants and therefore did not violate s 15 of the Charter. The WCAT appealed.

Issue: Did the WCAT have the power to apply the Charter?

Held: Yes. The WCAT had jurisdiction to consider the constitutionality of the impugned provisions. S 10(b) of the Act, and the Regulations in their entirety infringe s 15(1) of the Charter, and the infringement is not justified under s 1. The provisions are of no force or effect by operation of s 52(1) of the CA, 1982.

SCC (Gonthier, for the Court):

- The Constitution is the supreme law of Canada. By virtue of s 52 of the CA, 1982, the question of constitutional validity applies to every legislative enactment.
- A practical corollary to the principle of constitutional supremacy is the idea that Canadians should be entitled to assert their Constitutional guarantees in the most accessible forum available, without the need for parallel proceedings before the courts.
- To allow an administrative tribunal to decide Charter issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.
- Administrative tribunal decisions based on the Charter are subject to JR on a correctness standard. (NOTE: DORÉ CHANGES THIS)
- Additionally, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by an administrative tribunal that a provision of its enabling statute is invalid pursuant to the Charter is not binding on future decision makers, either within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases.
- Administrative tribunals that have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutionality of that provision.

- Explicit jurisdiction must be found in the terms of the statutory grant of authority. Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include:
    - The statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively;
    - The interaction of the tribunal in question with other elements of the administrative system;
    - Whether the tribunal is adjudicative in nature, and;
    - Practical considerations, including the tribunal's capacity to consider questions of law.
- Practical considerations, however, cannot override a clear implication from the statute itself. The party alleging that the tribunal lacks jurisdiction to apply the Charter may rebut the presumption by pointing to an explicit withdrawal of authority to consider the Charter; or by convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the Charter (or a category of questions that would include the Charter, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.

Note: We know from Conway that if a tribunal has the jurisdiction to determine constitutional questions, it may also award remedies under s 24(1), although this requires an assessment of legislative intention with regard to the specific types of remedies the tribunal is authorized to award.

THE BC ADMINISTRATIVE TRIBUNALS ACT

SECTIONS 58 AND 59

Standard of review if tribunal's enabling Act has privative clause

58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

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

(d) fails to take statutory requirements into account.

Standard of review if tribunal's enabling Act has no privative clause

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

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

(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

CODIFICATION OF PATENT UNREASONABLENESS

Canada (Citizenship and Immigration) v Khosa, 2009 SCC

Majority, per Binnie (para 19):

- Despite Dunsmuir, "patent unreasonableness" will live on in BC, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.
- That said, of course, the legislature in s 58 was and is directing the BC courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.

Rothstein (paras 102, 115, 116):

- Drawn to its logical conclusion, in order to displace the Dunsmuir standard of review analysis, the majority's approach would require legislatures to enact standard of review legislation with respect to every single administrative tribunal or decision-maker and perhaps in relation to every type of decision they make.
- With respect, this amounts to a serious overreaching of this Court's role. It fails to respect the legislature's prerogative to articulate, within constitutional limits, what standard of review should apply to decision-makers that are wholly the products of legislation.
- The record of the proceedings of the BC legislature also makes clear the legislature's intent to codify standards of review that would oust a duplicative common law standard of review analysis. The policy rationale for this move was clear. The legislation was aimed at refocusing judicial review litigation on the merits of the case, rather than on the convoluted process of determining and applying the standard of review.
- It would be troubling, I believe, to the BC legislature to think that, despite its effort to codify standard of review and shift the focus of judicial review to the merits of the case, this Court would re-impose a duplicative Dunsmuir-type analysis in cases arising under the BC ATA.

POST-DUNSMUIR COMMON LAW STANDARD OF REVIEW

At some point after **Southam**, some statutes were enacted that directed the court on the legislature's intended standard of review by explicitly stating whether a reviewing court should apply correctness, reasonableness simpliciter, or patent unreasonableness.

The **BC Administrative Tribunals Act (ATA)** itemizes grounds of judicial review applicable to the tribunals subject to the ATA and matches each ground with a standard of review. In the case of judicial review of the exercise of discretion, the ATA also lists factors relevant to determining whether discretion was exercised in a patently unreasonable way.

Dunsmuir did away with the two deferential standards of reasonableness simpliciter and patent unreasonableness, subsuming them into one unified standard of reasonableness. This left unresolved the question of how statues incorporating patent unreasonableness should be interpreted.

In **Khosa**, Binnie (although obiter) stated that the ATA could only be sensibly interpreted in the CL context. Despite Dunsmuir, patent unreasonableness would live on in BC, but the content of the expression, and the degree of deference it commanded, would continue to be calibrated according to general principles of administrative law. However, the legislature is directing courts to afford a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.

Jensen v Workers' Compensation Appeal Tribunal, 2010 BCSC

Standard of review if the ATA applies, and there is a privative clause: s 58

Facts: Jensen sought judicial review of a decision of the Workers' Compensation Appeal Tribunal (WCAT), which upheld a compensation decision of the WCB, affirmed by the Review Division, concluding that Jensen's work injury did not cause or aggravate his arthritis, and therefore, that the arthritis was not compensable. Jensen argued that the decision of the WCAT was patently unreasonable.

Issue: What is the content of the patent unreasonable standard, within the context of the ATA?

BCSC: Under s 58(1) of the ATA, if the tribunal has a privative clause, it is considered to be an expert tribunal in relation to all matters within its exclusive jurisdiction. Under s 58(2) of the ATA, matters involving a finding of fact or law over which the tribunal has exclusive jurisdiction under a privative clause must not be interfered with unless patently unreasonable. In the case at bar, questions of entitlement to compensation are within the WCAT's exclusive jurisdiction, and the standard of review is therefore patent unreasonableness.

- In BC, the CL approach to determining the standard of review has been supplanted by the ATA, with respect to ADMs that are subject to it. Despite Dunsmuir, patent unreasonableness lives on in BC with respect to the provincial administrative tribunals to which the ATA applies.
- Where a tribunal falls under the ATA, a reviewing court must apply the standard of review as set out therein.
- **The ATA does not define patent unreasonableness outside the context of s 58(3), which applies only to discretionary decisions. Therefore, the content of the standard for questions of mixed fact and law is determined by reference to the CL: the patent unreasonableness standard is to be defined by the CL as it existed pre-Dunsmuir. However, it is not frozen as such, and will continue to be calibrated according to general principles of administrative law.**
- Principles informing the standard of patent unreasonableness:
    - Defined by CL immediately prior to Dunsmuir
    - Continues to be calibrated according to general principles of administrative law (Khosa)
    - Decisions that do not accord with reason or are clearly irrational
    - Privative clauses require the highest level of deference
    - Courts are not to reweigh the evidence, second guess conclusions, substitute different findings of fact, or conclude that the evidence is insufficient to support the result

- The review should be applied to the result, not to the reasons leading to the result
- Decisions should only be set aside where the ADM commits a jurisdictional error
- Decisions based on no evidence are patently unreasonable, but decisions based on insufficient evidence are not
- A high degree of deference is required regarding the reasons offered or that could be offered in support of the impugned decision

Note: Remember that this is only for matters that are not delineated in the ATA.
Note: S 58(3) defines a patently unreasonable discretionary decision.

Coast Mountain Bus v CAW Canada, 2010 BCCA
Standard of review if the ATA applies, and there is no privative clause: s 59(1) and s 59(2)

- S 59, unlike s 58, does not address expertise; it is irrelevant.
- By necessary implication, the legislature has mandated correctness under s 59(1) for general questions of law, questions of law before expert tribunals, and questions of mixed fact and law.

BC (WCB) v Figliola
Standard of review if the ATA applies, and there is no privative clause: s 59(3) and s 59(4)

- As per the ATA, courts must review discretionary decisions on the standard of patent unreasonableness, as defined by the ATA.

Steps:

1. Read the enabling statute.
2. Does the enabling statute incorporate the ATA standards of review? If not, go to the CL. If so, continue.
3. Is there a privative clause? If so: s 58. If not: s 59.
4. What is the type of question? This will determine the appropriate standard of review.
5. If PU, pursuant to s 58 (2)(a), and therefore a question of fact or question of law within exclusive jurisdiction, follow jurisprudential guidance regarding its content: Jensen.
6. If PU, pursuant to s 58 and discretionary (s58(2)(a)), apply definition of PU set out in s.58(3).

CHAPTER 11: DISCRETIONARY DECISION MAKING

INTRODUCTION

Baker: 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 a statutorily imposed set of boundaries.

Discretion is essential to contemporary government: bringing the various legislative schemes that are put in place by Parliament requires some measure of flexibility on the part of the executive, either because:

1) Parliament cannot foresee every individual case that is likely to arise, OR
2) Parliament does not have the necessary expertise or knowledge to craft the norms that should apply in any given area.

The conferral of discretionary powers on ADMs, to be exercised in individual cases, is justified by the fact that the legislature cannot imagine all of the situations likely to arise under any given scheme, so it is impossible to formally conceive a comprehensive set of binding rules.

RECOGNIZING DISCRETION

Statutory language of discretion

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

DISCRETION FROM RONCARELLI TO BAKER

Roncarelli: Cartwright vs Rand

No guidance or rules in the statute expressly or implicitly	Always a perspective in which statute is intended to operate
Legislature intends open-ended or unfettered delegation of discretion in licensing regime	No such thing as absolute or untrammelled discretion or unlimited arbitrary power [absent express language]
Plain meaning approach to statutory interpretation	Purposive approach to statutory interpretation
No pre-existing right to a license nor to keep it if it can be cancelled at any time	Vital and vulnerable interest is at stake
Function of the commission is purely administrative not judicial or quasi-judicial	Commission must discharge public duties lawfully and reasonably
Self-interpreting jurisdiction	No such thing
Cancellation is formally authorized by law Principle of parliamentary supremacy	But unlawful if done capriciously, in bad faith, or for irrelevant purpose Unwritten principle of the rule of law
Good faith factual finding	Discrimination is a clear departure

THE CONTEMPORARY FRAMEWORK

Baker v Canada (Minister of Citizenship and Immigration)

***Immigration Act*, RSC, 1985**

114.(2) The Governor in Council **may, by regulation, authorize the Minister to exempt** any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person **where the Minister is satisfied** that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44

2.1 The **Minister is hereby authorized to exempt any person from any regulation** made under subsection 114(1) of the Act **or otherwise facilitate** the admission to Canada of any person **where the Minister is satisfied** that the person should be exempted from that regulation or that the person's admission should be facilitated **owing to the existence of compassionate or humanitarian considerations**.

Review of Ministerial discretion

Baker wants:

- standard of review of correctness = question of law
- discretion exercised in accordance with the Convention on the Rights of the Child
- Minister should apply the best interests of the child as a primary consideration in H & C decisions

Respondent argues:

- standard of review of reasonableness = mixed fact and law
- Convention not implemented in Canadian law,
- requiring interpretation in accordance with the Convention improperly interferes with broad discretion
- cannot re-weigh factual determinations
- requiring interpretation in accordance with the Convention also interferes with division of powers between federal and provincial governments

Pragmatic and functional approach to review reasonableness of exercise of discretion

- Review of discretionary decisions no longer on traditional limited grounds

Effect

- Brings review of error of law (jurisdiction/ultra vires) and review of discretion together

SoR factors used to review and, if necessary, constrain discretion:

1. Privative clause
2. Expertise of the decision-maker
3. Language/purpose of the provision and Act as a whole
4. Nature of the problem

[53] …These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis* …), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson* …).

Application: was the decision unreasonable?

YES Manner in which decision reached is inconsistent with values underlying the grant of discretion
Reasons disclose that decision-maker misinterpreted nature and scope of the delegated discretionary power

1. Statute
   - P **intended** discretion to be exercised in humanitarian and compassionate manner: legal requirement
2. International Law
   - *Convention on the Rights of the Child* ratified
   - **Influential values** inform context, statutory interpretation
3. Ministerial Guidelines
   - Describe **valid bases** for determination

Basis for finding of unreasonableness

- Approach taken is unreasonable and conflicts with interpretation of humanitarian and compassionate values
- Failed to consider a relevant or important factor (paras 65, 72)
- Failed to give this factor "serious weight" (para.65) or "substantial weight" (para 75)

Doré v Barreau du Québec

1. Standard of review for discretionary decisions affecting *Charter* rights is **reasonableness** (contextually applied)
2. Proper framework to determine compliance with the *Charter* is administrative law proportionality review
3. *Charter* values: **horizontal effect** in admin law

Abella J for the court

[52] So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.

[54] Nevertheless, as McLachlin C.J. noted … "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" … Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

DEFERENCE AND REWEIGHING

Suresh v Canada (Minister of Citizenship & Immigration)

Statutory provisions: *Immigration Act*, RSC 1985

19. (1) No person **shall** be granted admission who is a member of any of the following classes:
… (*e*) persons who there are **reasonable grounds** to believe
… (iv) are members of an organization that there are **reasonable grounds** to believe will
… (C) engage in terrorism;
… (*f*) persons who there are **reasonable grounds** to believe...
… (ii) have engaged in terrorism, or
(iii) are or were members of an organization that there are **reasonable grounds** to believe is or was engaged in
… (B) terrorism,

except persons who have **satisfied the Minister** that their admission would not be **detrimental to the national interest**;

53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless
…

(b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada;

Division of labour and obligations

Parliament ➔ establish criteria and procedures governing deportation within constitutional limits
Minister ➔ decide according to P's criteria and procedures and the constitution
Courts ➔ review M's decision to see if exercised within P's constraints and the constitution

If appropriate factors in considered in conformity with constraints, then deference.

Segmenting the standard of review

1. Constitutionality of deportation provisions in return to torture cases
   - correctness
2. Danger to national security
   - patent unreasonableness
3. Whether substantial risk of torture exists upon return
   - patent unreasonableness

Re-weighing weight in *Baker* (paras. 35-37)

- Guidelines self-imposed by Minister and ministerial delegate did not comply
- Minister obliged to give proper weight to relevant factors
- Failed to consider and weigh implied limitations or patently relevant factors

Lake v Canada (Minister of Justice)

Balancing under the P&FA/SOR

- Previous jurisprudence = deference = reasonableness
- No privative clause
- Superior expertise in relation to international obligations and foreign affairs
- Fact driven inquiry
- Balance Charter rights against other considerations
- Minister assesses severity of the infringement
- Minister take into account relevant factors
- Does the decision "shock the conscience" of Canadians to extradite?

Reasons

[46] As for the adequacy of the Minister's reasons, while I agree that the Minister has a duty to provide reasons for his decision, those reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected. Though the Minister's Cotroni analysis was brief in the instant case, it was in my view sufficient. The Minister is not required to provide a detailed analysis for every factor. An explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable.

Weight

[41] Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection afforded by the Charter. It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.

Extradition Act

POWERS OF THE MINISTER

Order for Surrender
When involving a refugee claim
40. (2) Before making an order with respect to a person who has made a claim for refugee protection under the Immigration and Refugee Protection Act, the Minister shall consult with the Minister responsible for that Act.

(3) The Minister may seek any assurances that the Minister considers appropriate from the extradition partner, or may subject the surrender to any conditions that the Minister considers appropriate, including a condition that the person not be prosecuted, nor that a sentence be imposed on or enforced against the person, in respect of any offence or conduct other than that referred to in the order of surrender.

Reasons for Refusal
When surrender order not to be made
44. (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that

(a) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or

(b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.

Immigration Act

INADMISSIBILITY

Serious criminality
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for …

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.
Exception
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

PRINCIPLE OF NON-REFOULEMENT

Protection
115.(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.
Exceptions

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

CHAPTER 4: REGULATIONS AND RULE MAKING: THE DILEMMA OF DELEGATION

THE SPREAD OF REGULATIONS, RULES, AND SOFT LAW

While legislatures set out general government policy in statutes, they empower the executive branch to create regulations; regulations are a form of law that explain how statutes actually work and are binding on all those made subject to them. Powers are delegated by the legislature to the Cabinet, an individual minister, or an administrative agency like a securities commission, to create (1) regulations, and (2) soft law; regulations-making powers must be in the statute, but the power to make soft law, which is not binding, does not need to be expressly provided by the legislature.

WHY DELEGATE?

Delegation is done for three primary reasons: (1) expertise, (2) time and information concerns, and (3) flexibility.

- Expertise is an important concept in administrative law and is central to the determining the standard of analysis for substantive review. Generally, this requires education and training, as well as expertise in dealing with particular issues. Developing a detailed regime of rules requires special knowledge that legislators do not have. The argument is that for optimal rules, delegation is best
- Legislators also lack the necessary time and information to determine all the workings of the regulatory and welfare state. Considering all of the contingencies needed to enact a complex regime that is beyond the time and attention of legislators.
- Delegation is needed in order to make regulatory regimes flexible in order to respond effectively to new information and adapt rapidly changing policy areas like securities and environmental regulation.

Soft law such as policies and guidelines can have a major impact on people's live and administrative actions. Guidelines were central in **Baker**; minister-issued guidelines set out the bases for how immigration officers were to make decisions on humanitarian and compassionate grounds. While not legally binding, the SCC gave them significant weight in assessing the degree of requisite procedural fairness and the limits in the discretion to be exercised. In such matters, the agency prefers to make soft law rather than to decide such issues piecemeal through a slew of cases.

In rule-making, there is a correlation between the permanence of the rule and its bindingness, as well as the level of consultation required. This process involves a balancing of the values of expediency and certainty in filling in the gaps in statutory frameworks that are necessarily incomplete. Beyond regulation, the creation of soft law offers predictive value to those involved in administrative actions, as in the case of Mavis Baker.

THE RISKS OF DELEGATION

In light of the expertise, time and information concerns, and flexibility desired, delegation is typically seen to be worth the risks that the executive branch won't meet the expectations of the legislature or the public. It arises when the executive is empowered to create regulations or soft law because of concerns of the public and the legislatures relating to (1) difficulties monitoring regulators, (2) regulators following its own view, (3) regulators furthering its own interests, (4) accountability to legislatures, especially if key functions are contracted out to third parties.

CONTROLLING THE RISKS

The breadth of delegation depends on many factors, including the capacity of the legislature to make detailed statutory rules, The willingness of the legislature will depend on its confidence in controls on the exercise of discretion. This is accomplished in four principal ways:

STRUCTURAL APPROACHES

Rule-making may be delegated broadly because Cabinet may have some control over the ministry or other body charged with regulating. The amount of power to be delegates depends on the amount of control, which may turn on whether there is a minority or majority government since that government essentially "controls" the executive branch. Delegated power may be controlled through the legislature's choice of what body will exercise the discretion and how it will be composed.

LEGISLATIVE REVIEW

The legislature can directly control discretion by reviewing the resulting rules through its committees. For example, with the Ontario Securities Commission, the minister had 60 days to either approve, reject, or return the rule for reconsideration. In some ways, this aggravates the time problem. As well, both deference and substitution of the legislator's view seem to defeat some of the main reasons for delegation in the first place.

JUDICIAL REVIEW

The courts are entitled to review rule-making for excess of jurisdiction and can check the risks of delegation, like ignoring the expectations of the delegator; this review is similar to that of executive decisions.

Thorne's Hardware v The Queen, 1983 SCC
The federal Cabinet made an order extending the boundaries of the Port of Saint John, NB to increase the revenues of the National Harbour Board. While the Act allowed Cabinet to change the boundaries "from time to time", the appellant claimed the order was made in bad faith. The SCC said that while an OIC can indeed be struck down on "jurisdictional or other compelling grounds", "it would take an egregious case to warrant such action". Governments do not give reasons, nor do they need to, and decisions often involve a multitude of political, economic, social, and partisan considerations. The courts will not inquire into the validity of an order where Cabinet believes it had reasonable grounds.

- ❖ The courts will generally not review Orders-in-Council made by Cabinet within its jurisdiction; any substantive review would require an egregious case of bad faith

In **Enbridge**, a 2005 SCC case, the courts reviewed a board-created rule on *vires* grounds and on the standard of correctness. It held that the rule was within the grant under a purposive interpretation. It also emphasized that gas distribution is a regulated activity and that there is no common law right to engage in it.

Courts have been even more reluctant to engage in the review of soft law, except in cases of fettering, i.e. where a guideline or policy becomes effectively mandatory or binding on a decision-maker or treated as if there is no discretion because of the policy's language or practical effect; this came up in **Thamotharem**. Three principal reasons why we might not want courts to review rules or soft law: (1) JR is pretty random and tends to favour certain interest groups, and the allocation of benefits is a policy choice; (2) courts don't have the expertise, and since they are "compulsorily ignorant", the check would come at the cost of expertise; and (3) it assumes, perhaps erroneously that courts are in the best position to interpret delegation and the appropriateness of a rule, and could devolve into judges reviewing policy. Legislatures may in fact decide to oust courts may insert cues when it wants an agency to interpret its own statute, i.e. a privative clause, or a right of appeal. This is common in policy-laden areas of the administrative state.

PROCESS REQUIREMENTS

Delegation may entail process requirements to control discretion in rule making, e.g. requirements to consult or hold hearing before making decisions. This is meant to allow for better decisions by (1) ensuring that DMs have all the relevant information needed, for example, through consulting the public, and (2) promoting deliberation and debate of the important issues and ideas. The risks of formal processes, however, risk being costly and time-consuming, a huge problem in the US regulatory state. Also, transparency in rule making may allow powerful interest groups an avenue of influence. Finally, the public itself makes mistakes and participation is not always as beneficial or instructive as it seems, e.g. people have conflated view of their abilities, and belittle the risks of climate change. People often don't invest the time or cost to inform themselves on the issues, leading some to encourage the isolation of regulation from the public; this may be undemocratic and the result of inappropriate consultative processes.

Generally speaking, there is no common law requirement for procedural fairness where a decision is of a legislative and general nature: **Knight**. In **Canadian Society of Immigration Consultants**, the decision to terminate the mandate of a body that regulates immigration consultants and to replace it with a new one was held to be a legislative action by the Federal Court of Canada. The rule does not require that the decision be made by the legislature, and the general rule throughout the jurisprudence has been that common law procedural requirements will not be imposed on delegated rule-making. Many process requirements will merely be formal, like the requirement to publish regulations in the Canada Gazette. Other more substantive requirements to provide "meaningful opportunities" for input by affected groups are largely self-imposed by the legislature or the Cabinet, or will be contained in the statute. In **Enbridge**, the court held that silence in the statute means that no procedural requirements were intended and that the courts will suppose that concerns about "thoughtless rulemaking" will be provided for if they exist. Much of the actual procedure in rulemaking will depend on the resources and willingness of the body itself, and the courts will be even more reluctant to interfere with a rule enacted where the use of procedure acts as a signal of good decision-making. Courts naturally have a hard time determining the weight given to given considerations because there are often so many and because they do not give reasons: **Thorne's Hardware**. However, accountability can be a weak constraint where monitoring is hindered by the costs of expertise, time and information economy, and flexibility.

AG Canada v Inuit Tapirisat et al., 1980 SCC

IT challenged a rate increase for telephone services from Bell Canada. The CRTC implemented the increases following a hearing in which IT was involved; its recommendations had been ignored. They appealed the decisions to Cabinet and were not allowed to respond to the CRTC's submissions. Cabinet rejected its appeal. The SCC found that Cabinet owed IT no duty of procedural fairness. According to Estey J, this was "legislative action in its purest form" because it affected many Bell subscribers, and while the CRTC had procedural requirements, Cabinet did not and there was no requirement for notice, a hearing, or reasons.

- ❖ Decisions that are legislative and general (polycentric) in character will not give rise to a common law duty of procedural fairness in favour of affected parties

Homex Realty v Wyoming, 1980 SCC

The municipality of Wyoming was in a dispute with a developer over who should pay the costs of infrastructure for a new subdivision. After tense negotiations, the municipality passed a by-law that designated the developer's plan not to be a "registered plan", without notice to the developer and with the effect of imposing additional costs and consent requirements. Homex challenged the by-law for being unfair. Estey J held that the by-law was not general in nature, but aimed at resolving a particular dispute. Dickson J dissented, but he agreed that there was a duty to provide procedural fairness since the decision did not apply to all citizens equally, but was aimed deliberately at limiting the rights of one individual.

- ❖ The exemption of legislative-type decisions made by delegate bodies from a duty of procedural fairness will not apply to rules aimed at the interests of a single party

THE ONGOING STRUGGLE

Legislators always take a risk when they delegate; they gain the expertise of other parties and can expand their reach, but his naturally engages a principal-agent dilemma. This becomes increasingly apparent with new forms of regulation, i.e the greater use of private parties and markets. This shift does not mean fewer rules, but does lead to more delegated legislation, more delegation of government functions to the private sector, and more quasi-legislative rules and soft law.