ADMINISTRATIVE LAW

•ORIGINS OF ADMIN LAW

-REASONS FOR EXPANSION OF GOVERNMENT ACTIVITY:

1. Desire to depoliticize certain decisions

2. Greater specialization and technical expertise

3. Release the courts from ever-burgeoning case load

-THEORIES OF ADMIN LAW: Conflicts & Tensions

-LEGAL FORMALISM:

-DICEY: Scientific legal truths that could be discovered with careful application of law

-Close examination of prior case law

-Validity of plain meaning

-Equitable outcomes irrelevant

-HEWART: Felt admin bodies were attempting to usurp PS & escape beyond reach of courts

-1920s CANADA: Legal formalism led to more & more admin body challenges for ultra vires

-Argued tribunals undermined primacy of courts & less likely to protect individual rights as they employed different procedures & policy considerations

-Sparling: “Sacred rights of individuals were often entrusted to whims of officials whose main qualifications was political loyalty”

-PROGRESSIVES: Liberty does not mean expulsion of State from our lives but instead its inclusion and willingness to provide the necessities for personal achievement

-POUND: “CL reasoning should be instrumental and seek social welfare”

-CORDOZO: “The final cause of law is the welfare of society”

-CAESAR WRIGHT: Must look for new legal ways of thought

-JOHN WILLIS: Admin powers necessary to ensure people cared for from cradle to grave

-Wanted special admin review board with subject expertise

-THREE SOURCES OF REVIEW POWER:

1. ORIGINAL JURISDICTION: Courts have jurisdiction by way of direct actions brought by private citizens against admin bodies in contract/tort

2. STATUTORY RIGHT OF APPEAL: Must be provided.

3. COURTS’ INHERENT JR JURISDICTION: Provincial SC may review decisions by admin institutions & officials

-ONTARIO JUDICIAL REVIEW PROCEDURE ACT 1971

-NOTE: Most provinces have adopted this as well as streamlined old CL remedies

-QUESTIONS OF LAW: Courts could review decisions of any statutory authorities determining rights & interest of affected parties

-QUESTIONS OF FACT: Could review decisions of those charged with making “statutory power of decision” on basis of evidence presented & facts of which they could take official notice: Most judicial or quasi-judicial bodies

-FEDERAL COURT ACT 1970: Relocated JR jurisdiction of federal admin action to federal court

-SUPREME COURT ACT s.53: Allows SCC to consider important questions of constitutional law

-AFFIRMED: CONSTITUTIONAL ACT 1867 s.101

-CONSTITUTION ACT 1982: Incorporates 25 primary documents including CA 1867

-PREAMBLE: “Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom”

-s.96: “Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.”

-EFFECT: s.96 means Province/Federal government cannot set up admin tribunal protected by a PC in attempt create parallel court else be unconstitutional

-PURPOSE: Parliamentary sovereignty v constitutional role of superior courts

-Latter implied in Constitution Act 1867 ss.96-101

-S.96 AND COURTS’ CONSTITUTIONAL RIGHT TO REVIEW ADMIN DECISIONS

-s.96: SC judges are federally appointed, such courts have inherent jurisdiction to oversee admin tribunals

-Provinces attempt to side-step s.96 SC by inserting PCs into admin tribunals

-THREE PART TEST: SC asks is admin tribunal acting like s.96 court & thus unconstitutional?

1. HISTORICAL INQUIRY: Is admin decision one that would historically be exclusively posed to superior, district or county courts?

-Courts interpret this broadly to ensure s.96 sanctity

2. JUDICIAL v LEGISLATIVE OR ADMIN POWERS: Judicial power: Private dispute between parties adjudicated through application of recognized body of rules consistent with fairness & impartiality

3. CONTEMPORARY CHARACTER: Has the manner of decision jurisdiction now such that courts are no longer appropriate?

-*Crevier*: SCC decided tribunal could not use PC to oust s.96 courts from overseeing jurisdiction (else tribunal would be creating own borders & be de facto s.96 court)

-*Bibeault*: “Role of SC in maintaining rule of law is so important that it is given constitutional protection.”

-*Bloedel*: Affirmed *Bibeault*, youth courts could not have exclusive jurisdiction to try youths for contempt of SC

-LAMER: “Inherent jurisdiction cannot be removed from courts without a change to constitution.”

REGULATIONS, RULES & SOFT LAW

•CONTROLLING RISKS OF DELEGATION

-PROF. GREENE identifies 4 approaches to principal-agent problem:

1. Structuring discretion: appointments or legal constraints and guidance
2. Legislative oversight: direct control by the legislature

-No one answer for oversight

1. Judicial review: court supervision

-Depends on money & thus access to courts

1. Process requirements: stakeholder or public involvement

-Often limited or veiled in media propaganda

-ASK: How do we ensure the accountability of the agent?

-We delegate on basis of expertise, which is basis for court’s deference often

-*Thorne’s Hardware:*

*-*ELEMENTS*:* Discretion to expand harbour limits in Act & create ORDER IN COUNCIL

-Delegated authority regarding tolls, resulted in BYLAW

-DICKSON Majority: Decisions involving public convenience and general policy are final and not reviewable in judicial proceedings

-Need no reasons

-Would have to be “egregious” to quash

-ARGUE: Is the ballot box sufficient?

-*Thamotharem*:

-ELEMENTS: Fettering & GUIDELINES

-ISSUE: Guidelines CANNOT be transformed into rule as this would constitute fettering

-RULES require EXEC approval

-EVANS HELD: Did not constitute fettering as still opportunity to deviate on facts

-Very high threshold

-*Enbridge Gas*:

-ELEMENTS: Process requirements, notice & comment provisions

-APPROACH: PFA analysis to determine selection of SOR

-No privative clause

-Question of law

-No expertise

-No reasons requirement (thus not reasonableness)

-Court declines to impose reasons requirements

-HELD: Board within jurisdiction & Enbridge given full consideration during government process

-*Canadian Society Of Immigration Consultants*

-ELEMENTS: Procedural Review of Regulations & Substantive review of jurisdiction

-PF is about procedures

-Substantive review occurs once decision made

-There is some overlap between these two concepts

-HELD: Decision by Minister who engaged in policy analysis & was done through legislative process which is beyond the purview of the courts

-Exercised statutory powers in appropriate manner

-NOTE: Applicant attempted to use *HOMEX* person-approach but court disagreed as applicant was not private body, not intended to make living

•RULE OF LAW IN THEORY: Three features

1. Jurisprudential principle of legality

2. Institutional practices of imposing effective legal restraints on the exercise of public power within the three branches of government

3. Distinctive political morality shared by all in Canadian political community

-PURPOSE OF RULE OF LAW:

-ARISTOTLE: Rule of law is normative standard by which public power is measured

-Ensures public powers fall within bounds of law & legitimacy

-Prevents and constrains arbitrariness of public authority

-BINNIE in *Mavi*: “Cannot presume Parliament intended for admin DM to be freely unfair”

-For the executive, legislative, judicial, admin to encroach upon jurisdiction of each other or seek monopoly offends separation of powers & is ultra vires

-ARBITRARY: If biased, illogical, unreasonable, capricious

-Is unilateral, does not sufficiently reciprocate, consult or participate

*-Insite:* HELD: Exercise of discretionary element not to allow exemption was “not in accordance with POFJ because it was arbitrary, overbroad and disproportionate”

-Arbitrary as did not further statutory objectives of public health & safety

-Grossly disproportionate to deny services

-NOTE: CHARTER s.7 claim failed as no “blanket ban”

-UNWRITTEN PRINCIPLES OF LAW:

-Principle of: Legality, constitutionalism, judicial independence, equality, generality, publicity, NJ, access to justice, non-retroactivity, consistency

-ADDITIONALLY: Protection of minority (druggies), rule of law (minister not above law), federalism, democracy (SC usurped Minister)

-PURPOSE: Attempts to ensure legality, reasonableness & fairness of admin processes & outcomes so that PAs do not overreach authority

-ATTRIBUTES OF RULE OF LAW:

-Organizes principles like legality, separation of powers, responsible government, judicial independence, access to justice, fundamental justice, honour of Crown etc

1. Constrains actions of public officials

2. Regulates activity of law making

3. Minimizes harms that may be created by law itself

-THEORETICAL APPROACHS TO RULE OF LAW:

-DICEY: Rule of law possesses three features:

1. Absence of arbitrary authority in government

2. Formal legal equality, all are subject to the law

3. Constitutional law forms binding part of ordinary law of land

-CL & unwritten constitution provide better mode of legal constraint than written codes/constitution as less vulnerable to executive attempts to suspend/remove rights

-JUDICIAL INTERVENTION JUSTIFICATIONS:

1. Courts are principal external check

2. Courts carry task of constraining admin discretion by ensuring admin body did not overstep statutory jurisdiction

3. Judicial perception that role of courts is to protect & vindicate private autonomy of individuals through CL rights derived from contract, tort & property

-FULLER: “Laws of lawfullness” model

-Legal system should have formal public characteristics that guide conduct of all legal subjects

-Does NOT share Diceyan distrust of admin bodies as usurpers

-LEGAL PRINCIPLES: Publicity, non-retroactivity, clarity, generality, consistency, stability, capability of being obeyed and clear rule

-Allows individuals to predict legal responses, avoid sanctions

-Similar to criminal law principle of legality: *R v Grant*

-Like legal formalism: Does not ensure substantive justice, only that procedure meets minimum legal conditions for procedural justice

-Admin that follow this framework should be supported by the courts instead of antagonized

-RAZ: “Guidance” model

-Agrees with much of Fuller

-Conceptual (purpose, vision, values) + Guidance (preferred direction, industry best practices) + Framework (policies, procedures, standards) + Fulfillment (goals, objectives) = Principles

-Diverse society must be able to agree on common set of principles

-Need both democracy and rule of law

-Trusts system is responsible and caring

-DWORKIN: “Rights-based” model

-Similar to Dicey: We are legal subjects with individual rights against State & are entitled to demand resolution of disputes over content of rights through legal system

-Judges act as checks on Executive power

-Judges are superheroes & guardians of the constitution

-Encourages judicial activism: Places courts at the apex of the government system

-Rule of law entails judicial determination of rights through principled interpretation where legal answer must be crafted by judges from existing legal sources

-DYZENHAUS: “Deference as respect” model

-Canadian courts are courteously deferential to the other branches of government

-FOUNDATIONS OF RULE OF LAW: CA 1867 & 1982: Appears implicitly & explicitly

*-Manitoba Language Rights Reference:* Non-compliance with bilingual legislation defied rule of law & was arbitrary

-Constitution requires provincial laws satisfy rule of law in “manner & form” to satisfy PRINCIPLE OF LEGALITY:

1. Law is supreme over government officials & private individuals & excludes influence & operation of arbitrary power

2. Requires creation & maintenance of actual order of positive laws which preserves and embodies more general principle normative order

-*Secession Reference*: Defined rule of law as one of 4 elements of constitutional order:

1. Rule of law

2. Federalism

3. Democracy

4. Constitutionalism

-HELD: SCA s.53 allowed SCC to consider important questions of constitutional law

-AFFIRMED: CA 1867 s.101

-APPLICATION OF RULE OF LAW: *Roncarelli v Duplessis*: Shows difference between formal & substantive approaches to rule of law

-ARBITRARINESS:

-Existence of unlimited discretion

-DM acting in bad faith

-Inappropriate responsiveness to individual’s important interests

-Consideration of irrelevant factors

-Disregard of statute

-Dictation of decision by external and unauthorized person

-Formalistic approach would allow maintenance of discretion, application of rule of law allows courts to review substance on principled & purposive approach

-THEORETICAL INTERPRETATIONS:

-DICEYAN: SC held *Duplessis* arbitrarily exercised power not his, violated legal principle of validity, behaved ultra vires

-ISSUE: Had Chairman not consulted D, then the decision would technically have been valid?

-RAND: Unfettered discretion always bound by unwritten constitutional rules of law, would have erred both formally and substantively

-NOTE: Gave rise to Quebec Charter of Human Rights & Freedoms 1976

-NEW MINIMALIST RULE OF LAW: *Imperial Tobacco; Charkaoui; Christie*

-SC narrowed scope & effect of rule of law to FOUR PRINCIPLES:

1. Supreme over private & government officials who must act according to law and non-arbitrarily

2. Requires creation/maintenance of positive order of laws: Legislation must exist

3. Requires relationship between state and individual to be regulated by law

4. Linked to principle of judicial independence

-“Manner & form” requirements: Rule of law alone cannot strike down law but must be tied to positive legislation (*Manitoba Language Rights Reference*)

-AFFIRMED: *Imperial Tobacco:* Charter cannot be overruled by free-floating POFJ, can only strike down through ballot box or s.52 invalidity

-*Christie*: Rule of law requires access to justice, but does not underwrite eradication of any obstacle: Cannot use it to strike down otherwise valid legislation

-ARGUE: Cases highlight court’s fear of arbitrariness arising from multitude of unwritten principles

-Now prefer to use them interpretively, not as tools with direct legal effect

-RULE OF LAW AND PRINCIPLE OF DEFERENCE

-Legislatures devised PCs to prevent, control or oust JR

-Judges reinterpreted PCs to mean courts “ought” to show deference as legislature has made legal statement that admin body is intended DM

-NOTE: “Deference as respect” (*Baker*)

-*Hutterian Brethern*: “Hostility to the regulation-making process is out of step with this Court’s jurisprudence and with the realities of the modern regulatory state”

-LOWER COURT UNRULINESS?

-SCC has signaled an unwillingness to engage in “gap-filling” with unwritten principles

-Lower courts, such as BC COA in *Christie*, have more robust approach to use of unwritten principles to supplement written constitutional text

-*Lalonde*: Ontario COA relied on SCC in *Baker* to state “review of discretionary decisions on basis of fundamental Canadian constitutional & societal values” is possible as such discretionary decisions are not immune from judicial scrutiny

-*Khadr*: Ontario COA concluded national security interests & intelligence objectives cannot trump rule of law

•DEFERENCE AS RESPECT:

-*National Corn Growers v Canada (Import Tribunal)*

-FACTS: Economic tribunal made decision on American company selling across border

-LEGISLATION:

-Special Import Measures Act: Allowed tribunal to define terms, matter of both law & fact & contained finality PC

-Canadian Import Tribunal Rules: Tribunal mandated to speculate on future, broad conferral of discretion & indicative of expertise

-FCA s.28(1): COA has jurisdiction, notwithstanding s.18 or provisions of any other Act, based on finding of fact of perversity or capriciousness

-General Agreement on Tariffs and Trade: GATT is general guidance document

-ISSUE: Was PC & reliance on speculation patently unreasonable?

-The case is couched in terms of standard of review

-Determination of SOR

-HELD: GONTHIER for majority: Must consider all underlying factors (such as GATT) to determine reasonableness as is in keeping with CUPE

-PC signals SOR

-More than one reasonable interpretation

-Rejects Dworkin model: “There can be only one”

-Specialized expert tribunal wins in interpretive disagreements

-DISSENT: Wilson

-Felt JR within patent unreasonableness SOR should only apply to interpretation, not outcome in face of PC

-Was worried of correctness veiled as reasonableness

-INTERPRETIVE ISSUES OF DEFERENCE: PC, SOR, Adequacy of Reasons & Charter

-GENERAL ROADMAP: Statutory interpretation is contextual & purposive with ordinary meaning

-PRIVATIVE CLAUSES: JR arose from CL presumption that Parliament intended to respect PF

-*Cupe:* Courts should balance respect for Parliamentary intent with rule of law powers of oversight on constitutional & jurisdictional matters

-CONCUR: Binnie in *Dunsmuir*: PCs are not conclusive but high important to SOR

-Expertise is another ground for deference

-If no PC, must look to legislative intent to determine SOR

-Reflects tension between judiciary and legislature

-COUNTER: Rothstein in *Khosa*: Expertise stands as a basis for deference only when protected by PC

-PC wholly conclusive, lack thereof dictates correctness

-STANDARD OF REVIEW:

-*National Corn Growers*: Contemporary approach to SOR reflects fundamental concerns about judicial legitimacy

-*Baker*: Tensions among rule of law, deference, SOR & admin state outlined

-Duty of fairness v deference

-PFA allows great deference to exist unchallenged as long as it falls within acceptable framework of rule of law, principles of admin law & fundamental values of Canadian society & Charter

-*Montreal (City) v Montreal Port Authority*: “Discretion cannot be equated with arbitrariness”

-Follows *Roncarelli* & *Baker* on JR for abuse of discretion

-*CUPE*: First determine if past jurisprudence addresses level of deference due, otherwise use contextual analysis:

1. Presence or absence of PC

2. Purpose of tribunal from interpretation of enabling legislation

3. Nature of question at issue (fact, law, mixed)

4. Expertise of tribunal

-Ensures PA is lawful, reasonable & fair, respects legislative supremacy

-Correctness should be limited to:

1. Constitutional issue

2. Question of law important to issue & outside tribunal’s expertise

3. Drawing jurisdictional lines between two or more competing specialized tribunals

4. True question of jurisdiction or vires

-*Dunsmuir*: Reasonableness is presumptive SOR when:

1. Specialized or expert tribunal

2. Interpreting its enabling or home statute

3. Question of fact or mixed fact/law

4. Exercising broad judicial discretion

5. Correctly applies all legal principles or tests

6. Constructing interpretation of statutory powers within acceptable range

7. Resulting in decision that demonstrates justification, transparency & intelligibility

8. Produces reasonable outcome that is defensible in respect of facts and law

-IF THE TRIBUNAL SATISFIES ALL THESE CONDITIONS, THE DECISION MUST BE FOUND REASONABLE

-NOTE: Khosa rejected rigid approach, prefers more contextual

-NOW: *Alliance Pipeline*: Tension still exists between role of PC & expertise in SOR

-IN/ADEQUACY OF REASONS:

-*Baker:* Duty to provide is context specific

-Deference results not from PC but from institutional competence, expertise & mutual respect for rule of law

-*Newfoundland Nurses*: Inadequate reasons are not analyzed under PF, but rather reasonableness SOR [22]

-Reasons must be transparent and show basis for the reasonable outcome

-TEST: Functional & purposive

-Address substance of live issues, key arguments, contradictory evidence & non-obvious inferences, cannot give attitude of “we got it right, trust us” (*VIAA*)

-DM cannot provide reasons just to dodge JR

-CHARTER: Fundamentally constrains theory of PS

-*Roncarelli* & *Baker* (1999): Admin & constitutional law are attuned to underlying fundamental values such as basic concerns for human dignity, vindication of rights and effects of political power on individuals

-*Cooper* (1996): ASKS: Can tribunal dismiss home law that contradicts Charter as per s.52 Constitution Act 1982? Does disallowing access to competent admin impede justice?

-DISSENT: LAMER: s.52 belongs only to the courts, admin bodies ill-suited [13]

-Cannot allow admin to set their own limits

-MCLACHLIN & DUBE: CHRC has power to consider questions of law, including Charter

-Should write Charter consideration out, like in BCHRA [70]

-MAJORITY: LA FOREST: Enabling statute must grant jurisdiction explicitly/implicitly else ignore parliamentary intent [57]

-NOTE: Case is overturned by *Martin*

-*Dore*: Changed methodological approach to review discretionary decisions involving Charter interests & values

-OAKES TEST does NOT replace admin law review for discretionary decisions regarding whether law justifiably infringes right or freedom

-SOR is reasonableness (PROPORTIONALITY)

-ADEQUATE REASONS SIGNALS REASONABLENESS

-*Conway*: Admin tribunal may have jurisdiction to consider Charter challenges to own enabling legislation & award Charter remedies under s.24(1)

-Efficient resolution of rights dispute & conforms to “institutional dialogue” & “deference as respect models”

-AFFIRMED: *Cooper* dissent: “Charter belongs to the people”

PROCEDURAL FAIRNESS

•BEGINNING OF DOF

-NATURAL JUSTICE TO FAIRNESS:

-THEN: Availability of procedural protection depended on way decision was characterized

-Only quasi/Judicial had NJ duty to hear the other side & freedom from bias

-Formalistic approach to admin law

-CHANGE: *Nicholson*: Followed HL in *Ridge v Baldwin* and abandoned harshness

-PF applies to admin decisions, but on sliding scale

-MINIMUM: Fairness (not arbitrariness), notice, opportunity to make submissions

-NOTE: General CL DOF

-Failure to meet this standard: Quash or remit for reassessment (*Cardinal*)

1. Right to be heard

2. Right to an independent and impartial hearing

-PF is CL & may be ousted by explicit enabling statute (but must still comply with Charter) (*Kane*)

-*Cooper*: Courts will read DOF into legislation

-CHARTER: s.7 instills expectation of hearing inclusive of POFJ: Fair, good faith, be heard (*Duke*)

-NOW: Individuals affected should have opportunity to present case fully & fairly and have decisions affecting rights, interests & privileges made using fair, impartial & open process (*Baker*)

-DUTY OF FAIRNESS:

1. Hear the other side

2. Independent, impartial & unbiased DM

1, HEAR THE OTHER SIDE

•THRESHOLD TEST: Decision of a public nature affecting rights interests & privileges carries DOF

-RIGHTS, PRIVILEGES AND INTERESTS: DOF applies to decisions of PA that affect rights privileges or interests (*Cardinal*)

-Right to fair hearing (subverted by state of emergency)

-Notice oral or written, chance to be heard

-DOF applies to disciplinary proceedings within penitentiary (*Martineau No2*)

-CONSTITUTIONAL PROTECTION:

-s.7 Charter: Everyone has right to life, liberty and security of person & right not to be deprived thereof except in accordance with POFJ

-Includes PF (*Re BC Motor Vehicle Act*)

-NOTE: Constitutional matters must still be linked to subject matter at hand

-Legislation can oust applicability of DOF via s.7 if matter is deemed not a s.7 Charter matter (such as issuing of licence)

-Can only justify exceptions to s.7 (s.1) that are “extraordinary circumstances where concerns are grave and challenges complex” (*Charkaoui*)

-*DUNSMUIR* CHANGES:

-Overturns DUBE in *Knight*: Employment governed by both contract/statute is private NO DOF

-Must still abide by statutory & CL notice standard for terminations without cause

-Notice reasonable in circumstances

-Substantive decisions may be reviewed for correctness and reasonableness in some cases, but the decision need not be “fair”

-PF applies to procedure, not outcome

-EMPLOYMENT HISTORY: When DOF is due:

|  |  |  |  |
| --- | --- | --- | --- |
| Ridge v Baldwin 1963 | Nicholson v Haldimand 1979 | Knight v Indian Head 1990 | Dunsmuir v NB 2008 |
| -3 possible CL employment can apply to PUBLIC employers:  1. Master & servant “pure” (has no public elements  2. Office held at pleasure  3. Office with removal for cause | -Employment & modern employment law:  1. Master & servant “pure”  2. Office held at pleasure ( “at pleasure” removed from statute)  3. Office with removal for cause | -Employment with contract  1. Master & servant “pure”  2. Office held at pleasure (statute and contract present)  3. Office with removal for cause | -Employment with contract  1. Master & Servant “pure”  2. Office held at pleasure (statute and contract present)  3. Office with removal for cause |
| Corresponding DOF on Employer When Terminating Employment | | | |
| 1. None  2. None  3. DOF present  -NOTE: Decision is administrative in nature | 1. None  2. PF MAY be implied in some circumstances (not as much as in #3)  3. Yes: Decision is made under statute & judges reject categorical approach | 1. None  2. PF MAY be implied where there is “strong statutory flavour”, (not as much as #3)  3. Yes: PA exercising delegated powers under statute must display DOF | 1. None  2. None (UNLESS PF was negotiated into the contract)  3. Yes |

-NOTE: Employees still have recourse via Human Rights Act or private law

-PYRAMID OF LEGAL AUTHORITY

-CHARTER: Can override explicit legislation

-LEGISLATION: Can explicitly override CL protection through clear statutory language

-CL: Can “supply omission” of legislature through statutory interpretation

•CONTENT OF THE DUTY: *Baker*

*-Cooper*: Look to how decision affects individual

-HELD: Written suffices, reasonable apprehension of bias, reasonableness fails SOR for lack of full consideration of children’s needs

-Fairness is minimum “floor” of duty to be met & contextually understood

-Procedures are essential to realizing the “just exercise of power”

-Reasonableness heavily informs DOF

-Procedures need only be adequate, not optimal

-Courts will not reach for the ideal but will balance needs of individual with needs of institution/public

-[28]: Values of PF demand full, fair opportunity to present using fair, impartial & open process

-[43]: Where decision has important significance for individual, when there is statutory right of appeal, SOME FORM of reasons will be required by

-*Indian Head:* DOF is “entrenched in principles governing our legal system” but must emphasize importance of respecting needs of DM

-DETERMINING CONTENT OF DOF: Dube (Not exhaustive)

1. NATURE & PROCESS OF DECISION

-Quasi/judicial decision likely to demand more extensive procedural protection than admin decisions

2. NATURE OF STATUTORY SCHEME AND TERMS

-Investigatory procedures are not normally subject to DOF

-Final decision more likely

-ASK: Does statute provide appeal process? Likely require reasons

3. IMPORTANCE OF DECISION TO INDIVIDUAL

-Content of DOF proportionate to importance

-*Kane:* “High standard of justice required when right to continue in one’s profession is at stake”

-Balance of interests of DM & deference towards procedures

4. LEGITIMATE EXPECTATIONS:

-May expand expectations of DOF in procedural protections

-*Mavi*: Representations of government official within scope of authority, clear, unambiguous & unqualified, procedural in nature & do not conflict with DM’s statutory duty. Proof of reliance not necessary

5. AGENCY EXPERTISE IN PROCEDURES:

-Should consider statutory choice of procedure, element of discretion granted, institutional constraints

-Polycentricity & efficiency concerns tend to lead to minimal reasons

-SPECIFIC COMPONENTS OF DOF:

1. NOTICE: MOST BASIC ASPECT OF DOF

-Usually outlined in home statute

-DONALD & EVANS: Must be adequate in all circumstance to afford reasonable opportunity to present proofs and arguments and to respond to those in opposition

-Is an ongoing duty

2. DISCLOSURE:

-Standards in *Stinchcombe* were rejected in *Ferndale Institution*

-Must know case against them, all relevant information DM relied upon

-Home or generic statutes involving tribunals will likely outline it

-NOTE: Issues of professional discipline and possibility of loss of livelihood require a high level of disclosure (*Sherriff*)

-Where needs of institution outweigh individual, DOF may be satisfied by after fact disclosures (*Ruby; Cardinal*)

3. ORAL HEARINGS:

-Not usually necessary except for witness credibility on CHARTER issue(*Singh*)

-Right found under s.7 Charter & s.2(e) Bill of Rights instead

4. RIGHT TO COUNSEL:

-*Re Men’s Clothing*: PF does not necessarily entail right to legal counsel even at one’s own expense

-CHARTER: Right to counsel (s.10(b)) restricted to circumstances of “arrest or detention”

-Not an inherent right under rule of law, avoid burdensome costs (*Christie*)

-Can use counsel for non-oral hearings anytime

5. RIGHT TO CALL EVIDENCE AND CROSS-EXAMINE WITNESSES

-Often but not always part of right to oral hearing

-Decision to exercise right to witness is made by holder of right, NOT tribunal (ESTEY in *Innisfil v Vespra*)

6. TIMELINESS AND DELAY

-CHARTER: No right to reasonable time (only criminal offence: s.11(b))

-*Blencoe*: 3-year delay by HRT, applied for JR & demanded stay of proceedings for delay

-Charter applies to home statute, but no violation of s.7 rights: No general right to dignity

-Charter claim fails, turn to admin: Does delay violate principles of fairness?

1. Unacceptable delay & significant prejudice: NO

2. Abuse of process must “bring HR system into disrepute”: NO

-DELAY must be unreasonable, inordinate, unacceptable & cause actual prejudice that would offend public decency & fairness

-LEBEL: Strongly dissents, felt delay is wrong [154]

-ARGUE: McKinnon was 23 years & couldn’t meet this threshold

-*NB v GJ*: If decision impairs s.7 interest, must be given counsel

-Seriousness, complexity, limited capacity

-*Wareham*: s.7 allows delays to be assessed cumulatively

-*Bloedel*: Weighed FACTORS:

1. Time taken compared to time requirements of matter before admin body, factual & legal complexities, time to ensure procedural safeguards to protect parties & public

2. Additional causes of delay, whether applicant contributed to delay & whether admin body used resources efficiently

3. Impact of delay considered as encompassing both prejudice in evidentiary sense and other harms to lives of real people impacted by ongoing delay

7. DUTY TO GIVE REASONS

-[28] Opportunity to present case fully & fairly, have decisions affecting rights, interests, or privileges made in fair, impartial, & open process, appropriate to statutory, institutional, & social context of the decisions

-More important, higher burden for reasons [43]

-*Alberta Teachers*: ROTHSTEIN: Sometimes may have to return reasons for DM to supplement

-Wholesale failure to provide reasons will constitute breach of DOF BUT: Only where duty exists (though courts contradict: *Lafontaine* & *North Cowichan*)

*-Newfoundland Nurses*: Absence of reasons is PF (FAIRNESS STANDARD), adequacy of reasons is substantive review (CORRECTNESS/REASONABLENESS)

-ABELLA MAIN POINT: “Do reasons allow court to understand why tribunal made its decision & permit it to determine whether conclusion within range of acceptable outcomes?”

-Not a freestanding ground of appeal, reasons read as whole with outcome of substantive review

-ADEQUATE: Address substance of live issues, key arguments, contradictory evidence, non-obvious inferences

-INADEQUATE: TEST: Functional & purposeful

-Bare, opaque conclusions, no supporting info, not supported by principles, inconsistent, irrelevant, omissions

-NOTE: Inadequate reasons can be akin to no reasons at all (*Clifford*)

-Substantive Review: Will not satisfy reasonableness

-*Dunsmuir*: Exhibit justification, transparency & intelligibility

-DEFERENCE & REASONS:

-*Mavi:* Parties cannot fail to demand reasons, then attempt to undermine deference by pointing to their absence

-DYZENHAUS: Deference as respect requires courts to be respectful of reasons offered or which could be offered

*-Alberta Teachers*: Cannot challenge reasonable reasons as toe-hold into JR of waived right (to complain of delay)

-CHARTER & REASONS: Rights only limited if can be demonstrably justified

-Interpreted as a duty to give reasons

-Oakes TEST & *Dore* both involve proportionality analysis

-STATUTORY INFLUENCES: General acts govern specific statutes

-QUEBEC ADMINISTRATIVE JUSTICE ACT:

-Chapter 1: Rules specific to decisions made in exercise of admin function

-Chapter 2: Rules specific to decisions in exercise of adjudicative function

-NOTE: Two different approaches:

-Differentiates between the standards needed for the exercise of administrative function verses the adjudicative function

-BC ATA:

-s.11: BC appears to have delegated rule making regarding practice and procedure

-Must hunt down information regarding procedure for each admin body

-ALBERTA ATA:

-s.1: Authority is given to those exercising statutory power

-s.2: Lieutenant Governor in Council may designate another as authority

-s.8: Requirements of other acts must be complied with

-JR OF DUTY OF FAIRNESS:

-DOF requirements are independent of substantive review & breach of duty voids decision

-*Cardinal*: “Denial of right to fair hearing must always render a decision invalid”

-Must be independent, unqualified right

-NOTE: Heavily supported by UK case law: Megarry in *John v Rees*

-RARE EXCEPTION: *Mobil Oil* - May be justifiable to disregard breach of NJ where claim would be hopeless anyways: HELD: To quash would be “impractical” & “nonsensical”

-NOTE: JR ON PROCEDURAL GROUNDS IS DIFFERENT FROM JR ON SUBSTANTIVE GROUNDS

-JR on substantive grounds: Correctness or reasonableness standard, or defer to admin agency (*Dunsmuir*)

-No similar approach for DOF

-Violation of DOF will not result in imposition of substantive outcome by court as court oversees process not correctness

-ARGUE: Courts may err on side of DOF being present considering great cost of time & money of quashing & resubmission (*Inquiry on Blood System*)

2, INDEPENDENCE, IMPARTIALITY & BIAS

•INDEPENDENCE, IMPARTIALITY & BIAS

-SOURCES OF INDEPENDENT & IMPARTIAL TRIBUNAL

-ACT OF SETTLEMENT 1701: Stopped royal influence (implications of general independence)

-CONSTITUTION ACT 1867:

-s.99: Provides judicial tenure till age 75

-s. 100: Salaries fixed

-BC ATA 2000: s.3: Suggests appointment of initially 2 years, then 5 years

-DEVELOPMENT OF LAW OF TRIBUNAL INDEPENDENCE IN CANADA:

-FIRST: Independence of judiciary foundation to mould concept of admin tribunal independence

-SECOND: Affirmed hybrid nature of tribunals & maintained no general constitutional guarantee of independence where tribunals are concerned (*Ocean Port Hotel*)

-THIRD: Affirmed the lack of general constitutional guarantee for tribunal independence

-JUDICIAL INDEPENDENCE

-DICKSON in *Beauregard*: “No outsider should interfere in fact, or attempt to interfere, with way in which judge conducts his or her case and makes his or her decision.”

-Appearances are important

-STRUCTURE CONDITIONS: :

-Security of tenure

-Constitution Act 1867 s.99: Hold office until 75

-Judges Act: Must be given opportunity to respond to allegations when facing removal

-No “at pleasure” judicial postings

-Financial security

-Constitution Act 1867 s.100: Guarantees fixed salary

-Negotiation committees set up to consider salary issues

-Administrative/institutional control

-How the affairs of the court are administered

-Negotiating office of Federal Commissioner of Judicial Affairs (Judges Act 1985)

-TRIBUNAL INDEPENDENCE

-*Valente*: Suggested judicial independence can be applied to tribunals

-OTHER CASE:

-*Singh*: s.7 Charter

-*Genereux*: s.11(d) Charter

-*Ruffo*: Abandoned s.11(d) arguments

-*Alex Couture* : Leave to appeal denied

-*Ocean; McKenzie*: Unwritten constitutional principles of Constitution preamble

-VALENTE TEST: Whether reasonable, well-informed person, having thought matter through would conclude admin DM is sufficiently free of factors that could interfere with ability to make impartial judgments

-APPLICATION: Guarantees of tribunal independence applied flexibly to account for different functions

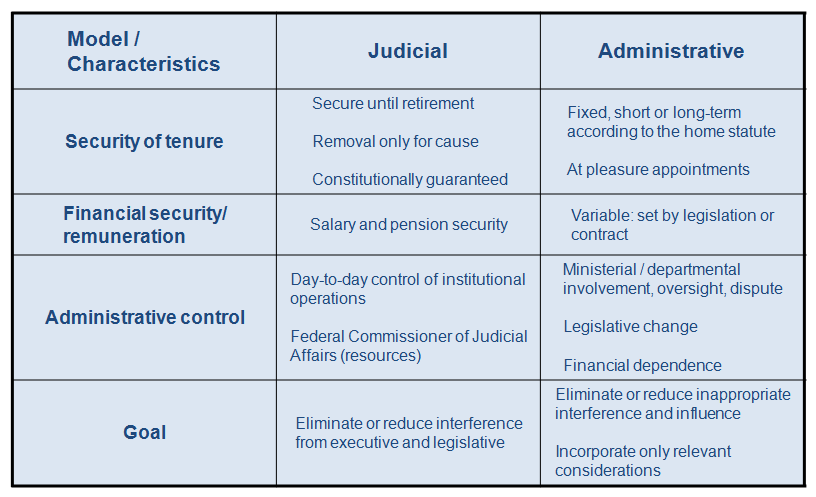
-*Matsqui*: Disagreement over application of POFJ to native tribunals

-LAMER*:*  Felt POFJ should still apply (ARGUE: Throwback to *Cooper*)

-SOPINKA: Purpose of self-government affects application of POFJ, should wait and see (points out that in prior case law LAMER had been content to wait)

-NOTE: *Matsqui* lowered tenure to merely NOT “at pleasure”

-FACTORS: Tribunal’s functions, Enabling legislation, Functions in actual practice



-ISSUE: “At pleasure” appointments within tribunal sphere

-*Ocean Port Hotel*: Turn towards challenging independence

-Argued appellate body required same standards as judiciary, particular as consequences harsh

-Appeal body served “at pleasure” with no secure tenure

-HELD: Tribunal independence is CL & can be ousted by explicit legislation

-No freestanding constitutional guarantee of admin independence, will of legislature dictates level of independence

-*Keen*: Issues with “at pleasure” appointments

-Argued was not given adequate PF in her dismissal by Minister

-HELD: Notice, reasons & opportunity to respond suffice for “at pleasure”

-Accepted *Dunsmuir* lower level of PF for “at pleasure”

-As long as not capricious

-ISSUE: Could argue Keen was dismissed arbitrarily as she had fulfilled her statute

-NOTE: In 2000, BCATA s.3: Suggests appointment of initially 2 years, then 5 years

-UNWRITTEN CONSTITUTIONAL PRINCIPLES, TRIBUNAL INDEPENDENCE & RULE OF LAW

-*Ocean Port*: No freestanding guarantee of independence for admin tribunals as they form part of the Exec branch

-*Bell Canada*: Indicated spectrum: Highly adjudicative tribunals with court-like powers would require more stringent PF

-*McKenzie*: Argued residential tenancy arbitrators should attract high levels of PF particularly as matter was once able to be adjudicated in other class with higher PF

-Cited principles of *PEI Reference*: Judicial independence stems from s.7 & s.11(d) CHARTER & unwritten constitutional principles from ACT OF SETTLEMENT 1701

- APPOINTMENT & REMOVAL PROCESS: *Saskatchewan Federation of Labour v Saskatchewan*

-HELD: New government parties may pass legislating replacing labour Board members with their own choices

-RULE AGAINST BIAS:

-Nemo judex rule: Maintain public confidence in admin of justice

-Rule against bias ensures DM not reasonably perceived to be deciding matters that will benefit them or consider irrelevant factors

-TYPES OF BIAS: Individual & institutional

-Allegations must be brought to DM at earliest opportunity

-EFFECT: Quash & rehearing

-REASONABLE APPREHENSION OF BIAS TEST: *Committee for Justice*

-TEST: Formulated in DEGRANDPRE’S dissent:

-“Apprehension must be reasonable one held by reasonable & right minded persons, applying themselves to question & obtaining thereon the required information. What would an informed person, viewing the matter realistically and practically, & having though the matter through, conclude?”

-Grounds must be substantial, with real likelihood on balance of probabilities

-Reasonable person not overly sensitive (*Committee For Justice; Bell; R v S(RD*))

-NOTE: Very contextual: Similar fact pattern in *Imperial Oil* did NOT result in bias though could argue that *Committee* was more adjudicative

-PERCEPTIONS OF INDIVIDUAL BIAS: Four types:

1. PECUNIARY INTEREST: *Dimes:* (UK): Decision set aside due to shareholder interest in company

-INDIRECT: CL more flexible: *Energy Probe* HELD: Pecuniary link must be direct & certain (non-contracted part-time board member not sufficient)

-DISSENT: Would determine whether any benefits could arise & “colour” case

-LEGISLATION: If gain no more than average person, no apprehension of bias

-Municipal Government Act 2000

-*R v Justices of Sunderland*

-NOTE: Statutory authorization of indirect pecuniary benefit prevails over CL rule against bias (*Burnbrae Farms; Pearlman*)

-NON-PECUNIARY MATERIAL INTEREST: *Obichon*: Decision to take band house for larger family quashed as DM was member of larger family

-*Local 204 v Johnson*: Members of Labour Relations Board had potential interest in case on circumstances in which government could terminate appointments

2. PERSONAL RELATIONSHIPS:

-KEY FACTORS: Whether relationship presents significant enough interest to affect impartiality of DM & whether relationship current enough to reasonably pose significant threat to impartiality

-*Brar*: Attempts to reinstitute DM does NOT constitute reasonable apprehension of bias

-Lack of evidence

-EVIDENCE REQUIREMENTS: Enough to overturn CL’s strong presumption of impartiality for adjudicators, offers immunity for tribunal members & protects deliberative secrecy

-Very contextual: STEYN in *Man O’War Station*

-Connections inevitable in profession tribunal panels: GORSKY: ‘Evidence and Procedure in Canadian Labour Arbitration”

-Consider extent of time passed: *Marques v Dylex*: HELD: Labour board member, previously lawyer for firm now involved, not biased

-Necessity may mitigate apprehension: *Calina*

3. PRIOR KNOWLEDGE OR INFORMATION: Focuses on nature & extent of DM prior involvement

-*Wewaykum* *Indian Band*: BINNIE’s involvement challenged on grounds had acted for party 15 years ago, HELD: No proof involved in prior assessment in material way

-*SEIU*: Entire Ontario Labour Relations Board disqualified to hear case as had received information earlier that contradicted parties’ representations

-SOLUTION: Ontario Public Officers Act allows for appointment of another

-LEGISLATION: Exists often to stop adjudicator from re-hearing same case on appeal

Ex. Health Insurance Act 1990

4. ATTITUDINAL PREDISPOSITION

-*Cangarle:* Chair engaging in inappropriate cross-examine gave rise to reasonable apprehension of bias

-ISSUE: Where to draw line between valid inquisitorial process & partisan interference

-*Thamotharem*: Inquisitorial process (guideline set out by chair of IRB) fair

-*R v S(RD)*: Can make comments referencing broader social context

-CIRCUMSTANCES GIVING RISE TO APPREHENSION

-Ex parte communications (DM spoke private with one party): *Merchant*

-Sexist, condescending, irrelevant comments: *Yusuf*

-Comments in prior cases indicating predisposition: *Alberta’s Teachers*

-Prior publications referencing strong views: *Great Atlantic & Pacific Co*

-KEY: Comments indicate “mind so closed any submission by parties would be futile” (*Newfoundland Telephone*)

-CLOSED MIND TEST: Degree to which prior fixed view is acceptable is determined by nature & function of DM process

-*Old St. Boniface Residents:* Politicians can advocate one thing during election and do another on panel

-NOTE: Would have to prove on FACT that DM’s mind was so closed as to make submission futile

-Standards may vary depending on function of admin body, such as investigations (more freedom for fixed view) than adjudicative

-ISSUE: Post *Newfie Telephone*, not clear when to apply reasonable apprehension of bias test or closed-mind test

-*Chretien:* Found reasonable apprehension of bias from commissioner media comments, surprising as public inquiries aim to determine fact & do not have binding impact, jurisprudence would have predicted the closed-mind approach for this investigatory stage

-ARGUE: Final decision with political impact carries onus of PF

-PERCEPTIONS OF INSTITUTIONAL BIAS:

-TEST: *R v Lippe*: “Reasonable apprehension of bias in mind of fully informed person in substantial number of cases” If NO: Apprehension of bias claims must be brought case-by-case

-AFFIRMED: *Matsqui*

-BIAS, ADJUDICATIVE INDEPENDENCE AND POLICY MAKING:

-Policy making is central to tribunal existence (*Ocean Port Hotel*)

-Policy creation by DM: Informal rule making (guidelines, bulletins, manuals) & formal rule making (delegate legislation)

-ISSUE: When this appears to impose on adjudicative independence of individual tribunal DM (*Beauregard*): Cannot substitute views of others

-FULL BOARD MEETINGS: Policies are non-binding guidelines that tribunal users can refer to

-*Bathurst*: Did meeting of full labour board to discuss use of *Westinghouse* TEST (duty to disclose info impacting economic lives of union members) breach NJ nemo judex & lack opportunity to respond?

-HELD: Necessary for consistency but cannot allow outside interference

-ASK: Is there pressure?

-EFFECT: Meetings must limit discussions to law or policy & allow parties opportunity to respond to new grounds

-*Tremblay*: Cannot require DM to consult when making decisions contrary to previous ones, cannot have evidence of SYSTEMATIC PRESSURE

-LEAD CASES: *Geza; Thamotharem*: On the facts, selection of lead case raised reasonable apprehension of institutional bias against Roma applicants

-ASSESSMENT: If no provisions in home statute on independence APPLY *BAKER*

-Cannot forego case-by-case analysis to rely on lead case factual matrix

-*Jaroslav*: CONTEXTUAL TEST: Cannot infer that Minister’s policy statements & ministry giving that policy effect has interfered with IRB’s roles as independent adjudicator

-Cannot be removed merely on basis of case outcomes

-ADJUDICATIVE INDEPENDENCE AND LEGISLATIVE PROCESS:

-*Local 707 v Alberta Labour Relations Board*: Faced accusations of lack of independence & impartiality regarding provision of labour law policy advice to government

-CONTRAST: MCLACHLIN in *Ocean Port*: Tribunals exist to implement government policy

-MULTIFUNCTIONALITY: Polycentric approach

-Experts assist technical tribunals in advisory manner

-Some tribunals will endeavour to separate their various duties

-Generally overlapping functions accepted if mandated by statute (*Regie; Brosseau)*

-TEST: *Lippe*: Whether system is structured in way that creates reasonable apprehension of bias in substantial number of cases

-CONSIDER: Tribunal in question, operation in practice, safeguards against bias

-*Mayrand*: Separation of statutory right to consider both investigatory & adjudicative rights sufficient to alleviate apprehension of bias

-*Currie*: Institutional bias arises from overlapping functions of prison guards and disciplinary board members

CHARTER REVIEW

•CHARTER FAIRNESS & ADMIN LAW

-CONSTITUTIONAL SOURCES:

-CANADIAN BILL OF RIGHTS (1960): Not constitutional & can be overridden if ousted specifically

-s.1: No discrimination and right to life, liberty, security of person & enjoyment of property, no deprivation without due process, equality before the law

-s.2: Unless explicitly ousting Bill of Rights, every law shall not infringe rights or freedoms, nor be construed to: Arbitrary detention, cruel & unusual treatment, upon detainment, deprive of right to info, counsel, interpreter

-(e) Deprive of fair hearing in accordance with POFJ

-CANADIAN CHARTER OF RIGHTS AND FREEDOMS

-PREAMBLE: Canada founded on POFJ

-s.1: Rights subject to reasonable limits prescribed by law as demonstrable justified

-s.7: Right to life, liberty & security of person & not to be deprived except in accordance with POFJ

-Confers rights of PF

-NOTE: CL informs and fills in the gaps of s.7

-ss.8-14: POFJ regarding detention BUT, unlike s.7, do not independently confer rights, must parasitically ride CL coattails

-s.32: Charter applies to government, legislature

-NOTE: Charter considerations only apply to decisions of government and legislation

-s.33: Parliament can explicitly override Charter considerations for 5 years

-PROCEDURAL FAIRNESS AND PRINCIPLES OF FUNDAMENTAL JUSTICE:

-THRESHOLD: To access s.7 rights, C must establishing rights infringed regarding life, liberty & security of person

-Otherwise, PF can only be established via CL or Bill of Rights

-Procedural requirements of POFJ are constitutional requirements under s.7 & legislation must conform to them (if threshold met)

-Usually, s.7 PF rights reviewed on correctness, BUT *Dore* states Charter issues are evaluated via reasonableness (*Alberta Health Services v Alberta Union*)

-LEGISLATION: Often dictates content of available PF & can oust CL (*Ocean Port*)

-But ONLY in jurisdictions that are not quasi-constitutional guarantees unless statute ALSO explicitly ousts Bill of Rights by name (Note 11, s.2)

-NOTE: While Bill of Rights & Charter s.7 Rights appear to convey same rights (*Singh*), Bill of Rights does not require infringement of life, liberty or security

-*Singh*:

-ISSUE: Immigration Act 1976 provides refugee with no right to reasons, rebuttal, CL rights ousted

-Normally Charter reserved for cases where statutory interpretation fails, but because POFJ requires oral hearings but was explicitly ousted, went to Charter

-CHARTER: s.7 guarantees POFJ to “everyone” (interpreted to include refugees)

-WILSON HELD: Procedures impossible to reconcile with s.7

-Matter is quasi-judicial thus high standard of PF required

-Not saved under s.1: Inconvenience & cost does not override Charter

-REMEDY: Declaration of no force & effect, new procedures, ORAL HEARINGS FOR ALL

-CRITIC: Court order resulted in whole new Immigration & Refugee Board

-Backlog: 150 000 cases , $100 million/year

-NOTE: Ultimately Singh’s case was rejected and he was deported

-INCORPORATION OF CL FRAMEWORK UNDER S.7:

-*Suresh*: NOTE: Unlike *Singh*, statute is silent on process

-ISSUE: Faces deportation, receives no submissions or responses

-Immigration Act s.53(1)(b): Refugee bears onus of proving risk of torture (meet s.7 threshold)

-S.7 MINIMUM: Similar to, but NOT the *Baker* framework

-DISCLOSURE: Materials against him, subject to valid reasons

-PARTICIPATION: Submissions in response, considered by Minister, opportunity to challenge validity of info,

-REASONS: Written, substantial & responsive, actual Minister not delegated, outline danger

-s.5 FAIL: Objectives do not satisfy infringement, limitations not connected to objective nor proportionate to harm

-SURESH EXCEPTION: Extraordinary circumstances will justify deportation to risk of torture

-EX PARTE IN CAMERA HEARINGS: *Charkaoui*

-NOTE: Non-citizens accused of terrorism fall under IA, instead of CC which carries higher PF

-ISSUE: Closed-door hearing, no defence, summary of evidence, no details, if security certificate deemed reasonable then no appeal or JR

-Applies s.7 framework:

-Threshold met: Detention & deportation

-s.1: Not justified, too much of an infringement BUT normally threats to society can be treated differently

-Denied fair hearing

-HELD: s.7 does not permit free-standing inquiry into whether legislation balanced as this should be done under s.1

-BUT: *Khawaja* (6 months later): HELD: Balanced individual & State interests within s.7

-Upheld constitutionality of ex parte sessions (with addition of *Charkaoui*  Special Advocate)

-REMEDY: Declared invalid, but unlike *Singh*, gave 1 year to adjust approach

-CHARTER & PREROGATIVE POWERS: *Khadr*

-Those exercising prerogative powers must fall within Charter

-ISSUE: s.7 analysis & violation, but beyond borders

-Canadian officials present sufficient for nexus of government

-HELD: Not in accordance with PFJ (did not go to s.1)

-s.52 declaration of violation as anything more would undermine PS

•LIMITATIONS TO DOF

-DOES NOT APPLY TO LEGISLATIVE DECISIONS: *Inuit Tapirisat*

-ESTEY: Polycentric nature of most legislative decisions too broad to handle

-CRITIC: Text Flood & Sossin: Remedies now depend on court willingness to categorize

-LEGITIMATE EXPECTATIONS: *Re Canada Assistance Plan* (AFFIRMING *Inuit Tapirisat*)

-Only applies to the procedure, not substance, must be: (*Mavi*)

-BINNIE: Representations within scope of authority, unambiguous, unqualified, procedural in nature & not conflicting with DM’s statutory duty

-Purely ministerial decisions on broad public policy will carry no DOF, attack only on abuse of discretion

-Courts are relevant AFTER legislation is enacted, not before

-Decisions only for review by electorate (*Wells)*

-NOTE: Courts pay no mind to actual effectiveness of political process as remedy

-Clear injustice not relevant to holding legislature accountable (*Authorson* - Retroactive legislation limiting money due to veterans)

-SC rejected argument they were denied right to property except by due process under Canadian Bill of Rights s. 1(a) & fair hearing according to PFOJ

1. ARE CABINET & MINISTERIAL DECISIONS COVERED BY LEGISLATIVE EXEMPTION?

-YES: If legislative in nature

-*Inuit Tapirisat*: Petitioning group has no right to be heard

-CRITIC: DOF flexible & adaptable to Cabinet matters (*Peko-Wallsend*)

2. IS SUBORDINATE LEGISLATION COVERED BY LEGISLATIVE EXEMPTION?

-YES: Counter that US has “notice and comment” requirements

-Usually courts will not impose PF on subordinate law-making function

-EXCEPTION: *Homex*: Due to specific nature of municipal bylaw & statutory requirement of notice (latter is toe-hold for the courts)

-ESTEY: Cannot use legislature as a weapon

3. ARE POLICY DECISIONS COVERED BY LEGISLATIVE EXEMPTION?

-YES: And decisions of general nature

-DICKSON in *Martineau*: “Purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection”

-DUBE in *Knight*: THRESHOLD TEST to determine whether admin owes CL DOF

1. Nature of decision: Admin v Legislative use of power

-Admin carries PF (reasons & hearing) while legislative powers do not

-Final DM: Preliminary decisions do not invoke PF

2. Relationship existing between body & individual & exercise of power is pursuant to statute (or prerogative/executive interest)

3. Effect on individual’s rights (privileges/interests): Low threshold

-NOTE: Must meet all requirements

-“At pleasure” can be terminated at will

-*Imperial Oil*: Minister was performing political role by choosing from among policy options allowed under provincial environmental protection legislation

-NOT subject to DOF

-PUBLIC OFFICE HOLDERS EMPLOYED UNDER CONTRACT: *Dunsmuir* overruled *Nicholson* & *Indian* *Head*

-If terms governed by contract then ordinary private law contract remedies apply

-Regardless of public nature of employment

-TWO EXCEPTIONS:

1. Employees not protected by employment contracts or subject to employment at pleasure, will still be protected by DOF

2. DOF may arise by necessary implication in some statutory contexts

-THE DUTY MAY BE SUSPENDED OR ABRIDGED IN EVENT OF EMERGENCY:

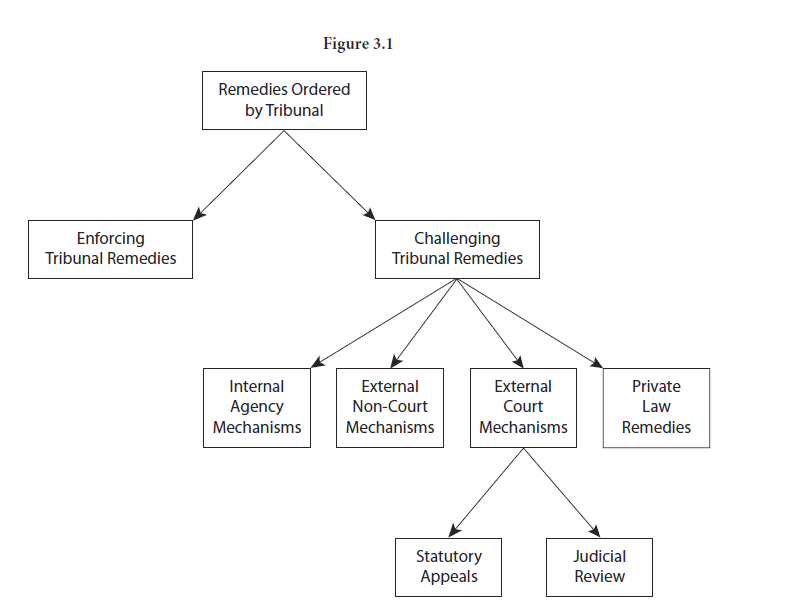
-DOF established duties that must be observed BEFORE decision can be made

-*Cardinal*: DOF applies to reassessment of solitary confinement, prior state of emergency negated initial duty

REMEDIES

•REMEDIES

-ROUTE:



-STATUTORY AUTHORITY:

-JURISDICTION: Tribunals cannot make orders that affect rights or obligations without authority from enabling statute (*Inuit Tapirisat*)

-Orders outside statute will exceed jurisdiction and be void

-Comparable tribunals making order when another has adequately done so will be exceeding jurisdiction (*Figliola*)

-QUASI-CRIMINAL REMEDIES: Some statutes can enable stiff fines or incarceration for quasi-criminal offences that require Crown prosecution (ex. BC Securities Act)

-Some can fashion remedies as they see fit (Ex. Ontario Human Rights Code)

-AMBIGUOUS statute: Can argue tribunal must be free to fulfill mandate (*ATCO Gas*)

-BUT orders for payment, equitable injunctions, require EXPRESS authority

-CHARTER: Freedom to grant Charter s.24(1) remedies another issue (*Conway*)

-Many provinces have barred tribunals from considering Charter issues (ex. BC Admin Tribunals Act)

-BC ADMIN TRIBUNALS ACT

-TRIBUNAL WITHOUT JURISDICTION OVER CONSTITUTIONAL QUESTIONS: s.44

(1) The tribunal does not have jurisdiction over constitutional questions.

-TRIBUNAL WITHOUT JURISDICTION OVER CHARTER ISSUES: s.45

(1) No jurisdiction over constitutional questions relating to Charter

(2) If non-Charter constitutional issue raised can refer question to court

(3) Case must be prepared by the tribunal, in writing, filed with the court registry & include statement of facts & relevant evidence

(4) Tribunal must hear & decide all other questions, suspend application & reserve decision until court opinion given & decide application in accordance

(5) Case must be brought for hearing ASAP

(6) Court must hear & determine stated case & give decision ASAP

(7) Court may refer stated case back to tribunal for amendment or clarification, and tribunal must promptly amend and return stated case for opinion of court.

-FEDERAL COURTS ACT: LIST OF REMEDIES

- s.18(1): Subject to s. 28, the FC has exclusive original jurisdiction

(a) To issue injunction, certiorari, prohibition, mandamus, quo warranto, or grant declaratory relief, against federal board, commission or other tribunal;

(b) To hear & determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a)

-s.28: List of bodies from which FCOA has jurisdiction to hear appeal

-NOTE: If you don’t fall in the list, you must proceed to JR

-ENFORCING TRIBUNAL ORDERS:

-TRIBUNAL SEEKS TO ENFORCE: Rare tribunal can self-enforce

Ex. Competition Tribunal can self-enforce for contempt (*Chrysler Canada*)

-Other tribunals may enforce monetary obligations: Garnishing wages, imposing licences, seizing assets, suspending driving privileges

-Must be granted by statute and pass constitutional scrutiny

-Cannot have criminal (federal) enforcement powers (*Bloedel*)

-BC ATA:

-s.18 & 31(1e): Schedule hearing, make decision, dismiss application for failure to comply

-s.47: Can order party to pay tribunal’s actual costs

- Statutory Powers Procedure Act: Usually tribunals must apply to court to enforce

-Tribunals constituting court of record have implicit right to make orders of contempt

-Can be civil or criminal (*United Nurses of Alberta v Alberta*)

-Must be violation of clear and unambiguous order

-PARTY SEEKS TO ENFORCE: Through courts (*Melia*)

-Courts more likely to enforce if order similar to kind of order court might make

-Applicant must convince courts to intervene despite lack of statutory provision empowering it to do so

-CRIMINAL PROSECUTION: Many statutes provide for quasi-criminal prosecutions of those who disobey tribunal orders

-Prosecuted by Crown & carry penalties of fines or imprisonment

Ex. BC Securities Act: Max $3 million or 3 years

-Federal Criminal Code s.127(1): Disobeying federal/provincial tribunal’s order criminal offence

-NOTE: Available ONLY when no other penalty expressed by enabling statute (*United Nurses of Alberta v Alberta*)

-CHALLENGING ADMIN ACTION:

-INTERNAL TRIBUNAL MECHANISMS:

-SLIP RULE: All tribunals can fix small things like clerical errors without statutory permission (*Chandler*)

-Tribunals can change minds prior to final decision, including preliminary hearings (*Comeau’s Sea Foods*)

-Some statutes allow tribunals to rehear decisions they have made

-Common for public utilities domain

-Some tribunals belong to multi-tiered admin agencies with internal appeal agencies (Immigration)

-Internal measures do not preclude access to courts

-EXTERNAL NON-COURT MECHANISMS: Ombud, Federal Privacy Commissioner, Auditor-General, Public inquiries, commissions, special bodies

-Ex. Ontario: Even independent bodies can be subject to ombud if government pays member’s wages (*Ontario (Ombud) v Ontario (Health Disciplines Board)*)

-USING THE COURTS: STATUTORY APPEALS (JR discussed farther below)

1. Does tribunal’s enabling statute provide for right of appeal?

-Courts have no inherent appellate jurisdiction over admin tribunals (*Medora*)

-If no statute, party must access courts through JR

2. What is scope of available appeal?

-Statute determines scope of statutory appeal

-Courts not expected to defer to appellate courts merely because statutes has labeled admin body as route of appeal (*Alliance Pipeline*)

3. Is an appeal available as of right, or is leave required? If leave required, who grants?

-Where leave required, can be from original DM or, usually from appellate body

4. Is a stay of proceedings automatic or must one apply for it?

-Enabling statute may expressly empower tribunals or appellate body to stay proceedings until appeal

-BC ATA does not allow for stays in face of an appeal

-SC has inherent authority to grant stay (*Kooner*)

-TYPES OF REMEDIES: Not exhaustive list

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| REMEDIES | ADMIN/PUBLIC LAW | CONSTITUTIONAL | CIVIL | CRIMINAL | NON-LEGAL |
| TRIBUNAL REMEDIES: Enabling statute explicitly or implicitly determines availability | -Declaratory order  -Enforce obligation, duty, right  -Mandamus  -Ongoing seizing  -Quo warranto  -Request court to enforce order  -Internal appeal  -Reconsider, rehear  -Membership | -s.52: Non-application of inconsistent LAW  -s.24: Just and equitable remedy | -Costs  -Compensation  -Damages  -Discipline  -Fines  -Licenses  -Restitution | -Federal or Provincial Crowns prosecute quasi-criminal offences: Fines and imprisonment | -Change agent  -Conciliate, mediate  -Consultation  -Education  -Equitable: Anything “fits”  -Expert  -Monitor  -Policy |
| JUDICIAL REMEDIES: In public law | -Certiorari, Quash  -Declaration  -Enforce obligation, duty, right  -Habeas corpus  -Injunction, structural injunction  -Mandamus | -s.52: Declaration of invalidity, delayed declaration of invalidity  -s.24: Just and equitable | -Costs  -Compensation  -Contempt  -Damages  -Restitution | -Contempt  -Fines  -Imprisonment  -Prosecution | -Change agent  -Equitable  -Reference question |

**-**NOVEL REMEDIES

-BLACK’S LAW Dictionary: Remedies is the “field of law dealing with means of enforcing rights & redressing wrongs”

-Judge fashions relief based on party negotiation & continuing judicial involvement, judges are change agents (*Chayes*)

-Tribunals take more polycentric holistic approach (*Pushpanathan*)

-Construct approaches to structural deficiencies (*Doucet-Bourdreau*)

-RISE OF PUBLIC-PRIVATE PARTNERSHIPS

-More effective & efficient, particularly in technical aspects (JODY FREEMAN)

-COUNTER: Lowers public accountability & privatizes what should be public (HARRY ARTHURS)

-*MCKINNON:* What happens when remedies don’t work?

-FACTS: Native + wife corrections officers suffer discrimination

-Ministry failed to implement novel remedies

-QUESTION: Can adjudicator improve effectiveness of previous orders?

-NO: Real QUESTION is: Did Ministry carry out orders in good faith or not?

-Avoided perpetual recrafting, broadens scope to Ministry & beyond

-LEGISLATION:

-Ontario HR Code Preamble: Guarantees respect & dignity

-s.34: Allows individual application to tribunal on infringement of rights

-s.35: Commission may also apply if in public interest

-s.45.2: REMEDIES: Monetary compensation such as for dignity etc

-Non-monetary restitution

-TRIBUNAL CAN CRAFT ANYTHING TO PROMOTE COMPLIANCE

-NOVEL REMEDIES: “Uncircling the wagons”: NOTE: Very *Chayes*

-“Executive Training” of Deputy Minister, Asst Deputy Minister, Regional Directors within 6 months of decision

-Anti-racism training programme with mandatory attendance

-Complaints to be handled by external persons

-Establish “Compliance Committee”

-Publication: Summary of decision sent to all employees, read at parade

-Paid leave of absence; reinstatement; promotion

-3rd party monitor of effectiveness of remedies

-Deputy Minister of Correctional Services could face civil action (such as the tort of abuse) for further failures to implement remedies

-CONFLICTING REMEDIES: *Domtar:* What happens when admin bodies give different remedies to same fact patterns?

-ISSUE: Principles of the rule of law and the principle of democracy

**-**FACTS**:** Employer wanted to compensate three days, not time extending into closure

**-**LEGISLATION: 4 statutes; 2 interpretations

-STATUTORY INTERPRETATION: If ambiguous, one facing penalty should receive benefit of doubt

-SOR: Patent Unreasonableness: HELD: Both decisions rationally defensible

-ARGUE: Legislature should amend act to avoid repeats

-DO CONFLICTING INTERPRETATIONS PROVIDE INDEPENDENT BASIS FOR JR?

-Dube: NO “principle of rule of law must itself be qualified”

-Constitutional principles not absolute, work in harmony, balance & occasionally outweigh each other

-CHANGES IN TRIBUNAL SYSTEM:

-Ontario amalgamating tribunals

-ISSUE: What about impartiality, independence, case-load, expertise?

-Quebec created a super-tribunal that hears all admin disputes and almost always has the final say (versus having to go to the Supreme Court)

-This is in place of our system of endless meandering tribunal routes

-The super-tribunal is staffed with experts, governed by principle of consistency and employs its own system of review

•ACCESS TO JR (See JR tree handout)

-USING THE COURTS: JUDICIAL REVIEW

-Court has discretion to refuse remedy even where one warranted (*Immeubles*)

-*Baker*: Tribunals cannot exist beyond law, discretion subject to same SOR analysis as non-discretionary decisions

-FIVE CL GROUNDS TO REFUSE REMEDY IN JR:

1. Adequate alternative remedies available, parties must exhaust all prescribed avenues of appeal

2. JR applications brought before conclusion of tribunal usually dismissed as premature

-Must show special circumstances: Challenge to legality of tribunal itself, clear question of tribunal’s jurisdiction or absence of appropriate remedy (*Secord)*

3. Delay & acquiesence may be grounds for reviewing court to refuse remedy (*Immeubles*), parties should object promptly to any perceived impropriety

4. No remedy in JR if issues moot: Issue not arisen, tribunal order expired, litigant no longer actually wants remedy (*Borrowski*)

5. Applicant does not have clean hands (*Cosman Realty*)

-1990s: Notion that courts would defer arose:

-*Domtar*: “For purposes of JR, the principle of the rule of law must be qualified”

-*McLachlin*: “Courts do not have a monopoly on the values of reasons and fairness”

-2008 *Dunsmuir*: Leading case on whether courts can review admin decisions on their merits

-Reassertion of courts’ role in upholding rule of law while avoiding “undue interference”

-*Khosa*: “Discretion to grant or withhold JR must be exercised judicially and in accordance with proper principles.”

-NOW: Courts will also consider analagous grounds

6. *Mining Watch*: Added balance of convenience to various parties

-JUDICIAL REVIEW:

-THRESHOLD: Public, standing, appropriate court, deadlines, other means of recourse?

-STANDING: Is collateral interest sufficient? (*Globalive Wireless*)

-APPROPRIATE COURT: Typically determined by whether authority is provincial or federal

-CHARTER: Provincial has concurrent jurisdiction in Charter attacks on federal legislative regimes (*Reza*)

-Ontario Judicial Review Procedure Act provides guidance

-DEADLINES: Some statutes impose deadlines by which party must file an application

-FCA: JR application from deferral tribunal to FC must be within 30 days from when order first communicated (s.18.1(2))

-NOTE: BC limit: 60 days! (BC ATA s.57(1))

-Courts can extend limit for reasonable delays or where no hardship arises or where party can display prima facie grounds for relief

-OTHER MEANS OF RECOURSE: Must be exhausted (*Harelkin*)

-FCA prohibits JR by FC where an available appeal exists

-FACTORS: Rending such recourse inadequate:

1. Appellate tribunal lacks statutory authority over, is not willing to address, issues

2. Appellate tribunal does not have statutory authority to grant remedy requested (*Evershed*)

3. Record before original tribunal for appeal does not include evidence relevant to applicant (*Laczko*) or includes evidentiary errors that appellate tribunal lacks authority to correct (*Cimolai*)

4. Alternative procedure too inefficient or costly (*Violette*)

-Unproven allegations that appellate tribunal will suffer from same errors or biases will NOT suffice (*Harelkin; Turnbull*)

-Cannot skip to JR by consent or simply by raising issues with original tribunal’s procedure or jurisdiction (*CB Powell Limited*)

-Though courts may grant JR, they are reluctant to do so (*Odufowora*)

-FACTORS OF PUBLIC BODY: *Anishinabek:* “Part of the machinery of government”

-FACTS: Native constable facing sexual misconduct during training

-Fired without notice, inclusion etc.

-Multiple statutes to consider

-MODERN RULE IN STATUTORY INTERPRETATION:

-Look to total context, purpose, consequences, presumptions, external aids, all relevant indicators of legislative meaning

-APPROPRIATE:

-Plausibility: Compliance with legislative text

-Efficacy: In promoting legislative purpose

-Acceptability: Outcome reasonable & just

-LEGISLATION: Decision made under non-statutory prerogative order

-LACKING STATUTE: Apply Functional Analysis

-Source of powers

-Functions and duties of the body

-Implied devolution of power

-Extent of the government’s direct or indirect control over the body

-Power over the public at large

-Nature of the body’s members and how appointed

-How funded

-Nature of the board’s decisions

-Constituting documents or procedures indicate DOF is owed

-Relationship to other statutory schemes or other parts of government, such that the body is woven into the network of government

-HELD: “Authority to discipline, though creature of contract, is still considered public”

1. Prerogative writs available to supervise machinery of government, even if not constituted by statutory power

2. IF DM fulfills public function or if DM has public law consequences

3. THEN DOF applies AND decision is subject to JR

-REMEDIES OF JR:

-Rooted in prerogative writs, not statute

-Application for JR does NOT normally stay preceding order (unlike appeal) though tribunal could do so

-PREROGATIVE WRITS:

|  |  |  |
| --- | --- | --- |
| NAME | TRANSLATION | EFFECT |
| Certiorari | Cause to be certified | Quash or invalidates an order or decision |
| Prohibition | Prohibit | Prevent unlawful assumption of jurisdiction or halt proceeding where unlawful jurisdiction is exercised |
| Mandamus | We command | Order duty to be performed BUT cannot tell tribunal how to decide |
| Certiorari + Mandamus | Most common admin law remedy | Send back (with directions) for reconsideration  -FCA: Send decision back for reconsideration in procedurally fair manner  -EXCEPTION: Insite |
| Declaration | Statement of legal position | Private law: Clarify or declare private party’s rights Public law: Declare action ultra vires  -Not enforceable but often respected (*Lount Corp*)  -Can be ignored (*Khadr*) |
| Habeas Corpus | Produce the body | Ensure detention is not arbitrary |
| Quo warranto | By what authority? | Challenge basis of authority used to justify acts |

-CONDITIONS FOR MANDAMUS: *Insite*

1. Demonstrate clear legal right to have thing sought done

2. Duty must lie on official at time relief sought

-Officials always subject to Charter rights

3. Duty must be “purely ministerial” in nature

-Officer must possess no discretionary powers in this matter

4. Demand for and refusal to perform the act sought

-STATUTORY REFORM: Writs overly complex, resulted in injustice

-FCA states only FC can issue: Injunction, certiorari, prohibition, mandamus, quo warranto or grant declaratory relief against any federal board, commission or tribunal

-BC & Ontario enacted most comprehensive omnibus reforms on JR

-BC Judicial Review Procedure Act

-REFORMS:

1. Simplified application procedures: Set out grounds for relief, relief sought

-Need not identify particular writ for application

2. Simplified remedies, courts can ignore technical errors or defects if no substantial wrong

3. Greater clarity as to who is party to hearing

4. Right of appeal, JR applications are generally made to provincial SC, with subsequent right of appeal to provincial COA

5. JR mechanisms regarding interlocutory orders and interim issues

-BC JRPA expanded range of JR to include any exercise of statutory power

-PRIVATE LAW REMEDIES: Fall outside scope of admin action and JR

-Applicants seek monetary relief, unavailable from JR

-Crown and servants can be liable to private parties for monetary relief

-FCA s.17; *Peter G White Management*

-Sued in for breach of contract or for tort of negligence or misfeasance in public office, the latter whose elements include:

1. Deliberate and unlawful conduct by one in public office

2. Public officer’s subjective knowledge that conduct was unlawful and likely to harm the plaintiff

-Clear proof is required: *Powder Mountain Resorts*

-Ensures public officials will not intentionally injure public through deliberate & unlawful conduct in exercise of public functions (*McMaster v The Queen*)

-Leading case on Malfeasance: *Odhavji* - JR not applied as no admin decision was being challenged in those cases

-ISSUE: The overlap between JR and private actions

-SOLUTION: 2010 *TeleZone*: Private law claims for breach of contract, negligence and unjust enrichment

-SC HELD: Need not seek JR before bringing private law action, latter does NOT violate rule against collateral attacks

-Proceed privately IF: Party has fundamentally private law claim arising from admin decision and primarily wants monetary damages

-BINNIE: Upon receiving damages, must be content to leave order standing

-REMEDIES UNDER S.24(1) CHARTER: Anyone whose Charter rights have been infringed may apply to court of competent jurisdiction to obtain remedy that is appropriate and just in circumstances

-*Conway*: New approach for determining when admin body can grant remedy under s.24(1)

-FACTS: Conway spent life in mental institution, sought absolute discharge

-HELD: Court did not have jurisdiction to grant remedy of absolute discharge

-FRAMEWORK: Determining Charter jurisdiction (use when statute doesn’t explicitly tell you whether tribunal can consult Charter):

1. Does tribunal have jurisdiction to decide questions of law?

2. Does statute give express or implied jurisdiction?

3. Has legislature clearly intended to withdraw jurisdiction?

-IF YES, YES, NO: Tribunal can grant s.24 and s.52 remedies for Charter issues.

-S.52: Declaration

-s.24: Open-door to remedies (even novel)

-THEN ASK:

4. For s.24, can tribunal grant this particular remedy?

-Look to statutory scheme to determine legislative intent that such a remedy would fulfill the statute’s purposes and the tribunal’s function.

-HELD: CC does not allow absolute discharge

-ARGUE: Charter access has been restricted by statute

SUBSTANTIVE REVIEW

•STANDARD OF REVIEW

-HISTORY:

-Labour-relations boards arose out of Legislative frustration with meddlesome courts

-JR was still available for breaches of PF, errors of law, abuse of discretion, factual findings made in absence of evidence

-PCs arose to encourage deference, speedy processes & alleviating burden on courts

-PCs exist as grant of exclusive jurisdiction over subject matter, declaration of finality with respect to outcome & prohibition of JR

-Ex. Workers’ Compensation Act s.22

-RULE OF LAW v PS

-DICEY: Must always be accountable to courts

-HWR WADE: Rule of law demands admin bodies not be sole judges of validity of own acts

-CONSTITUTION ACT 1867 s.96: SCC elevated JR to constitutionally protected principle

-PRIVATIVE CLAUSES: Judges would determine whether issue fell within jurisdiction & thus protected by PC or was otherwise JR

-CORRECTNESS was the implicit and exclusive SOR: All or nothing affair

-TWO WAYS TO DETERMINE JURISDICTION:

1. PRELIMINARY OR COLLATERAL QUESTION

-*Bell*: Courts could review on basis of determination of preliminary question regarding element of claim before tribunal

2. “ASKING WRONG QUESTION”

-*Metro* *Life*: JR allowed on grounds not protected by PC as board had not answered correct question of law

-CRITIC: Formalistic, malleable, manufactured reasons to meddle

-NOW: Jurisdiction largely ignored, but arguably lives on:

-*CUPE Local 79*: Consideration of legal matters within legal system as a whole

-*Barrie*: DM reasoning processes expanding beyond jurisdiction still rejected

-PATENT UNREASONABLENESS: Often correctness in disguise, required high standard

-CHANGE:

-*CUPE v New Brunswick*: DICKSON

-PRIVATIVE CLAUSE: Can be defeated by bad faith, gross interpretation, failure to consider relevant factors, otherwise SOR: PU

-Only interfere if interpretation “so patently unreasonable” that it cannot be “rationally supported by relevant legislation”

-JURISDICTION: Should not be quick to judge

-SOR: Inside jurisdiction: Patent unreasonableness

-Outside jurisdiction: Correctness

-DISCRETION: Admin bodies should be “entitled to err” [15]

-EXPERTISE: Indicative of deference

-*BIBEAULT*: What constitutes jurisdictional question (correctness) or within jurisdiction (PU)

-PRAGMATIC FUNCTIONAL ANALYSIS: “Did legislator intend question to be within jurisdiction conferred on tribunal?

-CONSIDER: Working of act, purpose of statute, reasons for tribunal’s existence, area of expertise of members & nature of problem

-*PEZIM*: IACOBUCCI

-DETERMINING SOR: Look to legislative intent, tribunal role or function, PC, whether question goes to jurisdiction (MOST IMPORTANT)

-Regardless of PC: Deference should be shown to specialized tribunals on matters within their expertise

-CONSTITUTIONAL PROTECTION:

-*Crevier*: ISSUE: Constitutionality of PCs challenged on basis confiding final & unreviewable DM authority to provincial admin tribunal would violate s.96 of CA 1867 by depriving s.96 judges of quintessential judicial function

-EFFECT: Constitutionalized JR for jurisdictional questions notwithstanding PCs

-*Royal Oak*: PC attempted to thwart s.96 but was ignored in favour of court adopting more deferential standard of patent unreasonableness

-LHD in *Pasienchyk*: Legislator cannot decide what is reviewable NOR can it decide what falls within jurisdiction

-THREE STANDARDS: *Southam* – IACOBUCCI created intermediate SOR: REASONABLENESS

-UNREASONABLE: One not supported by reasons that can stand up to somewhat probing examination [56]

-Look to reasons explaining evidentiary foundation or logical process by which conclusions are drawn

-DIFFERENT FROM PU: Whether defect is apparent on face of tribunal’s reasons or takes some searching [57]

-FOR DEFERENCE: Question of mixed law/fact, no PC, tribunal appeas on face within jurisdiction, statute purely economic, tribunal comprised of economic experts

-AGAINST DEFERENCE: Unfettered statutory right of appeal, presence of judges on tribunal panel

-EXPERTISE: Most determinative & higher deference

-*Ryan*: AFFIRMS: Three standards of review

-PRAGMATIC & FUNCTIONAL APPROACH: *Pushpanathan*

-DETERMINING SOR: Contextual analysis, function of statute powers & bodies

-Reformed *Bibeault* ASK: Did legislator intend question to attract deference?

-Questions which go to jurisdiction: Correctness based on PFA

1. PRIVATIVE CLAUSE: Indicative, not determinative, of deference

-Finality clause: Full PC compelling reason for deference

-Partial or equivocal: Look to legislative intent

-Statutory appeal: Permits more searching review

2. EXPERTISE: Most important!

-THREE STEPS: Courts must:

1. Characterize tribunal’s expertise

2. Consider own expertise relative to tribunal

-Ex. HR matters often fall to judicial expertise (*Cooper; Mossop; Chamberlain*)

3. Nature of issue before admin DM relative to expertise

-*Southam*: Should show deference in presence of “broad relative expertise” applied to general questions

-Both *Southam* & *National Corngrowers* chose PU

-PROFESSIONAL DISCIPLINE COMMITTEES: Lots of deference (*Ryan; Moreau-Berube)*

-ELECTED OFFICIALS: *Baker*

-More deference

-NOTE: *Chamberlain*: Though members elected & expert, HR element meant less deference

3. PURPOSE OF STATUTE AS WHOLE & PROVISION IN PARTICULAR:

-Polycentric concerns: More deference

-Whether provision protects or limits right will influence whether step more or less indicative of deference

4. NATURE OF PROBLEM:

-LAW: Less deference

-Courts likely to JR cases likely to set precedence:

-*Bibeault*: Concept derived from CL or Civil Code

-*Mossop*: General question of law

-*Pushpanathan*; *Chamberlain*: HR issue & serious question of general importance

-FACT: More deferential

-MIXED: More neutral

-*Retired Judges*: Highly generalized propositions of law should be left to courts

-Division of categories does not dictate expertise

-*BAKER*: SOR for errors of law & discretion:

-Must look to parliamentary intention but court must intervene where decision outside scope of power

-RISE OF DUNSMUIR & TWO SOR:

-*SOUTHAM*: Too many complaints of 3 SOR & PFA that was not very functional

-*TORONTO V CUPE*: Called for unified approach to reasonableness

-*DUNSMUIR*: Got rid of PU & affirmed deference

-Moved away from formalistic jurisdiction & highly contextual tests, reasonableness provides JR where needed but otherwise deference

-PROCEDURAL FAIRNESS:

-BINNIE: Correctness applies

-TWO STEP TEST OF SOR:

1. Past jurisprudence?

2. Then contextual analysis: Standard of Review (i.e PFA)

-*PUSHPANATHAN* factors

-REASONABLENESS: Presumptive standard when:

-Specialized/expert tribunal

-Interpreting enabling statute

-Question of fact or mixed

-Exercising broad statutory discretion

-Correctly applies all legal principles or tests

-Constructs interpretation of statutory powers that falls within range of possible acceptable interpretations

-Resulting in decision that demonstrates justification, transparency and intelligibility

-Produces reasonable outcome defensible in facts and law

-BINNIE: Argues we subsumed PU into reasonableness, spectrum inevitable

-REASONS: Very important in determining SOR

-NOTE: Inadequacy of reasons not stand-along basis to quash

-CORRECTNESS: Exceptionally applies to:

-Constitutional issue

-Question of general law that is BOTHof central importance to legal system as whole AND outside the specialized area of expertise (*Toronto v CUPE*)

-GENERAL QUESTION OF LAW:

-When DM is considering CL or civil law

-Issues of CL, like awarding costs: Depends on expertise of DM

-Often issues around HR (*Cooper; Mossop; Chamberlain)*

-Drawing jurisdictional lines between two specialized tribunals

-True question of jurisdiction or vires (ex. *Northrop*)

-NOTE: *Cupe*: “Be careful not to brand as jurisdictional that which may be doubtfully so”

-EXPERTISE:

-ROTHSTEIN:

-We should dispense with “expertise” as relevant factor

-Very rare that true jurisdictional issue every actually arises

-Reasonableness review most of the time

-COUNTER: CROMWELL: Jurisdiction is very important

-Role of courts to police limits of admin bodies, particularly in matters of interpretation

-Wants to reestablish a stronger sense of jurisdiction

-Should thoroughly examine legislative intent to determine if admin body is interpreting powers correctly

-Unpredictable correctness review

-BINNE: Runs in middle

-Combination of importance of expertise & wielding of discretion by admin body

-Less predictable, balances more factors

-*KHOSA*: Considered PCs & SOR in hugely discretionary decision

|  |  |  |  |
| --- | --- | --- | --- |
| BINNIE | ROTHSTEIN | DESCHAMPS | FISH (Dissenting) |
| -FCA: Felt it was grounds of review of admin action which permits relief  -Deference is presumptive approach, need no PC  -PC signals greater deference  -Courts not to re-weigh or substitute, but can determine range of reasonable outcomes  -Reasonableness is one single standard  -SOR: Reasonableness  -HELD: Reasonable decision | -FCA: Felt it codified SOR determined by legislature  -Legislative standards oust CL  -Without a PC correctness is presumptive approach  -PC signals expertise & is determinative  -Parliament’s intent: Deference only to findings of fact  -SOR: Reasonableness  -HELD: Reasonable decision | -FCA: SOR determined by legislature  -Legislated standards oust CL  -SOR: Reasonableness  -HELD: Reasonable decision  -NOTE: Does not agree with Rothstein’s reasoning in Parts 1 & 2  -NOTE: Feels expertise cannot be assumed | -FCA:SOR: Reasonableness but not codification  -The IAD needed to explain its disagreement with the sentencing judge  -IAD evidentiary finding incorrect  -HELD: Unreasonable decision  -NOTE: “Deference ends where unreasonableness begins”  -PC not determinative  -Advocated re-weighing |

-NOTE: Importance of reasons is made clear

-WHAT HAPPENED TO PRIVATIVE CLAUSE?

-*CUPE*: PC was legislative signal for deference

-*DUNSMUIR*: BINNIE: PC is indicative of deference, but not wholly determinative

-*KHOSA*: ROTHSTEIN: PC is determinative of deference, presumptive SOR correctness

-Argues should look for basis of deference in FCA, not CL

-MAJORITY: Deference warranted under SOR reasonableness & SOR analysis

-AFFIRMED: *Pushpanathan* multifactor consideration

-WHAT HAPPENED TO JURISDICTION?

-Initially jurisdiction arose to subvert PCs, but their status is now demoted

-POST-*Southam*: Jurisdiction untethered from formalistic approach & became label for outcome reached under *Pushpanathan* analysis

-*Dunsmuir*: Rejects *Pushpanathan* balancing act & revives formal idea of jurisdiction as boundary concept capable of rebutting presumption of deference

-AFFIRMED: *CUPE* emphasis on avoiding formalism as argument

-POST-*Dunsmuir*: Courts appear to uphold restraint & pursue stricter standard of correctness

-*Alliance Pipeline*: Refused to consider question of fact jurisdiction approach

-*Northrop*: (Pure questions of jurisdiction for US firm standing): Accepted pre-Dunsmuir jurisprudence indicating SOR

-*Alberta Teachers:* ISSUE with *Northrop*: Argued jurisprudence used was considering correctness, not jurisdiction, confronted *Dunsmuir* endurance of jurisdiction for SOR analysis:

-ROTHSTEIN: Question of jurisdiction is unclear concept & unworkable

-JR is constitutionally protected & *Dunsmuir* identifies criteria for applying correctness, no point to jurisdiction issues

-MAJORITY: Jurisdiction moot as is transformed in Post-*Dunsmuir* exceptions to presumption of reasonableness & multi-factor analysis

-BINNIE & DESCHAMPS propose:

1. Prediction that reasonableness will be spectrum of intensity

2. Revision of question of law of central importance as exception to deference

-CROMWELL: Feels to do away with jurisdiction would undermine foundation of JR

-ROTHSTEIN: Counters that CROMWELL fails to consider basis for application of correctness standard apart from jurisdictional question

-*Catalyst Paper*: Spoke only of deference and reasonableness (Like BINNIE & DESCHAMPS)

-*Halifax* v *Nova Scotia*: Rejected *Bell* notion of preliminary question, here appropriate SOR is reasonableness

-WHAT HAPPENED TO PATENT UNREASONABLENESS?

-POST-*Southam*: Legislators gave up on PCs & attempted to dictate which SOR JR should use

Ex. BC Admin Tribunals Act or Ontario Human Rights Code

-ISSUE: *Dunsmuir* got rid of PU

-ANSWER: *Khosa*: Meaning of PU within BC ATA intrinsically tied to CL definition which alters with most recent interpretation

-BUT: Wording of act implies strong deference

-*Figliola*: Need not interpret PU because phrase defined within BC ATA

-*Shaw v Phipps*: PU should be interpreted against legislative intent at time of Ontario HR Code

-POST-*Dunsmuir*: Deference for questions within specialized expertise of tribunal unless not rationally supported (i.e. Unreasonable)

-QUESTION OF CENTRAL IMPORTANCE OUTSIDE OF DM’S EXPERTISE?

-NOTE: *Dunsmuir* does not elevate expertise, but presumption of deference implies expertise

-*Celgene*; *Alliance Pipeline*: AFFIRMED: Interpretation of home statute will usually attract reasonableness SOR

-NOTE: BINNIE in *Dunsmuir* had been concerned definitions would lead to legal wrangling, but thus far that appears not to be the case

-*Domtar*: Inconsistent interpretations of home statute did not provide independent grounds for stricter correctness

-Principle of consistency NOT as strong in admin

-NOTE: Was restricted to issues of direct operational conflict

-*Mowat*: (Power to award costs & HR)

-ISSUE: Pre-*Dunsmuir*: No deference to HR issues (correctness) BUT post-*Dunsmuir:* Presumption of deference in context of home statute interpretation (reasonableness)

-Dodged by granting issue of costs to DM

-NOTE: Power to award costs in *Alliance Pipeline:* SOR reasonableness

-BUT: Post-*Domtar* ISSUE: Adopted *Abdoulrav* statement that rule of law requires statute apply equally and universally to all people

-*Mowat* took HR outside of expertise of DM

-CHARTER, DISCRETION & SOR:

-*Suresh*: Considers number of Charter questions which attract different levels of SOR

- *SURESH* EXCEPTION: Court did not answer whether one can deport to risk of torture, but instead allowed for exceptional circumstances

-*Dore*: “When charter values are applied to individual admin decision, they are being applied in relation to particular set of facts. *Dunsmuir* tells us this should attract deference”

-Proposed proportionality analysis (similar to OAKES TEST) that balances “severity of interference of Charter protection with statutory objectives”

-If outcome within range of possible acceptable outcomes, merits deference as reasonable

-REASONING ABOUT REASONS:

-Overlap of assessing adequacy of reasons as matter of PF & evaluating substantive content of reasons as matter of merits review

-*Newfoundland Nurses*: Dunsmuir does not imply adequacy of reasons is grounds alone for quashing or that two analysis should be taken, one for reasons and another for result

-No reasons is breach of PF and thus error of law (*Baker*)

-But if there are reasons, challenges should come from reasonableness analysis (of many factors)

•STATUTORY ANALYSIS:

-THEORETICAL APPROACH

-ROMANTIC DYZENHAUS: Constitutional Pluralism

-Three branches of government work to determine significance of legal norms governing exercise of state power

-SOURCES: Constitution, CL, international law, instruments of “soft law”, fundamental values of Canadian society

-Argues approach implicit in DUBE’S majority in *Baker*:

-i.e. Common commitment to ground admin & legal decisions in public justification

-ISSUES: Interpretations inherently contestable, no firm answer

-LISTON: Views this pluralism as good, allowing other actors to influence law

-DICEYAN: Rule of law, formalist, interventionalist, positivist, textualist

-Words have single, stable meaning over time

-Strict separation of powers

-Strict focus on context, plain meaning

-Correctness review is norm

-ISSUES:

1. Discretion

2. PCs

3. Smuggling in value-driven choices

4. Judicial abdication v judicial supremacy: (*Cooper*)

-SKEPTICS: SOR is a veil for judges doing as they please

-STATUTORY INTERPRETATION & SUBSTANTIVE REVIEW:

-MODERN APPROACH: “General Roadmap”: Read act contextually, use ordinary sense when lacking definition, harmoniously with purpose of act & intention of parliament (DRIEDGER)

-Issues arise with conflicting judgments on context and relevant elements

-ARGUE: Erodes notion that courts need not give reasoning of tribunal any weight & that policy & law can be truly separated

-POSITIVIST APPROACH: Law has singular meaning found in statute, stable over time

-Must determine legislative intent (*Mossop*)

-Inconsistent with notion of multiple correct answers of interpretation (*CUPE*)

-May demand constitutional challenge in lieu of upholding fundamentals of Canadian values

-CORRECTNESS REVIEW IN THEORY: *Dunsmuir:*

1. Supervise jurisdiction of admin DM

-Generalist judges are uniquely placed and independent of the executive

-Capable of providing guidance to those bodies

2. Exhibit expertise in matters over which admin DM less adept & knowledgeable

-But not all instances of law interpretation

-Judges have legitimate role of reigning in DM who are not experts

3. Ensure consistency & predictability in legal system

-Especially where a range of reasonable alternative interpretations exist? (*CUPE*)

-ARGUE: Does context sensitive reasonableness review negate need for correctness?

-CORRECTNESS REVIEW IN PRACTICE: Tensions reflected in *Bibeault* & *Mossop*

-*Bibeault* (labour relations): Judgment favours conceptual coherence between statute & civil law over context-inflected sympathies of tribunal

-But why should that alienate interesting interpretations?

-*MOSSOP*: Tribunal employed adept SOR analysis to allow modern reading of “family”

-SCC: Failed to use PFA, HELD: Error in interpretation on correctness SOR: Lacked PC

1. Positivist approach on legislative intent

2. Strict interpretation on ordinary meaning

-DUBE: Applied PFA & found for the tribunal on reasonableness SOR

-LA FOREST, LAMER: Absence of PC means correctness, cannot read into legislation

-Should have brought Charter complaint

-CORY/MCLACHLIN: Agree with Lamer/Forest on PC & SOR but with DUBE onwards

-Used correctness SOR to say Tribunal was correct

-*NORTHROP*: Tribunal engaged in comprehensive & legalistic inquiry: Found standing

-SCC: No standing

-ROTHSTEIN: Look’s to Parliament’s clear & unambiguous intent: No standing

-BUT: Failed to consider reasons (despite current expectations of SOR)

-HUMAN RIGHTS: Since *Mossop* & dismissal of PU: Courts more willing to accept deference on HR issues

-*Dore*: Balances exercise of adjudicative discretion involving CHARTER values & legal values should attract deference

-NOTE: Not clear whether *Pushpanathan* would still attract deference post-*Dore*

-ISSUE: Different interpretations of correctness

-*Barrie*: Two correctness SOR applied via pure statutory interpretation & policy goals

-*Domtar*: Statutory interpretation is not exact science

-ISSUE: How to justify correctness review then?

-REVIEW FOR REASONABLENESS

-QUESTION: Whether or how imperatives of deference & supervision may be integrated where judges are tasked with reviewing substantive legality of admin decisions

-Courts struggle to find balance

-EVOLUTION: Begins with *CUPE*

-GONTHIER in *NATIONAL CORN GROWERS*: Advocated in favour of Tribunal’s contextual approach, cannot determine reasonableness without considering reasons underlying

-*SOUTHAM*: Unreasonable decision is not supported by reasons that can stand up to somewhat probing examination, must look to reasons supporting & evidentiary foundation of logical process

-Reasons are minimum conditions for rationality

-*MOSSOP*: DUBE dissent & tribunal only ones to take PFA & consider reasons

-Others went strict legal interpretation & correctness

-*RYAN*: IACOBUCCI: Reasonableness does not lead to single answer

-ARGUE: Choosing best of worst, instead of correct answer?

-*DUNSMUIR*: Critics felt interpretation was unreasonable/incorrect in order to come to rescue of bad employee

-*CELGENE*: When interpreting own statute, deference owed: Reasonableness [34]

-Following *Dunsmuir, Khosa*

-AFFIRMS: Modern approach to statutory interpretation

-*CATALYST PAPER*: Decisions & bylaws can be reviewed for reasonableness

-Would have to be irrational, bad faith to engage JR

-*DORE*: Can reweigh but ONLY for CHARTER issues

-ENDURING QUESTIONS FROM PRE-*DUNSMUIR* LAW: Issues:

1. METHOD OR CONDUCT OF JUDICIAL REASONING MOST CONSISTENT WITH DEFERENCE

-*CUPE:* Basic tenant of constitutional pluralist orientation on statutory review is that court’s analysis is grounded in careful appraisal of tribunal’s reasons

-Like DUBE in *Mossop*

-Post-*CUPE*: Judge should not measure decision against what they feel is “correct”

-Ex. *Toronto (City) v CUPE*

-Pre-*Dunsmuir*: *Ryan* case prescribed staying close to reasons for admin DM while searching for “a line of analysis within given reasons that could reasonably lead tribunal from evidence before it to conclusion at which it arrived”

-As in *CUPE*: Decision likely reasonable if supported by tenable explanation, even if explanation is not one court finds appealing

-*Dunsmuir* AFFIRMED *CUPE* that there are numerous reasonable interpretations

2. SUBSTANTIVE INDICIA OF REASONABLENESS OR UNREASONABLENESS

-IACOBUCCI in *Southam*: Reasonableness: According considerable weight to reasons and views of tribunal with significant expertise

-Look to reasons

-NOTE: Became *Dunsmuir* reasonableness

-*Ryan*: No single right answer within scope of competing elements

-*Baker*: DUBE dissent attempted to reweigh DM considerations AND which factors were chosen

-*Suresh*: Does not reweigh elements, but looks to prior jurisprudence to see how ought to weigh

-No comment on DUBE’s attempt to expand

-*DUNSMUIR* REASONABLENESS IN PRACTICE: Judicial supremacy v judicial abdication

-JUDICIAL SUPREMACY IN PRACTICE: *Dunsmuir*

-Elevated CL values to exclusion of competing values privileged by DM

-ISSUE: Consideration of reasoning was comparably abrupt, court appeared more determined to ascertain right answer

-Judicial supremacy (CONTRAST: *Khosa*)

-NOTE: Dunsmuir still advocates respecting tribunal weight in expert matters

- JUDICIAL ABDICATION: Weighting in *Khosa*

-Court gave far more weight to DM designation of various elements, despite being not entirely convinced

-FISH DISSENT: Accuses court of being overly selective

-RESPECT, NOT SUBMISSION: *Celgene*

-Reasonableness SOR paid close attention to reasoning of Board which had departed from ordinary principles of commercial law

-AKS: Was DM justified?

-“Deference as respect for, not submission to” admin reasoning (Like: DUBE dissent in *Mossop*)

-AFFIRMED: *Alberta Teachers*

-PROPORTIONALITY:

-*Catalyst:* Highlights tensions between supremacy and abdication & scope of reasonableness

-Wide discretion granted to municipal DMs

-Commitment to identifying contextual factors supportive of deference

-NOTE: Can be seen as a pre-*Dore* inroad into proportionality

-*Dore*: Proportionality central to review of discretionary decisions implicating CHARTER values

-Indication of how reasonableness takes its colour from context

-Appears DM balancing CHARTER values not expected to engage in formal rights analysis on model of CHARTER jurisprudence nor must they defend decisions as “minimally impairing”

-Must demonstrate due regard to competing values

-*Dore* approach to reasonableness standard brings together two trends:

1. Courts should stay close to reasons of DM but also consider range of acceptable options

2. Eroded principle that courts may not revisit weighting of factors

-NOTE: Reweighing restricted to CHARTER! (Despite what DUBE in  *Baker* might want)

•CHARTER REVIEW

-OAKES TEST: *Slaight*

1. Is object pressing & substantial?

2. Are means chosen proportional?

-Rationally connected to objective

-Minimally impair rights

-OLD APPROACH: *Cooper (1996)*

-If tribunal within jurisdiction, may consider Charter issues as questions of law

-LAMER: Courts should have monopoly, separation of powers, check & balance

-LAFOREST: Decisions on correctness, must have explicit/implicit authority

-DISSENT: Jurisdiction to consider law is jurisdiction to consider Charter, need no explicit pass

-CHANGE: *Martin*

-GONTHIER: Must allow tribunals to uphold principle of constitutional supremacy, JR correctness, avoid judicial bifurcation

1. Look for explicit/implicit jurisdiction to interpret ANY question of law

-YES: Charter analysis

-NO: JR

-NOTE: Clear rejection of LAMER

2. Explicit must be found in terms, whereas implicit can be found in whole statute

-Contextual analysis

3. If jurisdiction: Power to consider Charter

4. Burden of rebutting presumption of jurisdiction on challenging party

-INCONSISTENCY OF S.1 APPLICATION:

-*DORE*: Courts must employ ADMIN LAW ANALYSIS of decision considering Charter concerns

-Rejects OAKES TEST for proportionality or whether there was minimal limitation of guaranteed right

-OAKES: Deals with “law” or rules of general application, NOT admin decisions that violate rights of particular individual

-REASONABLENESS: Reflects proper contextual balance of implementation of statutory purposes with Charter protection

-*SLAIGHT* FRAMEWORK & *DORE*:

-TWO TYPES OF ACTIONS: *Slaight*

1. Those based on express statutory authority to infringe protected right

-*Dore*: SOR: Correctness

-Evidentiary burden of OAKES TEST on party defending rule

2. Those based on imprecise or discretionary authority

-*Dore*: SOR: Reasonableness

-Burden of proving decision unreasonable on party seeking JR

-NOTE: Only post-*Dore* is this distinction become a point of contention

-FRAMEWORK:

1. Determine whether disputed order made under legislation that confers “expressly or by necessary implication, power to infringe a protected right”

-YES: Legislation must satisfy requirements of s.1 Charter

3. If legislation provides broad/imprecise discretion & authority to infringe protected right is not express:

-THEN order itself must be justified under s.1

4. If order CANNOT be justified under s.1, admin tribunal has exceeded jurisdiction

-If justified: Admin tribunal is within jurisdiction

-NOTE: *Dore* states that DECISION will NOT invite application of Oakes Test s.1

-EXPRESS AUTHORITY TO INFRINGE PROTECTED RIGHT:

-*Slaight*: Legislation itself must satisfy requirements of s.1 (AFFIRMED *Dore*)

-ISSUE: What about orders arising from such express legislation?

-*Dore*: Order will NOT be subject to OAKES TEST even if law/rule could be

-Order will be analyzed for reasonableness via admin law

-EX. Extradition Act: Express legislation that infringes rights, but no blanket s.1 justification, every decision must be individually justified though post-*Dore*, legislation itself need not satisfy OAKES

-*Lake*: Refused to apply s.1 analysis to decision on extradition, used *Dunsmuir* reasonableness

-Approach AFFIRMED in *Dore*

-ISSUE: Neither *Lake* nor *Dore* address issue of minimal impairment

-ABELLA in *Dore* feels that reasonableness and OAKES are two different analytic approaches that would lead to SAME result

-*Lake*: First to encourage deference towards s.1 justifications of DM

-NOTE: Despite *Dunsmuir* calling for correctness for constitutional issues

-CONCLUSION: DM need not satisfy s.1 justification threshold and is due deference

-FUTURE ISSUES: Likely over whether legislation explicit (correctness) or imprecise/discretionary (reasonableness)

-Ex. *Little Sisters*: Involved express legislation but subjected BOTH law & decision to s.1 analysis (inconsistent with *Dore*): HELD: Legislation justified, decision to interfere with importation of gay materials not

-IMPRECISE AUTHORITY TO INFRINGE CHARTER RIGHTS:

-*Multani* : Applied Oakes to admin decision

-MAJORITY: Followed *Slaight* FRAMEWORK & applied s.1 analysis to admin decision for correctness SOR on jurisdiction

-Rejected in *Dore*

-DESCHAMPS/ABELLA rejected Oakes altogether & insisted matter be analyzed through admin law on reasonableness SOR

-Wanted to avoid constant JR Charter applications

-NOTE: *Multani* did not involve a statute!

-NOW: *Dore:* s.1 applied to rule of general application, not particular decisions

-Admin law apply to admin decisions that infringe Charter rights

-Issues involving discretion: REASONABLENESS (Claimant must prove unreasonable)

-ISSUE: Government will put everything under discretion

-Use PFA to determine SOR: *Dunsmuir*

1. Past jurisprudence

2. Otherwise, contextual analysis using SOR analysis:

1. PC

2. Purpose

3. Nature of question

4. Expertise: Is DM authorized?

-Considers DM’s balance & proportionality

1. Charter values & statutory objectives

2. How Charter value best protected within statutory scheme

3. Proportionality analysis: Severity of interference with objectives

4. Choice of outcome within “range of possible acceptable outcomes” with reasons exhibiting “justification, transparency & intelligibility”

-Not yet clear if *Dore* approach will carry same protections as OAKES

-Party defending decisions alleged to infringe Charter seems to be relieved of obligation of demonstrably justifying infringement

-OAKES more simply reflected burden-of-proof requirements of s.1

-ISSUE: Dore does not clarify difference between s.1 requirements and Oakes analytical approach

-Unclear if case will be considered Charter violation or will be saved under s.1

-Not clear whether deference owed post-*Dore* to non-Charter DM decisions

-How do you weigh Charter rights & values? (Very LAMER question)

-TRIBUNALS & SS.24(1), 52(1):

-QUESTION: Do Tribunals have authority to interpret & apply Charter to enabling legislation for purpose of refusing to give effect to provisions found to violate Charter?

-Can Tribunals grant remedies under s.24(1) Charter?

-JURISDICTION: *Douglas Kwantlen*; *Cuddy Chicks*; *Tetreault-Gadoury*

-HELD: s.52(1) Constitution Act 1982 declares Constitution to be supreme law, inconsistent law is of no force and effect

-Admin DM with power to interpret law must also interpret Charter law

-Cannot declare infringing statutory provision invalid (courts only), s.52(1) allows DM to apply Charter to enabling legislation & REFUSE TO GIVE effect to provisions inconsistent with Charter

-SC may review such decisions on SOR CORRECTNESS

-ISSUE: What does it mean to have authority to consider question of law?

-*Cooper* DISSENT: All law & law-makers must conform to Charter”

-*Martin* (LEADING CASE): Admin tribunals which have jurisdiction, whether explicit or implied, to decide questions of law arising under legislative provision are presumed to have jurisdiction to decide constitutional validity of provision

-OVERRULED: Majorty in *Cooper*, AFFIRMED *Cooper* dissent

-Rejected notion of “general” or “limited” question of law

-FACTORS: Implicit power to consider questions of law:

1. Statutory mandate of Tribunal & whether deciding questions of law is necessary to fulfilling mandate effectively

2. Interaction of tribunal in question with other elements of admin system

3. Whether tribunal is adjudicative in nature

4. Practical considerations, including Tribunal’s capacity to consider questions of law

-BASIC PRINCIPLE: Did legislator intend Tribunal to consider questions of law?

-All this can be rebutted, such as explicit refusal to allow DM to consider law under BC Admin Tribunals Act

-Courts better

-Avoid costly legal complexity

BC ADMIN TRIBUNALS ACT

•DIFFERENT ADMIN APPROACHES

-QUEBEC: Have special tribunal set-up

-No courts

-Highly expert

-Generalist tribunal, considers +150 statutes

-Procedures very judicialized

-Enabling statute provides very detailed rules of procedure

-Members guaranteed to hold office short of bad behaviour

-Survived constitutional challenge

-Unclear if it is better than courts for efficiency, but appears to generate less litigation

-UK: Created unified tribunal system

-Has two tiers

-First: Chambers organized by subject matter

-Upper: Hears appeals as superior court with judicial status

-Involves expert judges and lay people

-Full independence of actors

-Aimed to remove issues of uncertainty in CL courts

-Aims to radically reduce applications for JR

-BC: Codified SOR

-Comprehensive review of BC admin justice system

-Created Admin justice office

-Goal to ensure fairness, education for tribunal members

-ATA came in 2004

-Does not create super tribunal, but is a code with procedural and substantive import relating to enabling statutes of various admin bodies

-NOTE: Liston has posted charts regarding the ATA online

•BC ATA

-DEATH OF PATENT UNREASONABLENESS

-Constitutionalization of right to JR completely undermined PCs

-*Southam*: Legislator tried to explicitly dictate SOR

Ex. BC ATA matches grounds for JR with particular SOR

-*Dunsmuir*: Got rid of patent unreasonableness

-*Khosa*: Considers issue of statutes that still reference PU

-Concepts of PU will be adjusted in line with general principles of admin law

-*Figliola*: Court did not have to interpret PU post-*Dunsmuir* as ATA already defined it according to traditional indicia of ABUSE OF DISCRETION

-*Shaw v Phipps*: PU should be interpreted with legislative intent at time of enactment

-Highest level of deference available under general principles of admin law on HR

-NOW: Respect those “questions within specialized expertise of Tribunal unless they are not rationally supported, i.e. are unreasonable

-S. 58: SOR IF TRIBUNAL’S ENABLING ACT HAS PC:

(1) If PC: Tribunal considered expert on matters it has exclusive jurisdiction over

(2) In JR of expert tribunal:

(a) Finding of fact/law or discretion: Patent unreasonableness

(b) Questions on CL rules of NJ & PF: Did tribunal act fairly

(c) All other matters: Correctness

-S.59: SOR IF TRIBUNAL’S ENABLING ACT HAS NO PC

(1) SOR is correctness EXCEPT for questions on exercise of discretion, fact, application of CL rules of NJ & PF

(2) Must not set aside finding of fact UNLESS lacks supporting evidence OR despite evidence is still unreasonable.

(3) Must NOT set aside discretionary decision unless patently unreasonable.

(4) Discretionary decision (3) is patently unreasonable IF:

(a) Exercised arbitrarily or in bad faith,

(b) Exercised for improper purpose,

(c) Based entirely or predominantly on irrelevant factors, or

(d) Fails to take statutory requirements into account.

(5) Questions on CL rules of NJ & PF consider if, in all the circumstances, tribunal acted fairly.

-PATENTLY UNREASONABLE: *Khosa*

-BINNIE (Majority): PU lives on in BC but will be in accordance with general principles of admin law, BCATA indicates high level of deference [19]

-ROTHSTEIN (Disagrees): Feels clear intention to maintain PU by legislator [102]

-Meant to avoid unnecessary SOR analysis [115]

-Reapply *Dunsmuir* when act clearly outlines SOR is pointless [116]

-PATENT UNREASONABLENESS & S.58 (SOR if PC)

-BEFORE *Khosa*: PU was whatever it was in the CL prior to its *Dunsmuir* abolition

-POST *Khosa*: *Jensen* rejects Khosa: PU is CL content

-CL DEFITION OF PU: *Jensen*

-HELD: Court directed to apply PU, courts should not interfere with expert determination

-PU ascribes high standard of deference

-PRINCIPLES OF PU: [79-80] *Dunmuir; Khosa*

-Clearly irrational, evidently unreasonable, no rational basis

-PC requires highest level of deference

-Not re-weigh evidence, second guess conclusions, substitute different findings of fact or conclude evidence is insufficient to support result

-If rational basis can be found for decision, then it must be recognized

-Should always try to supplement reasons (implies lower standard of adequacy for reasons)

-Review applied to result, not to reasons leading to result

-Decision set aside only where admin body commits jurisdictional error

-Decision based on no evidence is PU, but insufficient evidence is not

-High degree of deference regarding reasons offered or could be offered for the impugned decision

-PATENT UNREASONABLENESS & S.59 (SOR if no PC)

-*Coast Mountain Bus:*

-QUESTION: What about mixed (application of legal principles to set of facts)?

-ANSWER: Correctness, since no PC expertise is irrelevant

-ARGUE: This is at odds with direction of admin law, increases JR, ignores realities of many tribunals

-NOTE: Discretionary decisions still PU (3)

-THUS: s.59(1) mandates correctness regardless of general question of law, law before expert tribunal & mixed

-*Figliola*: PU is defined by (4) alone: Arbitrary, bad faith, improper purpose, irrelevant factors, fails to take statutory requirements into account (relitigation on this point also PU)

-NOTE: Closely engaged in merits review, could argue secret correctness review

-HELD: PU

-BCATA PROBLEM SOLVING:

1. Read enabling statute.
2. Determine if it incorporates ATA SOR (explicitly)
3. If statute does not incorporate ATA, go to CL
4. Determine if there is PC & go to appropriate provision (ss.58/59)
5. Ss. 58 & 59 are complete codes for SOR
6. Identify type of question.
7. Identify SOR
8. If PU (s58(2)(a)) & question of fact or law within exclusive jurisdiction, follow jurisprudential guidance regarding content.
9. If PU & discretionary (s58(2)(a)), apply definition of PU set out in s.58(3).

-Can look to CL jurisprudence for guidance, but legislator has laid down examples of what constitutes PU

DISCRETIONARY DECISION MAKING

•DISCRETION

-*Baker*: Decisions where law does not dictate specific outcome, or where DM given choice of options within statutorily imposed set of boundaries. Public officer has discretion whenever effective limits on power leave free to make choice among possible courses of action or inaction [52]

-DWORKIN: Principles fill gaps in statute with intangible but still legitimate law, discretion closes holes in the system

-ROLE OF DISCRETION:

-*Baker*: “Decisions where law does not dictate specific outcome, or where DM is given choice of options within statutorily imposed set of boundaries”

-DISCRETION IN INDIVIDUAL CASES:

-*Baker* & *Roncarelli*: Discretion arises to fill in the gaps between legislated will of government & enactment at practical level (Very DWORKIN)

-PFA TO REVIEW REASONABLENESS OF DISCRETION: *Baker*

-SOR factors used to review 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

-*Roncarelli*: Should show exercise of deference considerable respect [53]

-But keep in line with principles of admin law

-CHARTER: *Slaight*: Must be exercised in accordance with CHARTER

-*Dore*: SOR is reasonableness within admin law proportionality review

-UNREASONABLE: Approach is unreasonable & conflicts with relevant statute, failed to consider important factors (DUBE in *Baker*)

-DISCRETION TO ADOPT GENERAL NORMS

-Statutes often convey right to adopt binding rules of general application

-SOFT LAW: Directives, guidelines & manuals

-Allows for expertise & the constraints of time

-Allows for further delegation of powers (*Baker*)

-DISCRETION FROM *RONCARELLI* TO *BAKER*

-*Roncarelli*: Discretion is limited by legal principles

-RAND: Must pursue legitimate purposes & consider the situation of those affected

-Very DWORKIN

-CARTWRIGHT: Felt discretion truly meant unfettered DM abilities

-ARGUE: Can view Rand as BINNIE & Cartwright as DESCHAMPS

-UNAUTHORIZED OBJECT OR PURPOSE, IRRELEVANT CONSIDERATIONS:

-*Roncarelli* Majority: Decision made for reasons unrelated to purpose of enabling statute

-*Smith & Ruthland*: Cannot refuse via discretion on grounds of communism, unrelated to statutory purpose

-*Shell Canada*: Denying access to South Africa not a municipal purpose

-BAD FAITH:

-RAND in *Roncarelli*: Discretion requires good faith within bounds of statute

-*Landreville*: Though a high standard in establishing abuse of power equivalent to fraud...still could find bad faith

-ACTING UNDER DICTATION OR INFLUENCE:

-Cannot act under the power of another as Roncarelli did under Deplessis

-WRONGFUL DELEGATION OF POWERS:

-Statute must provide for relevant delegation: *Vic Restaurant*

-FETTERING OF DISCRETION:

-Must consider particulars of each situation and make decision on its merits

-Informs doctrine of legitimate expectation

-Though only procedural rights can be obtained when DM purports to go back on promise

-UNREASONABLENESS:

-Commonly linked to the rest, but calculated on Wednesbury Unreasonableness

-NOTE: Eventually the standard of review analysis arose out of all of this

-CONTEMPORARY FRAMEWORK OF ANALYSIS

-*Baker* issue was over the legality of minister’s refusal to exempt on humanitarian grounds

-Argued M failed to properly consider needs of children

-DUBE: Proper approach for admin discretion: PFA

-DM must be given important margin of manoeuvre and that DM must act within certain limits

-Accord with principles of rule of law (*Roncarelli*)

-Charter & general principles of admin law considerations

-M failed to give serious weight and consideration to interests of children

-Inconsistent with values underlying grant of discretion

-Determining whether discretion fell within confines of statute, must take contextual interpretation of statute

-ARGUE: Application of P&FA to discretion marked end of law v discretion in substantive JR

-*Baker* fell in line with *Nicholson* regarding duty to give reasons as indicative of a shift of focus from nature of power to its consequences

-THUS: Duty to give reasons is dependent on consideration of dignity of individual

-*Baker* drew law away from notion of political free reign towards discretion within law

-*Dunsmuir* introduced only two standards of review: Correctness & Reasonableness

-Must first determine whether standard already set by case law

-Otherwise use SOR analysis to ID proper level of deference

-Does not depart from *Baker* on DISCRETION:

-Questions of law and discretion are reviewed under same approach

-But *Dunsmuir*: Questions of discretion generally attract standard of reasonableness and deference will usually apply automatically

-Two cases largely set aside distinction between law and discretion for purpose of determining approach to JR

-WHAT IS LEFT OF PREVIOUS APPROACH?

-*Baker* Issue: Reconciling SOR analysis with need for conformity

-DUBE: Deferential SOR will give a lot of leeway to reasonableness of discretion

-In weighing elements

-Courts still appear to pursue correctness approach for weighing elements:

-*Lake*: Indicates that relevance of elements of consideration are for court to determine on correctness & for minister to decide on reasonableness

-*Montreal Port Authority*: Suggested determination of object/purpose of statue was for Court on correctness

-*Kane*: Dissent argued that consideration of relevance of elements was for Minister to determine on reasonableness as indicated in *Baker/Dunsmuir*

-NOTE: Appeal of this may shed new light!

-LEVEL OF DEFERENCE:

-*Baker & Dunsmuir* support notion that discretion must be reasonable within law

-*Montreal Port Authority*: States that SOR is reasonableness

-BUT: SC indicates discretionary nature not necessarily determining factor of SOR

-Could be question of determining discretion granted by statute (reasonableness)

-*Alliance Pipeline*: Statute interpretation was reasonableness

-Or be true question of jurisdiction (correctness)

-*ATCO Gas*: Question went to jurisdiction which goes to court on correctness

-ISSUE: Two approaches not easily differentiated

-*Alberta Teachers*: Questions relevance of category of “true questions of jurisdiction” in SOR analysis

-CHARTER: *Dore*: Introduces question of SOR of discretionary decision challenged on basis of Charter arguments

-OAKES TEST is inappropriate for judicial challenges to admin decisions as applied to individual cases as opposed to law/rule of general application

-Proportionality inquiry better integrates spirit of s.1 into JR

-Prior case law indicated SOR correctness, but *Dore* implies reasonableness because where Charter values present admin DM more likely to be better suited to consider impact of Charter values on specific facts of case

-NOTE: Full impact of decision still needs to be assessed

-ARGUE: Implies melding of correctness & reasonableness?

•REWEIGHING

-SUMMARY:

-*Baker*: Clearly indicated “weighing” of factors involved in reasonableness review

-*Suresh*: Court rejected notion that courts could reweigh as that was task for DM alone

-*Lake*: Affirmed *Suresh*, M in best position to make such determinations

-*Khosa*: FISH Dissent: Would have reweighed elements as felt too much emphasis on one factor

-Majority: Nope

-*Nemeth*: Reverts more to *Baker*, M failed to give sufficient weight or scope to Canada’s non-refoulement obligations

-*Suresh*: (Terrorist)

-SOR:

-If constitutionality of deportation: Correctness

-If factual question: Reasonableness

-BUT POLITICS: Is not law & thus reasonableness

-NOTE: Max. deference as indication of political expertise of Minister

-DIVISION OF LABOUR & OBLIGATIONS: Courts do NOT reweigh elements in this type of decision making environment

-PARLIAMENT: Makes criteria & procedures within constitutional limits

-MINISTER: Decides according to P’s criteria & procedures & constitution

-COURTS: Review M’s decision to see if within P’s constraints & constitution

-If appropriate factors in conformity with constraints: DEFERENCE

-SEGMENTING STANDARD OF REVIEW:

|  |  |
| --- | --- |
| Constitutionality of deportation provisions in return to torture cases | Correctness |
| Danger to national security | Patent unreasonableness |
| Whether substantial risk of torture exists upon return | Patent unreasonableness |

-NOW: Reasonableness instead of PU

-HELD: Applied *Baker* framework to determine level of procedural protection under Charter

-Not owed full oral hearing, but more than he received: Materials used, opportunity to respond

-REMEDY: Returned for reconsideration for lack of PF

-*Lake*: (Terrorist)

-MAIN: Does decision “shock conscience” of Canadians?

-CONSIDERS:

-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

-REASONS: Need be provided but no comprehensive

-Must convey why decision made, allow review to assess validity, consider submissions, most persuasive factors [46]

-NOTE: But in *Dore* & *Newfoundland Nurses*: Reasons must be more than minimal

-*Nemeth*: (Criminal Romas)

-Too high a threshold: Cannot place onerous burden of proof on Roma

-Cannot give insufficient weight to refugee status (as latter was indicative of real threat)

ABORIGINAL ADMINISTRATIVE LAW

•Aboriginal Admin Law

-Intersection of aboriginal law with admin bodies & tribunals

-Elements of Aboriginal law (LAMER in *Van Der Peet*) but NOT constrained by them, BUT also avoids assimilation (PAUL NADASDY)

-CONSTITUTIONAL BASIS:

-ROYAL PROCLAMATION OF 1763: Relations between French & England

-Constitutional monarchy

-ABORIGINAL IMPACT:

-Protection from settlers

-Protection of land

-Constitutional promise & foundation for fiduciary relationship between natives and Crown

-Crown has underlying claim to natives land but must deal with the land for benefit of natives

-Creates NO impediment to aboriginal

-BUT: Judiciary argued that as Natives were not truly sovereign they could not claim sovereign entitlement to legal frameworks

-BRITISH NORTH AMERICA ACT 1867:

-Honour of the Crown somewhat arises here

-Attaches itself to some acts of Federal government as fiduciary duty to natives

-Crown will act on interest of natives

-Inherently unequal relationship

-Paternalistic

s.91 & 24: Government makes laws for Indians & land reserved for Indians

-CONSTITUTION ACT 1982:

-s.35: Recognizes existing rights of Natives

-New rights may be created by treaty or recognized in court of law

-Provision modified by court interpretation, SC grafted on to provision limitation clause (like s.1): Aboriginal rights can be justifiably infringed

-UNWRITTEN PRINCIPLE OF HONOUR OF THE CROWN

-DUTY: Meant to constrain & guide authority of exercising of Crown powers

-SC: Sovereignty of Crown in Canada is assertion, not necessarily proved, must be re-proved in case law of Aboriginal peoples

-THUS: CL duty to consult may/not exist BUT fiduciary duty is proven

-RULE OF LAW & ABORIGINAL ADMIN LAW:

-CURRENT ROLE OF THE LEGAL SYSTEM: Convert moral & political duty to natives into effective legal obligation

-*Haida*: Transformed moral & political duties into effectives actions

-Rights will continue into future

-Rights will be protected, & judicial processes be erected to handle issues fairly

-Check power of Crown that was once unilateral & eliminate unfettered discretion

-Affirm and demand this historically continuing legal obligation

-Realize a large and liberal interpretation of Aboriginal rights

-Protect Aboriginal rights—proved and unproven—through legally controlled institutional processes

-DICEY: Excludes arbitrariness, prerogative, wide government discretion, equality before law

-EVOLVING ABORIGINAL MODES OF SELF-GOVERNMENT:

-A redistribution of sovereignty and recognition of legal pluralism

1. Sovereignty and self-government: e.g., Nisga’a Agreement

-And a territorial agreement in Nunavut

2. Self-management & self-administration: e.g., Band councils under the *Indian Act*

3. Co-management & joint management: e.g., Impact Review Board (public); Impact Benefit Agreements (private); Reconciliation Agreements

-Bands can negotiate with companies independently

4. Participation in government: e.g., Nunavut

-Expanded legal pluralism

-DELEGATED AUTHORITY:

-Delegated statutory authority through *Indian Act* or other legislation

-Variety of Aboriginal DM: band councils, settlement councils, tribunals

-Variety of actions taken: decisions, by-laws, codes, judgments

-Application of principles of fairness to procedures taken by:

-Aboriginal authorities affecting Aboriginal and non-Aboriginal persons;

-Non-Aboriginal authorities affecting Aboriginal rights and interests.

-Review of reasonableness/correctness of decisions taken by PAs

-NOTE: Delegated authority means principles of justice apply!

-ROTHSTEIN in *Sparvier v Cowessess*: Must still have minimum standards of NJ or PF

-APPLYING ADMIN LAW TO ABORIGINAL DM: *Matsqui*

-ISSUES WITH BAND FRAMEWORK:

-Does tribunal have jurisdiction to determine own land?

-NO: Appeal procedure not adequate

-LAMER: Concluded parliament intended concurrent jurisdiction on this

-Does Band have jurisdiction to appoint appellate body?

-BIAS ISSUE: Or second appellate body which includes band members who benefit from taxes?

-INDEPENDENCE: Institutional structure of appeal tribunal has no financial security, tenure & relationships too close

-HELD: Must wait till number of allegations before accusations of reasonable apprehension of bias can be brought

-Appropriate for band members to sit on tribunals to reflect community interests

-Monetary gain too remote

-Potential for conflict ONLY speculative, must wait & see

-LAMER: Clear intention of band autonomy [43] & reasonable to conclude promotion of self-government means disallowing the side-stepping of internal appeal process [44]

-*Harelkin*: Student had to exhaust internal appellate procedure & university has opportunity to correct own errors

-BUT: To satisfy independence, appellant bylaws MUST provide pay & tenure & ensure dismissal only with cause [101]

-Federal policy does not undermine principles of NJ

-Reasonable person, viewing entire process, would have reasonable apprehension of lack of independence

-SOPINKA (DISSENT): Must encourage self-governance, provisions limiting them must be narrowed [114]

-Must wait-and-see how processes are applied in practice [115]

-Courts usually wait till after judgments rendered anyway [123]

-DUTY TO CONSULT & ACCOMMODATE:

-HONOUR OF THE CROWN: *Haida:* “Honour of Crown always at stake in dealings with Aboriginal peoples”

-Has objective & concrete meanings

-Has legal import

-BINNIE: Duty exists in unwritten principle of Honour of the Crown & is essential legal framework by which treaty operates

-Exists independent of treaties

-OBJECTIVE: Reconcile pre-existing Aboriginal sovereignty with *de facto* Crown sovereignty:

-“…consultation is key to achievement of overall objective of modern law of treaty and aboriginal rights, namely **reconciliation**.” (*Haida*)

-*Haida*: Government has legal duty to consult where decisions will affect Haida

-Company could be liable to Haida if they dealt dishonestly with Haida

-NOTE: This case stands for the transformation of moral into legal

-FRAMEWORK:

|  |  |
| --- | --- |
| Stage 0: The Trigger | Crown contemplates action & has knowledge (real or constructive) affecting potential Aboriginal right or title  -Gathering information stage |
| Stage 1: Decision to Act | Nature of action potentially adversely affects (unproved) rights/title  -Duty to consult kicks in once decision made |
| Stage 2: “The Spectrum” | Determine scope of duty proportionate with:  -Strength of Aboriginal claim  -Potential impact  -Multiple variable or contextual factors (Ex. Public interest, environment, potential employment)  NOTE: A proportionality analysis must be done  -Think Dore |
| Stage 3 | Consultation with affected parties:  -Burden on Crown: Aboriginal & non-aboriginal parties that are directly affected  -Burden on Aboriginal Claimants: Must assert rights and specify nature of potential infringements, they must bring this forward (NOTE: Gives them framing power) |
| Stage 4 | Accommodation  -MAY be required  -Demonstrate interest considered  -Balance competing interests [proportionality analysis]  -MAY require modification of decision or policy to minimize impact on Aboriginal peoples (similar sentiment to Oakes) |

-RESPONSIVENESS & CONSULTATION

|  |  |
| --- | --- |
| MINIMUM CONSULTATION | DEEP CONSULTATION: MAX. RESPONSIVENESS |
| -Weak title claim  -Surrendered land  -Private land  -Right is limited  -Minor impact | -Title proved or strong case for claim  -Important right  -Infringement is substantial |

-NEW ZEALAND GUIDE FOR CONSULTATION WITH MAORI: Source of Canadian consultation:

-Consultation not just process of exchanging information.

-Entails testing & being prepared to amend policy proposals in light of info received, & providing feedback.

-Consultation becomes process which should ensure both parties are better informed

-Genuine consultation is process that involves:

-Gathering information to test policy proposals

-Putting forward proposals that are not yet finalised

-Seeking Māori opinion on those proposals

-Informing Māori of all relevant information upon which those proposals are based

-Not promoting but listening with an open mind to what Māori have to say

-Being prepared to alter the original proposal

-Providing feedback both during the consultation process and after the decision-process

-CONTENT OF CROWN’S DUTY:

-Crown cannot act unilaterally

-Ultimate decision-maker must hear the concerns of affected Aboriginal communities

-Crown must always consult

-Duty cannot be (sub) delegated

-Duty rests on both federal & provincial governments & agents/representatives/delegated authorities

-Duty inheres in a process

-Process must be fair & in good faith

-May fund Aboriginal participation

-Crown must justify action(s)

-Crown may have to accommodate

-No duty to agree

-CONTENT OF THE DUTY FOR ABORIGINAL PEOPLES

-Good faith consultation

-Clarity of claims

-Evidence in order to assess severity of impact

-Not frustrate Crown’s good faith attempts at consultation

-Try to reach mutually satisfactory solution

-No “veto” power

-PROCEDURAL COMPONENTS (NOTE: Underline indicates overlap with conventional PF components)

-Not act unilaterally

-Timely notice and early consultation

-Crown must inform itself of impact of proposed project

-Crown must communicate its findings

-Comprehensive disclosure of Crown’s knowledge

-Provide meaningful opportunity to be heard such as formal participation in decision-making

-Allow submissions and arguments in reply

-Meaningful engagement: e.g., direct meetings

-Crown must listen and respond carefully to representations

-Written reasons

-Crown must intend and substantially attempt to minimize impact on rights and address Aboriginal concerns: good faith

-Wherever possible, concerns must be demonstrably integrated into plan

-Consent (in certain cases)

-STANDARDS OF REVIEW

|  |  |
| --- | --- |
| Stage 0 | No review, Crown’s discretion |
| Stage 1 | Knowledge of adverse impact:  -Reviewed on facts with REASONABLENESS standard |
| Stage 2 | Spectrum analysis:  -CORRECTNESS: Regarding strength of claim, severity of impact as questions of law  -Constitutional rights impacted  -REASONABLENESS: If large degree of factual determination (mixed fact & law)  -NOTE: Adequacy of required consultation could be part of REASONABLENESS (Haida) or CORRECTNESS (Little Salmon), case law contradicts on this point  -Aboriginal would want it on CORRECTNESS standard |
| Stage 3 | Consultative Process  -REASONABLENESS: Regarding adequacy of process |
| Stage 4 | Accommodation:  -REASONABLENESS regarding outcomes & balancing of interests |

-AFTERMATH OF HAIDA: No government consultation

-*Haida* engaged in civil disobedience with non-Natives

-Government negotiated land-use treaty & *Haida* received co-management powers

*-LITTLE SALMON:* Wanted powers akin to veto in absence of consultation

-THOUGHTFUL ADMINISTRATION: Binnie

-Must be generous interpretations

-*Baker*: DM should be alive, alert & sensitive to issues

-BINNIE in *Dunsmuir:* Must be reasonable, not simply rational

-PF: *Little Salmon* received: Notice & opportunity to be heard

-ISSUE: Did not seek greater PF, but instead to quash (not granted)

-HELD: Not granted as LS one interest among many, claim weak, effect on land not onerous