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# Overview of Administrative Law

1. Public vs. Private Law

* **Private Law: Enables or constrains the use of individual power in relationships**
  + Provides a framework for obligations and agreements between or among individuals’
  + Structures relationships involving corporations or other private associations in civil society – “horizontal” in nature
* **Public Law: Structures the relationships b/w: the individual and the state and among state institutions**
  + Facilitates and constrains the exercise of public power – is “vertical” and general in nature
  + Applies only to public entities
* Distinction b/w public and private matters – available remedies

2. Elements of Administrative Law

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

4. What is Administrative Law?

* **Judicial Review of decisions and actions made by public actors in order to prevent the abuse or misuse of public power**
  + A subfield of public law; can be a form of constitutional law
* However, it does not overturn or invalidate legislation – tribunals can only order remedies under s. 24 (Conway) and choose not to apply laws under s. 52; no delcarations of no force or effect under s. 52 (Cooper; Nova Scotia v Martin)

5. History of Administrative Law

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

6. Jurisdiction of the Courts & Judicial Review

* Constitutional Basis – *Constitution Act, 1867* via the Preamble and s. 96
  + Courts have inherent jurisdiction; are immune from JR themselves
* How courts get involved
  1. Original jurisdiction – sue government through ordinary civil law (Roncarelli v Duplessis)
  2. Appellate jurisdiction – statute creates a right of appeal federally or provincially
  3. Supervisory Jurisdiction – JR of the decisions made by government
* Substantial difference between s. 96 superior courts and administrative tribunals
  + Jurisdiction of administrative tribunals designed by their enabling statute; s. 96 grants courts inherent jurisdiction
  + Only immune from JR to the extent that the privative clause prevents it the courts respect it
    - Per Crevier, courts may also rule a privative clause constitutionally invalid as an attempt by a provincial legislature to create a *de facto* s. 96 court

# Anatomy of Baker v Canada (Minister of Citizenship and Immigration [1999] SCC

Administrative Structure

* Sphere of State Activity: Immigration
* Minister’s Department: Citizenship and Immigration
* Decision Makers:
  + The Minister – decisions are made in the name of the Minister; decision is accepted
  + Officer Caden (2nd) – superior authorized the decision
  + Officer Lorenz (1st) – reviews the case and develops notes; makes the recommendation

Sources of Law

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

Court engages in a form of restricted JR

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

**Step 1: Procedural Fairness**

**First Principles of Fairness** – *audi alteram partem*

1. **Duty to Hear the Other Side** – Determining the content
   * The *Baker* framework is an open list of factors to be weighed and balanced
     1. Nature of the decision and the process followed
     2. Nature of the statutory scheme and terms of review
     3. Importance of the decision to the individual(s) affected
     4. Legitimate expectations of the persons challenging the decision
     5. Reviewing courts should respect agency expertise in determining and following their procedures
   * Where *Baker* seems to place the most weight on 3 & 4 – mother’s interests and child’s rights
   * Application:
     + *Baker* able to provide written submissions to DM
     + *S*he wanted to make oral submissions and wanted her children and the fathers involved
2. **Duty to Give Reasons**
   * “in certain circumstances, the duty of PF will require the provision of a written explanation for a decision”
   * In situations where:
     + The decision has important significance for the individual
     + There is a statutory right of appeal
     + Or in other circumstances
   * Creates a *prima facie* duty to provide reasons; reasons are the indicia of a good procedure and a fair result
     + Creates only a presumption for reasons. Not all circumstances will compel reasons.
   * Application:
     + H&C applications clearly of importance the the individual; reasons are required
     + Baker did not get reasons for the decision until her counsel requested them; they received Officer Lorenz’s full set of notes; used as the basis of this case
   * **Aside**: May create an incentive for DMs to give “boilerplate” or incomplete reasons – 1 step forward, 2 steps back
     + Where reasons are part of procedural fairness and substantive review

**Second Principle of Fairness** – *nemo judex in sua causa debet esse*

* Everyone has a right to an independent, impartial, unbiased decision-maker
* **Reasonable Apprehension of Bias Test**: “Reasonable and Right Minded Persons”
  + “…[W]hat would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.”
  + Proving to a court that a decision-maker is biased, is a huge hurdle
  + Application:
    - Lorenz’s notes demonstrate bias against Baker as an individual suffering from mental illness, as a single mother, low income/receiver of welfare and individual who performs domestic work
    - What other factors did Lorenz take into account?
      * She was an illegal immigrant; she didn’t follow the proper immigration channels – if she had, she likely would have been excluded on the basis that she would have been a “drain on the system”
      * She had a conviction for a violent criminal offence

**Discretion (see below)**

* Abuse of Discretion – The margin of manoeuvre left to the DM by the statute to decide the matter on grounds other than those identified by law and who is therefore free to choose amongst options
  + “The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the DM is given a choice of options within a statutorily imposed set of boundaries.”
* Discretionary decisions are not lawless or arbitrary (still subject to the ROL)
* However, discretionary decisions do require deference from a reviewing court
  + “These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that **courts should not lightly interfere with such decisions**, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised.”

**Step 2: Substantive Review**

* SOR dictates the level of scrutiny and how much deference will be given to the decision-maker
* Determining the intensity of JR (Dunsmuir)
  + Step 1: Search for prior jurisprudence
  + Step 2: Consider the contextualized factors to be weighed & balanced by the reviewing J
    1. Presence of a privative clause
    2. Expertise of the decision-maker
    3. Language/purpose of the provision and within the Act as a whole
    4. Nature of the problem (law, fact, mixed fact and law)
* Standards of Review (at the time of Baker)
  + Correctness – decision must be exactly the same as the courts
  + Reasonableness – more deferential
  + Patent unreasonableness – no longer exists (Dunsmuir); greatest amount of discretion
* Principle of Deference – deference owed to discretionary decisions
  + “The P&FA can take into account the fact that the more discretion that is left to a DM, **the more reluctant courts should be to interfere with the manner in which DMs have made choices among various options**. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the **boundaries imposed in the statute**, the **principles of the rule of law**, the **principles of administrative law**, **the fundamental values** of Canadian society, and the **principles of the Charter**.”

**Concurrence and Partial Dissent**

* Rejected the international Convention as playing any role in Canadian law
* Iacobucci J (Cory J concurring): “The primacy accorded to the rights of children in the Convention … is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my colleague concluded that the appellant’s claim fell within the ambit of rights protected by the [*Charter*].” (para 81)

**Application: Issue of Bias**

* Re: Concern that the Minister did not adequately weigh the H&C factors in considering Baker’s H&C application
* Baker wants:
  + SOR = correctness (question of law)
  + Discretion must be exercised in accordance with the *Convention on the Rights of the Child*
  + Minister should apply the best interests of the child as a primary consideration in H&C decisions
* Respondent Minister argues:
  + SOR = reasonableness *simpliciter* (mixed fact and law)
  + Convention not implemented in Canadian law – only persuasive
  + Requiring interpretation in accordance with the Convention improperly interferes with broad discretion and with the division of powers between federal and provincial governments
  + Cannot re-weigh factual determinations – per Southam, no re-weighing. Mixed fact & law means more deference.
  + Summary: Contains too many risks to justify intervening in this kind of decision
* **Pragmatic and functional approach applies to review reasonableness of exercise of discretion** 
  + **SOR = reasonableness *simpliciter***
  + Review of discretionary decisions no longer within traditional writs; more general review available
  + Even discretionary decisions involving a broad statutory grant of discretion ought not to be arbitrary
    - Is that DM acting within the bounds of discretion conferred with the statute? With the CL? Constitution?
    - Considerable deference automatically applies b/c of the nature of discretionary decisions
* **Effect:**
  + Brings substantive review (jurisdiction/*ultra vires*) and review of discretion together
    - Challenging to determine the limits of discretion – It is fact? Law? Or mixed fact and law?
    - Very challenging to determine boundaries; where discretion begins and ends may be difficult to recognize
  + SOR factors used to review and, if necessary, constrain discretion:
    1. Privative clause
    2. Expertise of the decision-maker
    3. Language/purpose of the provision and Act as a whole
    4. Nature of the problem
  + Per Dunsmuir, reasonableness is the presumed standard. However the SOR analysis is helpful if you want the court to engage in a more probing analysis or more deferential version of reasonableness.
    - Need to read statutes carefully and fully; all of the signals included in the statute must be considered
    - Consider other relevant sources of law such as guidelines or international law
    - When the DM is permitted to consider several grounds, up to counsel to raise those concerns
* **Application: Was the decision unreasonable?** 
  + **YES** – Manner in which decision reached is inconsistent w/ the values underlying the grant of discretion
    - Reasons disclose that DM misinterpreted nature and scope of the delegated discretionary power
    - Considered factors that, while relevant and reasonable, were not outlined by the statute
    - LHD discusses the “values” rather than the rights; such as dignity interests
      * Means admin law can be broader than rights; values included in the statute
  + Statute – **Intended** discretion to be exercised in H&C manner; legal requirement
  + International Law – *Convention on the Rights of the Child* ratified
    - **Influential values** inform context; an aid in statutory interpretation (assume conformance per R v Hape)
  + Ministerial Guidelines – Describe **valid bases** for determination
* Basis for finding of unreasonableness:
  + Approach taken is unreasonable and conflicts with interpretation of H&C values
  + Failed to consider a relevant or important factor (paras 65, 72)
  + Failed to give this factor “serious weight” (para 65) or “substantial weight” (para 75)
    - Controversy over this statement; reasonableness should not re-weigh the factors

# Rule of Law

1. Five Rule of Law Theories

* **Dicey Common Law Model** (1890 to the 1970s)
  + III core propositions:
    1. Should be no arbitrary authority in government – especially the executive branch
    2. All persons are equally subject to the law – formal equality
    3. Constitutional law is part of the “ordinary law” of the land – common law
       - Applies to the UK; Canadian constitutional law is not just “ordinary” law
  + Role of the courts is to check the discretionary power of executive DMs who are delegated power under statutes
  + However, courts must respect parliamentary sovereignty if the power is expressly granted to an admin body
* Fuller’s 8 Principles of Legality (1970s) – to ensure “good law making”
  1. Laws should be general
  2. They should be promulgated so that citizens might know the standards to which they are being held
  3. Retroactive rule-making and application should be minimized
  4. Laws should be understandable
  5. They should not be contradictory
  6. Laws should not demand the impossible, requiring conduct beyond the abilities of those affected to meet
  7. Laws should remain relatively constant through time
  8. There should be congruence between the laws as announced and their actual administration
* Raz’s Guidance Model (70s)
  + Law must be capable of guiding the behaviour of its subjects; done best when it guides behaviour well
  + Judicial independence, access to justice and legal systems w/ effective remedies are necessary to preserve the ROL
  + Where relative autonomy of law from politics is a central req’t of the rule of law
    - Re: separation of powers and the principles of judicial independence
* Dworkin’s Rights Based Model
  + Courts should balance the needs of society to determine if individual rights can be rightfully trumped
  + Informed s. 1 of the *Charter*; allowing government to justify their infringement on individual rights
  + Critique: Puts judges at the top; makes them the wielders of public law power
    - However government may use s. 33 to override SCC decisions for five years; not yet used
* **Dyzenhaus’s “Deference as Respect” Model**
  + Reciprocal recognition for decision-makers; respect the expertise and knowledge of other areas of government
  + New Zealand has expressly rejected this concept; considered undemocratic; “that’s a dreadful word”

2. The Core of the Rule of Law

* Courts are wary of the public perception of their role and their relationship with government; ongoing debate about the legitimate scope and content of judicial power
* **Rule of law characterized by three interrelated features:**
  1. A jurisprudential principle of legality
  2. Institutional practices of imposing effective legal restraints on the exercise of public power within the three branches of government
  3. A distinctive political morality shared by all in the Canadian political community
* Concept stands for the supremacy of law over unconstrained political power
  + Animated by the need to prevent and constrain arbitrariness within the exercise of public authority
* **Core Meaning: Arbitrariness, non-arbitrariness and legality**
  + judge, supreme ruler
  + one who makes a choice, judgment decision
  + to be decided by one’s liking
  + dependent upon will or pleasure
  + at the discretion or option of any one
* Where arbitrariness may be acceptable in some circumstances, but is unacceptable in the political or legal sphere In Canada; we restrict arbitrary use of power via our gov’t models
  + History of democratic liberal government has rejected arbitrary forms of government such as tyranny, absolute monarchy, totalitarian state, etc.
* Canada (AG) v Insite – court found decision by Minister arbitrary; ordered *mandamus*
  + The statute provided discretion to the Minister within defined boundaries and the evidence was such that the Minister’s decision was ignorant of that evidence (violation of s. 7)
  + Courts have broad powers to offer remedies under s. 24 (Conway); however practically, these powers are constrained by the division of powers and other political considerations

SCC’s Approach to the Rule of Law – Related to:

* principle of legality – restrains arbitrary power in III ways:
  + constrains the actions of public officials
  + regulates the activity of law making
  + seeks to minimize harms that may be created by the law itself
* principle of constitutionalism
* principle of judicial independence
* principles of equality
* principle of generality
* principle of publicity
* principles of natural justice
* principle of access to justice
* principle of non-retroactivity
* principle of consistency
* Identified as an unwritten principle of the Constitution in Roncarelli v Duplessis

Relevant Jurisprudence

* Unwritten Principles (Secession Reference)
  + Unwritten constitutional principles have full normative force; serve a structural function
  + Can be used robustly by judges as the lifeblood and heart of public law and our legal system
    - Law could not be understood without these principles
  + ROL is a “highly textured expression…conveying…a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority”
  + Also identified the following unwritten principles:
    - Federalism
    - Democracy
    - Constitutionalism
    - Respect for minorities
* **Principles of the Rule of Law** (BC v Imperial Tobacco)
  1. Law is supreme over private individuals and government officials and precludes the influence of arbitrary power
     + Over gov’t officials who are required to exercise their authority non-arbitrarily and according to law
     + Legislation enables and constrains the powers of government officials
  2. Requires the creation and maintenance of a positive order of laws which preserves the more general principle of normative order (Manitoba Language Rights Reference)
     + Laws must exist in legislative or common law form
  3. Requires the relationship between the State and the individual to be regulated by law
     + Officials’ actions must be legally founded in order to be valid
     + “In public regulation of this sort **there is no such thing as absolute and untrammelled “discretion”**, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, **without express language**, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute…” (Roncarelli v Duplessis)
  + It is linked to the principle of judicial independence
  + Unwritten principles alone cannot be used as the basis for striking down legislation – interpretive aid only
  + Can be used in conjunction w/ written provisions of the Constitution
    - Written Constitution has primacy; such that the attributes of the ROL are simply broader versions of the rights already contained in the Charter
* Access to Justice (BC v Christie; legal services tax hampered access to justice)
  + ROL does not underwrite a general right to legal services, to legal assistance, or to counsel in relation to court and tribunal proceedings
    - Court shies away from making the rule of law a structural necessity
  + N.B. SCC recently granted to leave to an access to justice case; may be new jurisprudence in this area
* Court has shifted to a “middle ground” > unwritten principles have no direct legal effect; are merely influential and interpretive “constitutional values”

3. The ROL and Deference as Respect (Dyzenhaus)

* Canadian concept first identified and elaborated in National Corn Growers v Canada (provisional duty on US corn)
  + Gonthier’s analysis set the stage for the development of reasonableness *simpliciter* – recognizes the legislative signal sent by the privative clause and acknowledges the expertise of the tribunal
  + Supports an “institutional dialogue” or a joint effort in governance (re: Peter Hogg)
* Developed as courts began to acknowledge the legitimacy of the welfare and administrative state
* Exhibits tension b/w the following:
  + Courts provide an essential accountability function by policing the exercise of delegated powers to ensure that they are confined to the terms and purposes specified by the authorizing statute
  + Courts are conscious of their own lack of expertise in policy making and ROL constraints which respect the separation of powers

4. Problems with Deference as Respect

* Privative Clause
* Standard of Review – including judicial restraint and expertise
* Adequacy of Reasons

a) Privative Clause

* A statutory provision protecting the decision made by public officials in boards, tribunals and ministries either from further dispute internally or from external JR
  + Problem: Seemingly authorizes officials to act with unfettered discretion
  + Problem: Creates tension b/w the supremacy of the legislature and judicial branches of government
* Signals the courts to recognize the interpretive authority of the tribunal within its area of expertise; judges may continue to exercise their ROL powers of oversight on constitutional and jurisdictional matters

b) Standard of Review

* Applicable standard of review functions as a prime ROL constraint on judges
  + Raises concerns regarding judicial legitimacy
  + Affects how closely and thoroughly judges review the decisions made by admin bodies
* “…discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of admin law, the fundamental values of Canadian society, and the principles of the Charter” (LHD in Baker)
* “The statutes and regulations define the scope of discretion and the principles governing the exercise of discretion, and they make it possible to determine whether it has in fact been exercised reasonably.” (Montreal v Montreal Port Authority)
* Per Dunsmuir, a presumption of reasonableness applies. Correctness should be limited to the four exceptions outlined
  + Legislative intent should ultimately prevail (within the confines of the Constitution)
  + Privative clause functions as a sign from the legislature that reasonableness should apply

Role of the Privative Clause: Dunsmuir vs. Khosa

|  |  |  |
| --- | --- | --- |
|  | BINNIE (Dissent in Dunsmuir) | ROTHSTEIN (Dissent in Khosa) |
| Standard of Review | PRESUMPTION: Reasonableness  Though correctness may still apply | RULE: Privative clause is determinative  existence = reasonableness  absence = correctness |
| Legislative Intent | Fundamental re: standard of review | Fundamental re: standard of review |
| Privative Clause (PC) | Not conclusive but high ranking | Conclusive; must use reasonableness where PC exists |
| Expertise | Indicates separate ground for deference | PC indicates expertise |
| If NO PC | Legislative intent determines whether reasonableness or correctness applies | Correctness |
| Effect | Applicant has burden to show unreasonableness | Applicant has burden to show unreasonableness |
| Constitutional Model | Always a judicial-legislative tension in admin law | No tension, only if there is a PC |

c) Inadequacy of Reasons

* In Baker, court imposes a duty to give reasons on statutory and prerogative DMs in administrative contexts where important individual interest are at stake, there is a statutory appeal or in other circumstances
  + Not required for all decisions; but stands as a substantive procedural protection
* Reasons serve III functions:
  1. Disclose expertise in the subject area of the home statute
  2. Justify the decision using transparent, intelligible and reasonable reasoning
  3. Demonstrate that is outcome is reasonable when more than one reasonable results is possible
* Newfoundland Nurses (interpretation of collective agreement re: vacation)
  + Per *Dunsmuir*, the purpose of reasons, when they are required, is to demonstrate “justification, transparency and intelligibility”
  + Requirement to provided reasons is part of procedural fairness – reviewed on standard of fairness
  + Adequacy of reasons are part of substantive review – reviewed according to the SOR analysis
  + Reasons must:
    - Permit effective review in order to satisfy the principles of legality, accountability and the rule of law
    - Address the substance of the live issues – including key arguments, contradictory evidence and non-obvious inferences
      * Inconsistencies and irrelevant considerations are serious flaws

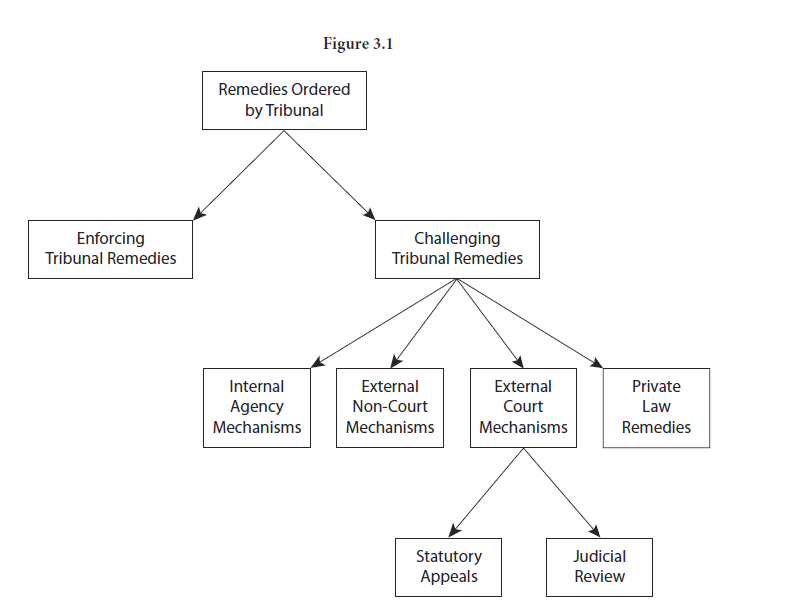
5. Constitutional Implications

* *Charter* has fundamentally constrained the principle of parliamentary sovereignty; must be reconciled w/ the ROL thru JR
  + Constrains delegations of broad discretionary powers; particularly where *Charter* rights & freedoms are implicated
* If a tribunal thinks a provision in their home statute is unconstitutional, can they consider the constitutionality of that provision under s. 52? (Cooper; later Nova Scotia v Martin)
  + La Forest in Cooper: “tribunals which have jurisdiction over the general law, have jurisdiction to refuse to apply — and hence effectively to render inoperative — laws that they find to be unconstitutional, since through the operation of s. 52 of the *Constitution Act*, 1982, the *Constitution* is the supreme law of Canada”
    - See Nova Scotia v Martin for the Test for Jurisdiction
  + Per Dore v Barreau du Quebec, SOR for Constitutional questions is reasonableness with the concept of “proportionality” serving as the central criterion of reasonableness

**Rule of Law**: Unwritten Common Law, Constitutional Principle

* A legal principle is a binding normative standard which does not dictate the result. It serves to guide th judgement and discretion of public officials, especially judges
* Competing Conceptions:
  + Dicey – ROL best served through s. 96 courts
  + Raz – ROL requires independent judiciary and
  + Dyzenhaus – deference as respect
* Rule of law is:
  + Powerful, fundamental concept that functions as an interpretive aid (BC v Imperial Tobacco)
  + Cannot be used on its own to strike down legislation (BC v Christie)
* The interaction b/w the ROL and the parliamentary sovereignty conceptually underpins all of administrative law
  + Where inherent jurisdiction of the superior courts and the ROL provide the legitimacy of judicial review

# Remedies



1. Introduction

* **Administrative law process does not begin with JR; begins with the admin tribunal decision and remedies**
* How can the legislature limit judicial review??
  1. Include privative clause
  2. Create avenues of appeal that are internal to the tribunal itself
     + **Rule:** Must use all internal mechanisms of the administrative body and under the statute prior to accessing JR (Harelkin v UofRegina)
* Allows the Executive to maintain a greater degree of control over the statutory scheme it has constructed
* Remedies are different from those available to the courts – are both:
  + Restricted – must be within the scope of the statute
  + Expansive – can go beyond the traditional writs, damages and equitable remedies

Available Remedies: READ THE STATUTE & Applicable Administrative Codes

* Remedies may be narrow or very broad depending on the home statute – this will limit or authorize your creativity
* Some statutes explicitly list the available remedies from the tribunal
* Others accord the tribunal broad, discretionary powers to fashion the remedies they see fit
  + i.e. Ontario *Human Rights Code* (McKinnon) provides the tribunal the discretion to “do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with this Act” both in respect of the complaint and in respect of future practices
  + i.e. *Canada Labour Code* (Slaight) provides discretion to “do any other like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal”

2. Types of Remedies

* Ultimate difference between a tribunal and a court is that courts are bound by precedent
  + Courts are charged with rectifying systemic discrimination
* Tribunals and administrative agencies often contribute heavily to the development of policy; are mandated by the legislature to be a change agent in society

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Types of Remedies | Tribunal Remedies  (enabling statute explicitly or implicitly determines availability) | | Judicial Remedies  (in public law) | |
| Administrative/  Public Law | * Declaratory order * Enforce obligation/duty/right * Mandamus * **Ongoing seizin** * Quo warranto * Request court to enforce order   \*See prerogative writs below   * Internal appeal * Reconsider/rehear * Use of a 3rd party to oversee progress (McKinnon) | | * Certiorari/quash * Declaration * Enforce obligation/ duty/right * Habeas corpus * Injunction/structural injunction * Mandamus * Quo warranto | |
| Constitutional | * s. 52: non-application of inconsistent law * s. 24: just & equitable remedy | | * s. 52: declaration of invalidity (possibly delayed) * s. 24: just & equitable remedy | |
| Non-Legal | * Change agent * Conciliate/mediate * Consultation * Education * Equitable: anything “fits” * “Expert” * Monitor * Policy | | * Change agent * Equitable * Reference question | |
| Non-Court Remedies:   * Ombudsperson * Privacy Commissioner | | * Officers of the Legislature – i.e. BC Representative for Children and Youth | | * Commissions * Media/public unrest |

3. Novel & Effective Remedies

* Tribunal’s composition, structure and mandates are different from courts – approach to remedies reflects this difference
  + Broader mandate – making a broader range of tools available
  + Ongoing seizin – can remain seized of a case over a longer period of time
  + Different expertise – often not made up of the legally trained; leading to more creative remedies
  + Trend towards “new public management” – may lead private parties/organizations responsible for the implementation of administrative mandates (i.e. self-regulating bodies)
* Means can develop remedies that address underlying structural or systemic problems, in a forward-looking, rather than a retrospective, rights-oriented way
  + More prospective, open-ended and subject to ongoing revision and elaboration
  + Commonly more focused on the wide-ranging, permanent, systemic change to institutional structures
* Example: McKinnon v Ontario (Aboriginal prison guard; CHRT ordered HR programs and 3rd party manager)
  + Use of an independent 3rd party to develop and implement remedial measures; able to facilitate a deliberative process within the organization and work through problems internally
* Example: Slaight v Davidson (wrongful dismissal; letter; s. 2(b) challenge)
  + Jurisdiction granted by statute to “do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal”

4. Enforcing Tribunal Orders

* Tribunal can only enforce its own orders where provided for in the home statute (i.e. order for civil contempt)
  + Others are given the authority to enforce monetary obligations through liens, garnishment orders, seizing assets or suspending driving privileges
  + *Criminal Code*, s. 127 makes it an offence to disobey lawful orders made by administrative bodies; applies only where no other penalty is provided for by law
* More commonly, tribunals must make an application in court to enforce any order it makes; then it is enforceable through the same manner as a court judgment
  + Seems that legislative drafters accept recourse to the courts to *enforce* tribunal orders, but not to challenge them
* Private parties can seek to enforce tribunal orders as well

5. Challenging Administrative Action

1. Internal Tribunal Mechanisms (Harelkin v UofRegina)
2. External Non-Court Mechanisms (see non-court remedies above)
3. Courts: Statutory Appeals
   * Does the statute provide for right of appeal?
   * What is the scope of the appeal that the statute permits?
     + Not usually a *de novo* appellate review; usually constrained in some form
   * Is it by right or do you need leave of the court?
     + If leave is required, possible that you will be denied leave. May have a collateral against the denial.
   * Is there a stay of the original decision-makers decision?
4. Courts: Judicial Review

6. Availability of Judicial Review (see Judicial Review Decision Tree)

* **JR is not automatic; it is a discretionary and exception remedy that relies on the inherent jurisdiciotn of the courts and the rule of law**
* CL may deny your ability to access JR if:
  + Your issue has been resolved in another case
  + No standing
  + Outside of limitations
  + “Unclean hands”
* **Process: Will JR be available?**
  + Is the decision-maker a public body? Apply the Public Functions Test (McDonald v Anishinabek)
  + Do I have standing?
  + Which court should I apply to for JR?
    - Based on applicable administrative codes and the source of the impugned authority’s power
  + Have any deadlines passed?
    - Check all applicable statutes, rules of court and statutory codes
  + Have I exhausted all other adequate means of recourse for challenging the tribunal’s action?
    - Must exhaust all internal mechanisms within the administrative body (Harelkin v UofRegina)
    - Check all relevant statutory codes – do they impose additional constraints?
* Once all of the above are satisfied, then the individual can apply for JR
* Per Domtar v Quebec, conflicting administrative interpretations do not provide an independent basis for judicial review
  + Two different decisions about the same provisions in a labour statute from parallel tribunals
  + Tribunals are not bound by *stare decisis*, but do aim for uniformity and consistency – case establishes that administrative law **operates by a “flexible” rule of consistency**
    - Are able to use internal processes to ensure consistency across decisions (IWA v Consolidated Bathurst; full board meetings and Geza v Canada; lead cases)

Public Functions Test: McDonald v Anishinabek [2006] ONSC (C discharged from police w/out due process)

* **Modern Rule for Statutory Interpretation**: Courts are obliged to determine the meaning of legislation in its total context…
  + …having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning.
  + After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of:
* its **plausibility**, that is, its compliance with the legislative text;
* its **efficacy** in its promotion of the legislative purpose; and
* its **acceptability**, that is, the outcome is reasonable and just.
* Court establishes criteria/framework to apply to administrative bodies that operate privately, but that provide or perform public functions. Should consider:
  + 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 duty of fairness is owed
  + relationship to other statutory schemes or other parts of government, such that the body is woven into the network of government

Exhaust All Adequate Means of Recourse: Harelkin v University of Regina [1978] SCC (social work student; sought JR before Senate)

* Parties must exhaust all available remedies under the home statute of the tribunal prior to seeking JR
* However, judicial discretion to exempt individuals from this requirement exists. Court outlines factors to consider in deciding not to exercise judicial discretion:
  + Procedure on appeal
  + Composition of the Senate Appeal Committee
  + Powers and manners in which they were probably exercised by a non-professional body
  + More likely to “re-try” the case (able to conduct a *de novo* hearing)
  + Burden of previous finding
  + Efficiency, expediency, costs
* Dissent considers other factors in their decision to exercise:
  + Delay
  + Nature of the error
  + Right of appeal to courts vs. to statutory tribunal or administrative officials
  + Capacity of remedial body
  + Alternative remedy: convenience and adequacy

7. The Prerogative Writs – Remedies from Judicial Review

|  |  |  |
| --- | --- | --- |
| **Name** | **Translation** | **Effect** |
| ***Certiorari*** | cause to be certified | quash or invalidate an order or a decision |
| ***Prohibition*** | prohibit | prevent the unlawful assumption of jurisdiction or halt the proceedings where unlawful jurisdiction is being exercised |
| ***Mandamus*** | we command | order a duty to be performed  BUT cannot tell tribunal how to decide |
| ***Certiorari + Mandamus*** | The most common administrative law remedy | send back (with directions) for reconsideration |
| ***Declaration*** | statement of legal position | public law = declare action *ultra vires* (outside jurisdiction)  \*not enforceable *per se*, but usually respected by gov’t |
| ***Habeas corpus*** | produce the body | ensure detention is not arbitrary |
| ***Quo warranto*** | by what authority? | challenge basis of authority used to justify acts |

Canada v PHS (Insite) [2011] SCC

* Two components to challenge:
  + Constitutionality of the provision – found to be valid
  + Judicial review of the Minister’s decision – found violation the principles of fundamental justice
* Typically courts will provide only declarations (Khadr); unwilling to employ *mandamus* against ministerial discretion
* Conditions for obtaining *mandamus* and application to the case:
  1. Demonstrate clear legal right to have the thing sought done, in the manner, and by the person
     + A: Right – s. 7 security of the person
  2. Duty must lie on the official at time relief sought
     + A: Duty lies on the Minister b/c only he can grant the exemption
  3. Duty must be “purely ministerial” in nature\*
     + Officer must possess *no discretionary powers* in this matter
     + A: Minister DID have discretionary power but court held that there was clear evidence in these circumstances;
  4. Demand for and refusal to perform the act sought
     + A: Insite applied for the exemption and it was denied
* Despite Minister’s discretionary power, Court found evidence was so compelling as to insist that the decision was in violation of s. 7 and was not in accordance with the principles of fundamental justice
* The application seemingly modified the *mandamus* test; however court did not explicitly change the CL
* NOTE: Case would have been approached differently in light of Dore

8. Charter s. 24(1) Remedies – Court of Competent Jurisdiction

* 24 (1) Anyone whose rights or freedoms…have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances
* **Conway Framework for Determining Charter Jurisdiction:**
  1. Does this tribunal have the jurisdiction to determine **questions of law**?
     + Is it a court of competent jurisdiction?
  2. Does the statute give **express or implied** jurisdiction?
  3. Has the **legislature clearly intended to withdraw** jurisdiction?
  + If yes, yes, no – then the tribunal can grant s. 24 and s. 52 remedies for Charter issues
    - Aside: Per Cooper, s. 52 remedies limited to inapplication
  1. **Then ask:** Can the tribunal grant this particular remedy?
  2. To determine, look to the statutory scheme to determine legislative intent – remedy must fulfill the bodies statutory mandate/purpose and the tribunal’s functions
     + Purpose of the statutory scheme:
       - Statutory history
       - Institutional history
       - Statutory goals
     + Statutory powers – What does the statutory scheme explicitly or implicitly grant?
     + Where expertise and efficiency are two permanent values
* Case considered a victory for statutory tribunals. However, this framework is applied on a case-by-case basis for each kind of remedy. Requires counsel to prove to the court that s. 24 is within their purview.

Aside: How does this match up with the language of s. 24(1)?

* Test still dependent on the board’s statutory scheme; are limited to the remedies available under their home statute
* SCC chose not to grant jurisdiction to do whatever is “appropriate and just in the circumstances” to remedy a Charter violation; held it would be inconsistent with the differing purposes and structures of tribunals
* **Means:** Applicants are entitled to petition boards for only those remedies and orders that are available under the statute

9. Judicial Review before the Federal Courts

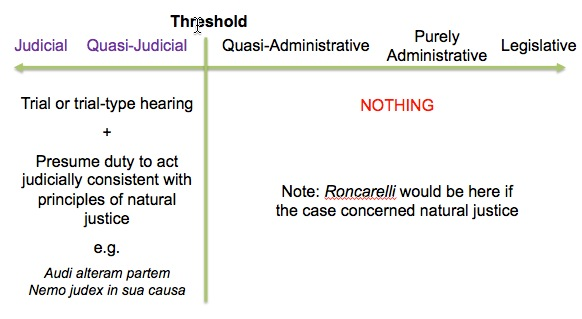
* Powers are confined to those outlined by their constituting federal statute; meanwhile provincial superior courts (s. 96 courts) have all judicial powers not expressly removed from them
* s. 17(1) provides the FC with “concurrent original jurisdiction in all cases in which relief is claimed against the Crown”
* 18.1(3) On an application for judicial review, the Federal Court may
  + order a **federal board, commission or other tribunal** to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
  + declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
* **18.1(4) “grounds of review”**
  + acted beyond jurisdiction (apply correctness per Khosa)
  + failed to observe procedural fairness (apply fairness per Khosa and Baker)
    - unlike provincial superior courts, able to rely on the *Canadian Bill of Rights* which includes the right to enjoyment of property and the right to due process
  + erred in law (apply SOR analysis per Dunsmuir)
  + based on an erroneous finding of fact (apply SOR analysis per Dunsmuir)
    - must be in a “perverse and capricious manner or without regarding for the material before it”
  + acted by reason of fraud or perjured evidence
  + or acted in any other way that was contrary to law (apply SOR analysis per Dunsmuir)
* Where the *Federal Courts Act* provides concurrent, but not exclusive jurisdiction, for claimants seeking relief against the Crown and/or review of federal administrative bodies (Canada v Telezone; claim damages for license refusal)

10. Provincial Statutory Procedural Codes

**Summary: Remedies in Administrative Law**

* Understand the Constitutional relationship b/w the courts and tribunals
* Private law remedies are available – incl. at the Federal Court as part of concurrent jurisdiction (Telezone)
* Public law remedies are one of the most creative aspects of lawyering
* **JR is not automatic; it is a discretionary remedy\*\***
  + It is a remedy in itself; not just a procedure of the court system
* Cannot leap frog into JR if there are adequate alternative remedies available (Harelkin v UofRegina)
* Remedies available are outlined by the enabling statute; however creative remedies may be available where the wording in the statute is broad (McKinnon v Ontario)
  + Can persuade a tribunal to implement creative or unique remedies (think human rights)
* Administrative bodies must adhere to the rule of law, but are not bound by *stare decisis*
  + Strive for consistency in decision making
  + Where inconsistency among admin tribunals cannot be used as sole grounds for JR (Domtar)
* Tribunals can be asked to correct their own procedures prior to seeking JR
* Understand the difference b/w JR and statutory appeals
  + Statute will outline opportunity, grounds and process for statutory appeal
  + Statute may limit JR; consider privative clauses or the jurisdiction of the court (i.e. Federal Court)
* **Chief remedies for admin law are the prerogative writs** (Insite re: *mandamus*)
* Reforms occurred across Canada in the 90s w/ respect to admin law
  + Sought to simplify access to JR; simplified the rules within the statute (i.e. JRPA & ATA)
* *Charter* & Constitutional law
  + Consider whether or not the tribunal can offer Charter remedies
  + s. 52 – If a tribunal is empowered to consider general questions of law, likely able to access s. 52 (Cooper)
  + s. 24 – Apply the framework test (Conway) to determine if a tribunal is competent for the purposes of s. 24; must be determined on a case by case basis
* Politics and media are also available as remedies – may do more good than going to court!

# Duty of Fairness – Origins



1. Introduction to Duty of Fairness

* Duty of Fairness – two pieces:
  + Duty to hear the other side
    - Procedural Fairness (incl. reasons)
  + Right to an impartial and unbiased decision maker
    - Reasonable apprehension of bias
* Exceptions to the rule do exist – not the average case

2. Origin: Duty to Hear the Other Side

* Pre-Nicholson, the admin body had to look similar to a court in order to mandate procedural fairness (right)
* If not found to be judicial or quasi-judicial, then there was no right to procedural fairness

3. Modern Common Law Development

* **Requirements of PF apply to nearly all public decision-makers**; however this will occur on a sliding scale whereby the nature of the decision will affect the level of procedural fairness required (Nicholson v Haldimand Police; PO fired within probationary period)
  + Primarily purely legislative decisions (sometimes includes “purely Ministerial” discretion)
* Modern CL duty of fairness includes “natural justice” as part of its content; this imports more adjudicative-style content

Ask: Is this a decision that ought to attract the duty of fairness?

* **First:** Has an individual’s *rights, interests or privileges* been affected by a decision or an action of an administrative decision-maker?
  + Threshold Test For Procedural Fairness (Le Dain J in Cardinal v Kent Institution; inmate placed in segregation) “This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on *every public authority* making an administrative decision which is not of a legislature nature and which affects the *rights, privileges or interests* of an individual”
* **Second:** Contextually apply the *Baker* framework to determine appropriate level of procedural fairness
  + If Charter, s. 7 applies, the POFJ demand a higher level of PF (i.e. criminal trial)
* Pyramid of Legal Authority (right)
  + Statute may provide procedures; if the procedure is flawed, courts can fill the gap with the common law
  + Legislature can respond to judicial decisions and override the common law; can amend the legislation

# Duty of Fairness – Limitations

Limitations on the Duty of Fairness

1. Policy Decisions
2. Legislative Decision
   * a.k.a. cabinet and ministerial decisions
   * Exception: Subordinate legislation (by-laws)
3. “Public Officers Employed under Contract”
4. Regulations
5. Emergencies

a. Policy Decisions

* No duty of fairness applies to “purely ministerial” or policy decisions
* “A **purely ministerial decision**, on **broad grounds of public policy**, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision” (Sopinka J Reference Canada Assistance Plan)

b. Legislative Decisions

* Where a decision maker is making a legislative or policy decision, no duty of procedural fairness exists. Must consider what function is being performed and the polycentric or individualized nature of the decision.
  + Termed a “legislative exemption”
  + Where “**legislative decision making** is not subject to any known duty of fairness” (Wells v Newfoundland; legislative change ousted PUB Commissioner)
* Canada (AG) v Inuit Tapirisat of Canada; CRTC approved increased Bell rates; sought GIC review
  + “Where, however, **the executive branch has been assigned a function performable in the past by the Legislature itself** and where the *res* or subject matter is **not an individual concern or a right** unique to the petitioner or appellant, different considerations may be thought to arise. The fact that the function has been assigned as here to a tier of agencies…does not, in my view, alter the political science pathology of the case. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing **construe the statute to determine whether the GIC has performed its functions within the boundary of the parliamentary grant** and in accordance with the terms of the parliamentary mandate.”

Exception: Subordinate Legislation (by-laws)

* Municipalities will be held to standards of procedural fairness wrt decision-making
* Exception is dependent on the fact that municipalities are “creatures of statutes”
  + Though a form of democratic governance, municipal powers are granted and revoked via statute – possess no independent basis of jurisdiction
* Was previously an all-encompassing exceptions; courts were unlikely to show deference
* However, under McLachlin CJ, the court has recognized municipalities as a democratic form of government which are enabled by statute. **Will show deference as long as decisions are polycentric, rather than bipolar**.
  + Homex v Wyoming Village – Court examined substance of decision; determined that municipality enacted by-law w/ goal of ending negotiations w/ Homex (bipolar rather than polycentric)
  + Compare this case with Catalyst Paper & Thorne’s Hardware

c. Public Office Holders Employed Under Contract

* If the relationship between a person holding a public office and the public authority who is their employer is contractual rather than statutory, **ordinary private law contractual remedies will apply in dismissal cases**
  + Gov’t employers must still abide by statutory and CL notice standards for terminations that are without cause
    - i.e. notice period that is reasonable in the circumstances
    - i.e. in Dunsmuir, the employment contract allowed for termination upon notice or pay in lieu of notice
  + Reinstatement will not be a remedy unless specified in the contract
* Key Point: **The duty of fairness will NOT apply UNLESS it is provided for in the contract**
  + Evolution of public employment context through the jurisprudence
  + Have moved from providing no duty of fairness, to some duty of fairness, and finally back to the private employment context whereby duty of fairness is required only based on the employment contract
* Propositions that are no longer valid from Knight v Indian Head:
  + Government employment has a strong “statutory flavour”; not a case of “pure master and servant”
    - When hired by government, you need to get a lawyer to ensure your contract clearly defines what your rights are. No additional obligations placed on government in the employment context.
  + Presume parties intended PF would apply in the contract of employment unless explicitly excluded
    - Opposite presumption now applies; must have PF requirements included in your contract
    - “Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, **the applicable law governing his or her dismissal is the law of contract**, not general principles arising out of public law.” (Dunsmuir)

|  |  |  |
| --- | --- | --- |
| Nicholson v Haldimand, 1979  PO fired within probationary period | Knight v Indian Head, 1990  dismissed by Board resolution w/ 3 months notice | Dunsmuir v NB, 2008  terminated w/ out cause, bad employee |
| Rethink employment relation-ships in light of modern employment law   * Master & servant “pure” * Office held at pleasure * at pleasure removed from statute * Office with removal for cause   Effect = Nicholson’s office falls within categories of PF | Rethink employment relation-ships where contract is present   * Master & servant “pure” * Office held at pleasure * statute and contract present * Office with removal for cause | Rethink employment relation-ships where contract is present   * Master & servant “pure” * Office held at pleasure * statute and contract present * Office with removal for cause |
| PF applies to employer when terminating employment:   1. None  * PF may be implied in some circumstances  1. not as much as 3 2. Yes   Effect = Decision is made under a statute & judges reject categorical approach | PF applies to employer when terminating employment:   * None * PF may be implied in some circumstances  1. “strong statutory flavour” 2. not as much as 3 3. Yes   Effect = All public authorities exercising delegated powers under statute must act fairly | PF applies to employer when terminating employment:   1. None 2. None  * unless negotiated in contract * Yes |

d. Procedural Review of Regulations

* Judicial review of the regulatory process will be very narrow (Immigration Consultants; CSIC challenged regulatory change wrt regulation of immigration consultants on basis of bias and bad faith)
  + Procedural Fairness: Very high hurdle; requires the party to establish the VERY unlikely argument of bias in procedures or bad faith
    - Minister acting in a policy environment; decisions akin to the legislative exemption
    - Requires a “smoking gun”
  + Substantive: Must be an issue of jurisdiction – i.e. passing regulations beyond the scope of the governing statute
* **Aside:** Distinguish from Homex v Wyoming
  + Despite regulations being a form of “sub-ordinate” legislation, SCC treats regulations differently than by-laws
  + Homex did not have notice of the by-law; meanwhile CSIC was involved in the process from start to finish
  + Homex was a by-law enacted for the purpose of resolving a dispute b/w the municipality and the developer; however this change was one of policy with impacts throughout the country
  + Just so happens that CSIC had a monopoly at that time
  + Homex case dealt with a municipal body w/ delegated power; the Minister is a different type of decision making body and is owed a greater amount of deference
  + Homex deals with property rights; there is no specific rights at issue for CSIC
  + Immigration Consultants v Canada is the more common precedent; Homex is a very unusual case

e. Emergencies

* LeDain J in Cardinal v Kent Institution – “**Because of the apparently urgent or emergency nature of the decision** to impose segregation in the particular circumstances of the case**, there could be no requirement of prior notice and an opportunity to be heard before the decision**.”
* However, McEachern CJSC severely criticized the instruction b/c it was **not followed as soon as possible by written notice with reasons for the decision**

# Duty of Fairness – Content of the Duty

1. Content of the Duty of Fairness: Ethos, Threshold, Framework & Criteria

* Baker v Canada (Minister of Citizenship & Immigration)
  + **Fairness is the minimum “floor” of the duty** that must be met; must be contextually understood
    - Admin law infrequently attracts the “ceiling” or the maximum fairness; only available in a criminal court
  + **Procedural fairness is a participatory right entailing:**
    - An open and appropriate procedure
    - An opportunity to put views and evidence forward fully
    - Governed by the principles of democracy and the rule of law
  + Procedures are essential to realizing the “just exercise of power”
    - **Procedures need only be adequate, not optimal**
    - If you step outside the jurisdiction by engaging unfair decision making processes, the court is entitled to validate the flaw in the procedure
  + Administrative bodies are masters of their own procedure = principle of deference (Knight v Indian Head)
* **Fundamental Question:** What specific rights does the duty of fairness reasonably require of an authority in a particular legislative and administrative context?
  + Application Question: Was the procedure used fair considering all of the circumstances?
  + **General Rule:** Legislator always intends a duty of fairness to apply unless clear statutory language or necessary implication demands the contrary
  + To determine, weigh and balance the [open] Baker factors:

1. Nature of the decision being made and the process followed in making it
   * + - Where the nature of the decision will contextualize the other factors (Canada v Mavi)
2. Nature of the statutory scheme and the terms of the statute pursuant to which the body operates
   * + - Enabling statute may impose procedural requirements
       - Tribunal may be authorized to make procedural rules
3. Importance of the decision to the individual or individuals affected
4. Legitimate expectations of the person challenging the relevant decision
5. Respect for agency expertise in determining and following the agency’s own procedures

* Need to go through each of these factors on an exam; evaluate how much weight each one bears\*\*
  + Place on a spectrum of procedural fairness

2. Doctrine of Legitimate Expectations

* Public law equivalent to promissory estoppel – public official will be held to their representations re: procedures
  + N.B. Occurs very infrequently; public decision makers don’t usually make promises about things
* **Doctrine requires** (Canada v Mavi; collection of debt from Family Reunification Program undertaking)
  + Government official makes representations within jurisdiction regarding process to be followed
  + Representations must be clear, unambiguous and unqualified
  + Representations must only be procedural, not substantive
  + Representations must not conflict with a statutory duty
  + Proof of reliance is not required (unlike K law)
* “Where a government official makes **representations** **within the scope of his or her authority** to an individual about an **administrative process** that the government will follow, and the representations said to give rise to the legitimate expectations are **clear, unambiguous and unqualified**, the government may be held to its word, provided the representations are **procedural in nature and** **do not conflict with the decision maker’s statutory duty”** (Binnie J)
  + Note: Also cite Canada v Mavi for the application of the Baker framework
* However, this is a high threshold wrt to government decision-making. Per Reference Re Canada Assistance Plan, the courts are unwilling to apply the doctrine if it would create an undue restraint on government.
  + Example: Applications for permanent residency made at the airport; Department of Immigration provides translators to individuals and/or provides an opportunity for adjournment

3. Procedural Fairness: Specific Components

* **Notice:** Was notice adequate?
* **Disclosure:** *Stinchcombe* principles do not apply; must be sufficient in order to now the case to be met
* **Oral Hearings:** Seldom required unless credibility is at issue
  + Fundamental justice requires hearing where credibility is at issue (Wilson J in Singh)
* **Right to Counsel:** No right to counsel in administrative proceedings
* **Right to Call Evidence and Cross-Examine Witnesses:** Normally part of an oral hearing
  + Check procedures for limitations
* **Duty to Give Reasons:** May be required in some circumstances
* **Timeliness and Delay:** Delay may be a breach of fairness and usual remedy would be ordering an expedited process (Blencoe v BC (HRC); provincial Minister accused of sexual assault; took 3 years to hear his case)
  1. Requires *unacceptable* delay + *significant* prejudice
  2. Abuse of process must meet threshold from #1 + “bring human rights system into disrepute”
     + Delay must be unreasonable, inordinate, unacceptable and;
     + Have caused actual prejudice of a magnitude that would affect the public’s sense of decency and fairness
  + A delay in proceedings or action by an administrative body has to be very lengthy before it will constitute a violation of procedural fairness; may need to show bad faith
  + Strong dissent: “Abusive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing”
* These are your floors; will require creative lawyering to reach up to the ceiling

# Duty of Fairness – Reasons

1. Introduction: Duty to Give Reasons

* Two sources for reason giving:
  1. Statutes – Existed for a long time in more developed areas of administrative law (i.e. labour)
  2. Common Law
     + LDB in Baker: “…the principle that affected persons should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decisions.”
* **Why reasons?** (Newfoundland Nurses)
  + Per Dunsmuir, the purpose of reasons is to demonstrate “justification, transparency and intelligibility”
    - Further public confidence, accountability & transparency in decision making
    - Important for process and crucial for substance – make decision known to all
      * e.g. losing party, counsel, other agencies, reviewing court, media, general public
    - The *sine qua non* requirement for the ROL; provide the basis for upholding decisions under s. 1
  + disclose expertise “using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist”
  + illustrate that the outcome is reasonable, especially when more than one reasonable result is possible
* **When are they required?** Duty of PF requires the provision of a written explanation for a decision (reasons) when (Baker):
  + The decision has important significance for the individual
    - B/c public actors demonstrate respect for those affected by justifying the decisions they make
  + There is a statutory right of appeal
    - B/c it is difficult for a court to assess the decision w/out arguments
    - Proper administration of justice requires it; interests of the legal system require reasons in order to ensure it functions properly
  + Or in other circumstances (determined on a case by case basis)
* However, only a requirement that “some form of reasons should be required”; it is not a general duty

**Process:** When does fairness require that a tribunal must give reasons for its decision?

* Check the relevant statute and procedural code for a reasons requirement
* If none, apply the *five Baker factors* to determine the content of the duty in order to argue that reasons are or are not required in these circumstances [see below]
  1. Contextual analysis based on the type of admin body, the nature of the decision and the process followed
  2. Consider the contexts laid out by LHD above
  3. Be strategic! On an exam, need to successfully argue one way or the other
* **If duty exists:**
  1. **SOR** = Fairness (akin to correctness)
     + No deference will be owed to the tribunal in its choice not to give reasons
  2. **Remedy** = Quash the decision and send back for re-determination with reasons
     + Requires parties to return to the admin body to begin proceedings again with direction from the court
     + Extremely costly and time consuming; not likely a favourable outcome for litigants
  3. **Principles Satisfied =** Democracy, rule of law, accountability, good/responsible government
* Issues considered under Baker Framework:
  + Nature of the decision and the process followed
    - Disputes *between parties* pull toward more extensive protections
    - Where *rights* are involved more extensive reasons required; Charter rights add a constitutional dimension
    - More *judicial-type* environment incurs a more stringent reasons requirement
  + Nature of the statutory scheme and its terms
    - Preliminary vs. *final* decision
      * But if important right at stake, then may attach to preliminary decisions
    - Existence of *statutory appeal* favours reasons requirement
  + Importance of the decision to the individual(s) affected
    - More *important* the decision to the individual, more important that intelligible reasons be provided
    - *Balanced* against interests of decision-maker and deference towards selected procedures
  + Legitimate expectations of the person challenging the decision
    - Enhanced *procedural* protection only
  + Respect agency expertise in determining and following own procedures
    - Agency has *jurisdiction* to create own procedures
    - Agency has *expertise* in determining appropriate procedures in the circumstances
    - *Polycentricity* and *efficiency* concerns tend in the direction of minimal reasons requirement

2. No Reasons vs. Inadequate Reasons

* **Absence of reasons** **where required, matter of procedural fairness**
  + Assessed on a standard of fairness (akin to correctness); some deference will be shown
  + Threshold for satisfying the req’t to provide reasons is low (Cardinal v Kent Institution; Newfoundland Nurses)
* **Adequacy of reasons** **where required, matter of substantive review**
  + Standard of review based on Dunsmuir – correctness or reasonableness
    - Court has decidedly not gotten involved w/ the adequacy or sufficiency of reasons
    - Informed by deference as respect
  + Matter of law, interpretation and discretion
  + What if there is a minor problem with the reasons?
    - Before declaring reasons unreasonable, courts may attempt to inform the reasons based on submissions made by counsel and information from external sources
    - Still substantive review and an issue of adequacy of reasons
      * Aside: Odd that the courts will supplement the reasons. Then either apply their own view to their supplemented reasons (correctness) or assess the reasonableness of their supplemented reasons
* **Remedy:** Quash the decision

Newfoundland Nurses; arbitrator found that casual employment not part of vacay calculation

* How is the review of reasons informed by deference?
  + inadequate reasons and unreasonable decisions are not identical
  + unclear writing does not necessarily indicate deficiency in reasoning
  + deficient reasons are not a freestanding ground of appeal
  + reasons need not be perfect but merely sufficient
  + need not be comprehensive or well-written and may contain errors
  + reasons need to be read as a whole and not with “forensic or microscopic lens”
  + In other words, reasons do not need to be comprehensive or perfect; need only be sufficient
* What are adequate reasons?
  + exhibit “justification, transparency and intelligibility” (*Dunsmuir*)
  + permit the parties to understand why the tribunal made the decision
  + facilitate the appeal process and judicial review
  + satisfy the reviewing court that the tribunal grappled with the substantive live issues
  + allow the reviewing court to understand how outcome is within the range of acceptable outcomes
* What are inadequate reasons?
  + bare conclusions with no supporting information
  + opaque conclusions
  + no intelligible path to conclusions
  + conclusions not supported by principles
  + glaring inconsistencies
  + lack of evidence
  + irrelevant considerations present / relevant considerations omitted
  + minimal reasons which effectively immunize from review and accountability
  + exhibit attitude of “Trust us, we got it right.” (*VIAA*, para. 21)

Example of Inadequate Reasons: Lafontaine (Village)

* Letter from the Municipality to the Congregation des témoins de Jéhovah de St-Jérôme-Lafontaine :
  + “You have made a number of applications to amend the zoning by-law. The Legislature has given the municipal council the responsibility for exercising this power, which is discretionary. Upon careful consideration, the council…has decided not to take action in respect of your applications. The municipal council…is not required to provide you w/ a justification and we therefore have no intention of giving reasons for the council’s decision.”
* What’s wrong? Not clear that they considered anything submitted by the individuals applying for the re-zoning
  + Clear that they don’t feel they had to provide reasons; suggest a level of arbitrariness

**Aside:** Two Potential Areas of “Slippage”:

* Can reasons be so deficient that they no longer count as reasons?
  + Where a court has to review a decision alleged to have fatal gaps in reasoning
  + Not yet fully addressed by the case law; may be a creative argument
* Reviewing courts will “first seek to supplement them before it seeks to subvert them” (Alberta Teachers)

3. Deficient Reasons and Deference as Respect: Reasons that “could have been given”

* Court may intervene & supplement reasons (Alberta Teachers; Privacy Comm. didn’t address extended timelines in reasons)
* Must consider whether this would have a prejudicial effect on the parties, the tribunal or the public interest
* “We agree with David Dyzenhaus where he states that the concept of ‘deference as respect’ requires of the courts not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.”
* “When there is no duty to give reasons or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review. The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.”
* Can also look at Agraira and Catalyst Paper; commented on by Abella J in Newfoundland Nurses

4. Connection b/w Process & Substance in Judicial Review: Rule of Law Redux

* Dawson JA in Leahy v Canada (denied request for access under Privacy Act):
  + Reviewing courts need basic information to conduct JR
    1. Who is the DM? What did they consider in reaching their decision?
  + For this reasons, Dunsmuir insisted that reasons “be transparent and intelligible”
  + “**If the reasons for decision are non-existent, opaque or otherwise indiscernible, and if the record before the administrative DM does not shed light on the reasons why the administrative DM decided or could have decided in the way it did, the requirement that administrative decisions be transparent and intelligible is not met…”**
  + “Any reviewing court upholding a decision whose bases cannot be discerned would blindly accept the decision, abdicating its responsibility to ensure that it is consistent with the rule of law.”
* Contrast w/ Rand J in Roncarelli:
  + “It may be difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served; **there may be no means…of compelling the Commission to justify a refusal or revocation or to give reasons for its action**; on these questions I make no observation; but in the case before us that difficulty is not present: the reasons are openly avowed.”
* Contrast with Laskin J in Nicholson v Haldimand:
  + “If the making of the telephone call of which Burger disapproved…was the basis of the proposed dismissal, it would have been simple enough to say so. I can hardly credit that in itself it could be a reason for dismissing a constable who had served for fifteen months. If it was an allegedly culminating event this too could be easily stated, or if there was another ground Nicholson could have been told of it prior to dismissal. I do not regard it as giving a reason for dismissal to tell Nicholson that he had no future in the department. Moreover, there is nothing in the record to show that an inspector, the particular inspector, had the power to dismiss a constable with less than eighteen months' service.”

# The *Charter* and Administrative Law

Principles of Fundamental Justice and Procedural Fairness

* Constitutional Sources of Procedural Fairness
* Procedural Fairness and the POFJ
  + Application & Threshold (Singh)
  + Common law framework (Suresh)
  + Content (Suresh, Charkaoui)
  + Remedies (Singh, Charkaoui, Khadr)

1. Constitutional Sources of Procedural Fairness

* *Canadian Bill of Rights (1960)* [excerpt]
  + It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the **following human rights and fundamental freedoms**, namely,
    - the right of the individual to life, liberty, security of the person and **enjoyment of property**, and the right not to be deprived thereof except by due process of law
    - the right of the individual to equality before the law and the protection of the law …
  + Every law of Canada shall, **unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights**, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, **no law of Canada shall be construed or applied so as to**
    - authorize or effect the arbitrary detention, imprisonment or exile of any person;
    - impose or authorize the imposition of cruel and unusual treatment or punishment;
    - deprive a person who has been arrested or detained
      * of the right to be informed promptly of the reason for his arrest or detention,
      * of the right to retain and instruct counsel without delay, or
      * of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;
    - authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;
    - deprive a person of the right to a fair hearing in accordance with the POFJ for the determination of his rights and obligations;
* *Canadian Charter of Rights and Freedoms*
  + PREAMBLE Whereas Canada is founded upon **principles** that recognize the supremacy of God and **the rule of law**…
  + 1. …guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society
  + 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
    1. Limits on s. 7 are similar to the limits on procedural fairness
  + 8. Everyone has the right to be secure against unreasonable search or seizure
  + 9. Everyone has the right not to be arbitrarily detained or imprisoned
  + 10. Everyone has the right on arrest or detention
    - to be informed promptly of the reasons therefor;
    - to retain and instruct counsel without delay and to be informed of that right; and
    - to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful
  + 11. Any person charged with an offence has the right [specific content follows] …
  + **Charter Application**, s.32(1) – This Charter applies
    - to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
    - to the legislature and government of each province in respect of all matters within the authority of the legislature of each province
    - N.B. Reach limited to gov’t actions; many entities are not covered (determined on a case-by-case basis)

A. Application and Threshold:

* Singh v Minister of Employment and Immigration [1985] SCC (refugee applicants not given opportunity to state case or know the case they have to meet; violation of POFJ found)
  + Foundational case for s. 7 procedural fairness considerations
  + Balance of administrative inconvenience does not override Charter principles
  + Costs of compliance may be a factor courts should give [considerable?] weight, but here not so prohibitive
* Format:
  1. Application: Who is the decision maker?
  2. Application:
  3. Threshold Test: Per Cardinal v Kent
  4. Content:
  5. Limit Justified:
  6. Remedy:

B. Common Law Framework: Suresh v Canada [2002] SCC (deportation to torture)

* Minimum Requirements of POFJ: **Disclosure, Participation, Reasons**
* Principle: Be informed of the case to be met
  + Subject to privilege or other valid reasons for reduced disclosure (Leahy v Canada)
* Principle: Opportunity to respond to case presented to Minister
  + Must be provided with materials being used to make the decision
  + Minister must consider these written submissions in response; along with others
* Principle: Opportunity to challenge Minister’s information re: validity of the decision
* Duty: Minister is required to provide reasons where their decision has the potential to infringe a Charter right
  + Reasons from DM (Minister) must clearly articulate why the decision was made w/in confines of statute
* Reasonableness review of discretionary decisions should not re-weigh the factors consider by the DM (contrary to Baker)
  + “It follows that the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion …” (para 34)
  + DM obliged to give proper weight to relevant factors – courts should review whether DM failed to consider and weigh implied limitations or patently relevant factors only

C. Section 7 Analysis and Content: Charkaoui v Canada [2007] SCC (terrorist certificate scheme)

* Case expands on Suresh and outlines the minimum requirements of s. 7 as:
  + Right to a fair hearing
  + Right to an independent an impartial decision maker
  + Decision must be made on the facts and the law
  + Right to know the case put against you and to make full answer and defence
* Where s. 7 violations are unlikely to be justified under s. 1 analysis (R v Chaulk)
* However, deference is owed to the legislature in assessing their legislative choices; Parliament need not create perfect procedures
* Holding: Process deprived the person named in the certificate of some or all of the info on the basis of which the certificate was issued or the detention ordered
  + Declaration under s. 52 suspended to allow Parliament time to amend the law

D. Breach & Remedy: Canada v Khadr [2010] SCC (15 year old held in Guantanamo)

* Charter can apply to Canadian citizens in other countries where Canadian government involvement is found
* Courts have a general, but narrow ability to review prerogative powers – these powers are not exempt from constitutional scrutiny
  + Even then, the available remedies may be limited
  + i.e. Khadr provided s. 52 declaratory relief only – no s. 24 “appropriate and just in the circumstances” available
    - re: Insite is a very unique case
* Where procedural fairness is explicitly ousted by a statute, only the Charter can be used to convince the courts that some level of procedural fairness (i.e. with POFJ) should apply

# Independence, Impartiality and Bias

Introduction

* **Impartiality** = refers to the ideal state of the decision-maker or institution; one who is able to make judgments with an open mind and is without connections that improperly influence the process
  + *Audi alteram partem* – requires the DM to hear and listen to both sides of the case before making a decision
* **Bias** = a decision maker should neither judge his or her own cause nor have any interest in the outcome of a case before him or her (*nemo judex*); perception of partiality toward a particular outcome
* **Independence** = institutional autonomy that aims to secure the conditions needed for impartiality
  + Refers to the courts ability to decide matters free of inappropriate interference or influence
  + Valued as an aspect of the *rule of law*
* Separate but related concepts which centre on the notion of fairness in the admin decision-making process
* Why? To ensure the public’s confidence in the administration of justice
  + Very important; such that the mere perception of bias or partiality toward a particular outcome, provided that the perception is reasonable, is enough to have a decision overturned

A. Constitutional Sources of Judicial Independence

* Independence of the judiciary is guaranteed by the division of powers and the rule of law
  + Guaranteed in some cases by ss. 7 and 11(d)
  + Constitution Act 1867, ss. 99 and 100 guarantees tenure and financial security
  + Also incorporated through the Act of Settlement (1701); imports the rule of law via the Preamble
* **Judicial independence serves to protect other values within our system of justice**
* Three structural conditions for judicial independence (**Valente Principles**):
  1. **Security of tenure**
     + Prevents governments from removing judges for rendering unfavourable decisions
     + Guaranteed by ss. 98 & 99 for judges of the superior courts; can only be removed “for cause” and must have an opportunity to respond to allegations against them (“at pleasure” appts rendered invalid)
  2. **Financial security**
     + Guaranteed a fix salary and salary must be sufficient to keep them from seeking alternative means of supplementing their income (s. 100)
  3. **Administrative control**
     + Must have control over the way in which the courts are administered
* **Related Concept: Adjudicative Independence**
  + Independence from interference in deliberations; concept deals with relational matters and the internal process of deliberation by individual decision-makers (Beauregard)

## B. Administrative Independence, Impartiality and Bias

* Refers to a tribunals/institutions ability to decide matters free of inappropriate interference or influence
  + *Independence* deals with the institutional structure itself; not the actual adjudicator or the decision
  + *Impartiality* deals w/ the state of mind or attitude to the issues/parties; based on the individual and the position they hold
  + *Bias* deals with the actual decision in the case
    - **Aside:** Where the statute may authorize or direct a particular mentality – i.e. may direct decision-maker to privilege national security over individual rights
* **Issue:** To what extent should tribunals and other admin bodies be independent of the gov’t?
  1. How can a tribunal best fulfill its functions while maintaining an “appropriate distance” from the gov’t, litigants and other stakeholders?
  2. To what extent is this independence legally guaranteed?
  3. Are there certain kinds of admin bodies that require more independence than others?
* Where most admin bodies are linked to the executive branch through a Cabinet minister; as dictated by their home statute
  + May file annual reports, provide advice or additional information to the Minister
* III Waves of Jurisprudence:
  + Independence akin to the judiciary (CP v Matsqui Indian Band)
  + Affirmation of the hybrid nature of tribunals; SCC maintains that there is no general constitutional guarantee of independence (Ocean Port Hotel)
  + Retrenchment; push for judicial declaration that admin tribunal independence is guaranteed by the Constitution

|  |  |  |
| --- | --- | --- |
| **Model /**  **Objective Conditions** | **Judicial** | **Administrative** |
| **Goal** | Eliminate or reduce interference from Exec and legislature  Secure impartiality and ensure decision-making autonomy | Greater scope for governmental influence  Seek to eliminate or reduce “inappropriate interference” and influence  Incorporate only relevant considerations |
| **Security of Tenure** | Secure until retirement  Removal only for cause  Constitutionally guaranteed | Fixed, short or long-term **appointments** according to the home statute (2747-3174 Quebec v Regie)  At pleasure appointments possible; therefore more easily removed (Keen v Canada)  [Raises concerns around wrongful or arbitrary dismissal; however this allows maximum government flexibility to reshape policy directions] |
| **Financial Security/ Remuneration** | Salary and pension security | Variable: set by legislation or contract  \*not the route to “get rich” |
| **Administrative Control** | Day-to-day control of institutional operations  Federal Commissioner of Judicial Affairs (allocates resources) | Ministerial / departmental involvement & oversight therefore more external interference  Subject to legislative change; financially dependent |
| **Independence = institutional relations** | Possess institutional autonomy from other branches of gov’t   * 3 OBJECTIVE structural conditions: security of tenure, financial security, institutional control * freedom from external pressures: litigants, media, organized groups * protection from Exec interference in administration / salaries / judgment | Less institutional autonomy from the Executive branch   * appointments & removals * “at pleasure” appointments * budget and remuneration * policy-making control * appropriate Ministerial involvement and/or undue interference in decision-making * freedom from external pressures: litigants, media, organized groups |
| **Impartiality  = state of mind or attitude to issues/parties** | Individual autonomy to decide w/ an “open mind” and be and/or appear impartial   * adjudicative independence * freedom from internal pressures: colleagues, staff, higher-ups * reliance on own mind and conscience to hear the matter fully | Decisions made within a regulatory context and directed by the statute   * involvement with other tribunal members * norms, values, priorities, policies set by statute and Executive |
| **Bias  = individual judgment** | Individual prejudgement precluded b/c of:   * already decided (“closed mind”) * ideological, discriminatory, arbitrary * conflict of interest * pecuniary interest / corrupt * irrelevant considerations | Practices that promote consistency and efficiency but in tension with the judicial model:   * expertise, board meetings, membership * individual bias = individual tribunal member * institutional bias = body as a whole |

Test for Tribunal Independence and RAB: Canadian Pacific v Matsqui (taxation scheme under *Indian Act*)

* **CL Test for Tribunal Independence, Impartiality and Bias**
* [T]the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”
* Where the:
  + ONUS lies on the person alleging to raise the issue before the decision-maker at the first available opportunity
  + ONUS lies on the person alleging to adduce evidence to meet the reasonableness threshold of “more than mere suspicion”
  + PROOF is on a balance of probabilities
* **Application to Admin Bodies/Tribunals**
  + Valente Principles must be applied in context of the functions performed by tribunal
    - Security of tenure, financial security and administrative control
    - “The requisite level of institutional independence…will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office”
  + Can also consider the Baker factors
    - Nature of the Decision: adjudicative - based on information provided by both parties
    - Interests: Assessment of property taxes; lesser right or interest
    - Statutory Scheme: Two levels of appeal
    - Procedures: Where is deference shown if the agency procedures were never used? Sopinka’s argument that the body’s operation is required
  + Grounds for RAB must be substantial; must be more than mere suspicion
  + Note: Where Sopinka J dissents on the basis that (1) the primary purpose of the scheme is self-government and that this should inform statutory interpretation and (2) that the application of RAB test must wait for operational knowledge – “otherwise, the administrative law hypothetical ‘right-minded person’ is right-minded, but uninformed.” (para. 123)
* N.B. Danger of looking at everything through a judicial model – informs how you assess administrative bodies
  + Whereas some aboriginal communities believe decisions should be considered fair when rendered by non-strangers whom they know and trust

How is this relevant to arguing your case?

1. Admin body placed along the *Independence, Impartiality & Bias* spectrum according to its nature, mandate & function
   * Must engage with the statute, regulation or Terms of Reference (i.e. for a Commission) (Chretien v Canada)
2. Need to be able to argue your case for your client – more adjudicative in nature will require a greater degree of independence and impartiality
3. Applicable Standards for Assessing Allegations of Bias

|  |  |  |  |
| --- | --- | --- | --- |
| Spectrum | Adjudicative | Somewhere in the middle | Legislative |
| Applicable Standard | Strict reasonable apprehension of bias | Flexible RAB | More lenient closed-mind standard |
| Type of  Admin Body | Applicable to courts and tribunals for hearings | Commission or Inquiry | Applicable to legislative, policy & investigative decision-makers |

## C. Tribunal Independence

* Judicial independence is designed to protect the judiciary from interference by the other two branches of government; however administrative tribunals are part of government (Ocean Port v BC; hotel had their liquor license suspended)
  + They span the “constitutional divide b/w the executive and the judicial branches of gov’t”
  + Cannot apply the unwritten principles to them the same way
* **Test for Tribunal Independence:** Whether a reasonable, well-informed person having thought the matter through would conclude that an admin DM is sufficiently free of factors that could interfere with their ability to make impartial judgments
* **There is no freestanding constitutional guarantee of administrative tribunal independence**
* The requisite degree of independence is a question most appropriately determined by Parliament/legislature – use the Valente Principles and the Baker factors to determine what level of tribunal independence is required
  + CL independence may be ousted by express statutory language
  + “the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected”
* Where “at pleasure” appointments may be sufficient to ensure tribunal independence depending on the context of the admin body in question and the statutory language (Keen v Canada; CNSC President removed; closed nuclear power plant)

Pushing for Independence after Keen v Canada

* Cases have suggested a spectrum of decision-making types in which highly adjudicative tribunals endowed with court-like powers and procedures must meet more stringent requirements of procedural fairness (incl. independence)
* McKenzie v Minister of Public Safety [2006] BCSC
  1. SCC had held that the unwritten constitutional principles serve to protect the judicial independence of JOPs
  2. Court held that in light of this extension, judicial independence should apply to res ten arbitrators; relevant that res ten arbitration has been removed from the civil courts

## D. Individual Bias

Four grounds exist at common law to determine whether an individual decision maker has exhibited bias:

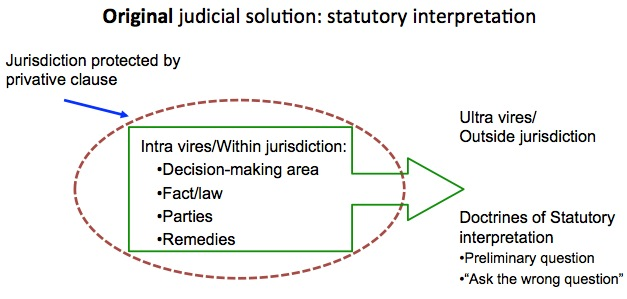
1. A pecuniary or material interest
   * Only direct and certain financial interests count (Energy Probe)
   * If the gain is insignificant and no different from that received by the average person in a widespread group of benefit recipients, it will not count
   * A statute may authorize indirect pecuniary benefit
2. Personal relationships with those involved in the dispute
   * Including parties, counsel, witnesses and other administrative actors
   * Must determine if the relationship was close enough and current enough to pose a threat to impartiality
     + Key factors: Whether the relationship presents a significant enough interest to affect the impartiality of the decision-maker and the amount of time that has passed (In re Pinochet; HL Justice connections)
   * Where context is important – i.e. labour arbitration panels include nominees who are chosen for their particular sympathies to the parties
3. Prior knowledge or information about the matter in dispute
   * Requires direct previous knowledge or involvement (Wewaykum Indian Band v Canada; Binnie had participated in a meeting in which the band’s claims were discussed)
   * Mediation privilege may be directed by the statute
   * The statute could authorize multiple overlapping functions that may oust the common law
     + Common when adjudicator is asked to hear an appeal or a subsequent proceeding of an original matter
4. An attitudinal predisposition towards the outcome (i.e. a prior or fixed view) (Chretien v Canada; Commissioner who spoke out against Chretien 3 months into 9 month inquiry)
   * The text is flexible and ranges in application from strict to lenient depending on the nature and function of the DM
   * Gleaned from the decision-makers’ comments and attitudes during and outside of the proceedings – the DM’s statements of his own lack of bias are not relevant (Chretien v Canada)
     + Rude towards your client
     + Prosecutorial stance; pursuing your client with questions
     + Make discriminatory or sexist remarks
   * A municipal councillor, for example, will not be held to stricter adjudicative standards (St. B Residents Assn v Wpg)
     + Must advocate a position during election time; apply a “closed-mind” test which requires that the council be shown to have such a closed mine on a matter that any representations made would be futile

## E. Institutional Bias

* Test for Institutional Bias – II part test to determine if an apprehension of bias exists institutionally:
  1. Having regard for a number of factors including, but not limited to, the potential for conflict between the interests of tribunal members and those of the parties who appear before them, will there be a reasonable apprehension of bias in the mind of a fully informed person in a **substantial number** of cases?
  2. If the answer to that question is no, allegations of an apprehension of bias **cannot** be brought on an institutional level, but must be dealt with on a case-by-case basis.
* Relevant Case: IWA v Consolidated Bathurst; full board meetings
  + Test for independence is freedom to decide according to one’s conscience and opinions, not absence of influence
  + Issue: Whether there is pressure on the individual DM to decide against his/her own conscience and opinion
  + Generally, the use of full board meetings will not breach the principles of natural justice if:
    - Discussions are limited to law or policy, and not factual issues, and
    - The parties are given an opportunity to respond to any new grounds arising from the meeting
    - Appropriate checks and balances for full board meetings included not keeping minutes, not keeping attendance, not holding a vote, not requiring consensus, and having attendance be voluntary
* In Geza v Canada (lead cases by IARB), FC held that Step 1 was not satisfied
  + No evidence that motive for lead case was to increase the rejection rate of Hungarian Roma, of inappropriate relationship between IRB and Citizenship & Immigration or that Bubrin (DM) was partial or showed a negative pre-disposition to rejecting Roma refugee claims (as part of administrative lead case team)
  + *Ratio:* Test for RAB on institutional level, determine using entire factual matrix. Fine line between tribunal efficiency and bias in using lead cases.
* However, the FCA found a RAB on the basis that two members of the three panel team were involved in the lead case administration; based on leaks to the media, suggestions that lead cases were meant to create non-binding but influential precedent that would reject Hungarian Roma applications
* In Jaroslav v Canada, the Minister’s negative comments about Czech Republic refugee application did not raise a RAB b/c the IARB is independent of the Minister; IARB conducted a thorough analysis of the refugee claim and disposed of it in a fair and reasonable manner

# Standard of Review – Basics

1. Concept of Jurisdiction

* Jurisdiction = “law declared”
  + General governmental power to exercise authority over persons/things; usually conferred by statute
  + Scope of court’s inherent power to decide a case/grant a remedy
* Sometimes jurisdiction is explicit, clear or obvious in the statute – others times must be determined implicitly
* Per Rand J in Roncarelli, discretion is never unfettered
  + Constrained by the rule of law, the Constitution, the Charter and principles of fairness
  + Administrative bodies do not have the final say in determining their jurisdiction
* **Key Factor: Privative Clauses**
  + Full and Robust PC – commonly worded in extremely clear language; completely ousts the ability to access JR
  + Partial Clauses – finality clause; no reference to JR but makes the tribunal the “final decision maker”
  + Not PC – statute which delegates some responsibility to judges
    - i.e. requirement to obtain leave from the FC under the *IRPA*
* Raises problems for the constitutionally entrenched inherent jurisdiction of the courts; PC contradicts some aspects of the ROL by sheltering executive decisions from judicial or other government scrutiny
  + Potential to be used inappropriately
* **Original Judicial Solution:** Statutory Interpretation
  + Two Options:
    1. Use statutory interpretation to narrowly read them down
    2. Apply the “wrong question” or “preliminary question” doctrine
* However, issues of pure jurisdiction are reserved for the courts (Dunsmuir)
  + Without this exception, privative clauses would be inconsistent with the ROL. Requires that decision-makers make decisions with the confines of the jurisdiction afforded to them by the legislative.
  + Also, s. 52 challenges under the Constitution and the Charter are reserved for the courts.

2. The Doctrines

* Both doctrines are related to preliminary steps about how the tribunal asserts jurisdiction
  + An example of the broadened scope of jurisdiction that prevailed prior to “deference as respect” and Dunsmuir
* Commonly applied when key statutory terms are not defined – is this the sort of claim that this statute ought to cover?
* Preliminary Question Doctrine: Bell v Ontario Human Rights Commission [1971] SCC
  + Found that the DM didn’t asked the preliminary question of how a “self-contained dwelling” should be defined; court held that defining this issue was beyond their jurisdiction
* Doctrines are officially rejected by NB Liquor Corp v CUPE [1979] SCC (def’n of strike provision)
  + Early application of deference as respect and expertise
    - “The interpretation of s. 102(3) would seem to lie logically at the heart of the specialized jurisdiction confided to the Board. In that case, not only would the Board not be required to be “correct” in its interpretation, but one would think that the Board was entitled to err and any such error would be protected from review by the privative clause in s. 101.”
  + Example of patently unreasonable standard of review

2. Reasonableness Review

* Canada v Southam (Competition Tribunal re: newspapers in the Lower Mainland) introduces the third SOR of “reasonableness *simpliciter*”
  + **“An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination.** Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The **defect**, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.”
  + This standard “instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise… the issue is the weight that should be accorded to expert opinions”
  + Courts should not re-weigh the factors considered by the decision maker
    - **Makes reasons intimately connected to the reasonableness review**
* However, the judgment very poorly identifies the difference b/w reasonableness *simpliciter* and patently unreasonable:
  + “…lies in the **immediacy or obviousness of the defect**. If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable. But if it takes **some significant searching or testing to find the defect**, then the decision is unreasonable but not patently unreasonable…This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem.”
* Future Problems are flagged:
  + Iacobucci admits that he would have given more weight to the evidence of inter-industry competition; argues that the Tribunal’s finding is “difficult to accept” but is not unreasonable; ultimately defers to the Tribunal on this issue
  + He finds the decision reasonable; but does not seemingly engage with the tribunals 100 page reasons

3. Pre-Dunsmuir: Pragmatic and Functional Approach

* Pragmatic – reasoned and informed approach
* Requires reviewing judge to assess, apply and weigh four factors (Pushpanathan; guilty of trafficking, sought refugee status)
  + **Privative clause: weighed against expertise as a factor**
    - Ouster or full privative clause is compelling reason for deference
      * Absence of privative clause may be reason for less deference
    - If partial or equivocal: look to legislative intent
    - Presence of a statutory appeal: permits more searching review
  + **Expertise: lack of expertise outweighs a privative clause**
    - Expertise is assessed by the courts relative to their own expertise
    - Interpret the enabling legislation: purposes, objective, agency composition
    - Specialized knowledge of decision-makers: broad relative to courts or areas that generalist judges will not know—economic, financial, technical and labour (Canada v Southam)
    - Special procedures for dispute resolution
    - Judicial skills and procedures—comparative assessment
      * Are special procedures employed for dispute resolution?
  + **Purpose of the act as a whole and provision in particular**
    - Must review legislative scheme in its entirety
    - Purpose and expertise often overlap
      * Principle of polycentricity informs the purpose
    - Assess whether rights/entitlements are protected/affected
    - Use contextual and purposive approach to statutory interpretation
    - Pay close attention to language that is vague, open-textured, or grants discretion
  + **Nature of the problem and level of deference**
    - Question of law (less) or question of fact (more) or question of mixed fact and law (neutral)
    - Legislative intent re: questions of law [review points 1,2,3] and intersection with expertise
    - Generalized proposition of law = correctness
    - Discretionary power = reasonableness
* Baker: [55] The “pragmatic and functional” approach recognizes that SORs for errors of law [and discretionary decisions] are **appropriately seen as a spectrum**, with certain decisions being entitled to more deference, and others entitled to less…The spectrum of SORs can incorporate the principle that in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament.”
* Note: Four factors are relevant and important factors to consider; although operate differently under the SOR analysis

# Standard of Review – Standard of Review Analysis

1. Standard of Review Analysis (Dunsmuir)

* Problem lays not in the concept of deference or its virtues, but in the challenge of putting it into operation
* Step 1: Look to past jurisprudence to see how particular category of question was addressed (if satisfactorily) regarding level of deference owed
  + Statutory context and legal issue needs to be near identical
  + More recent cases may offer more agreement; however it may also be a real “dog’s breakfast”
  + If the legislature has specified an applicable SOR, then the courts must apply (i.e. BC ATA)
* Step 2: If not satisfactory, contextually analyze the factors using the Standard of Review analysis
  1. Privative clause
  2. Purpose of tribunal from interpretation of enabling legislation
  3. Nature of the question
     + Deference owed on questions of fact or mixed fact
     + Deference owed on questions of law involving the interpretation of the home statute
     + Correctly applies all the legal principles and tests
  4. Expertise of the tribunal
     + Specialized or expert tribunal interpreting its enabling (home) or closely related statute
* **Defeasible presumption of reasonableness applies** – particularly where the Tribunal:
  + Produces a reasonable outcome which is defensible in respect of the law
  + Constructs an interpretation of its statutory powers that falls within a range of competing interpretations
  + Arrives at a decision that demonstrates justification, transparency and intelligibility
  + Is supported by adequate reasons (Baker)
* **Correctness review applies only to questions of law if one of the exceptions applies:**

1. A constitutional issue
2. A question of general law that is “of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”
3. A “true” question of jurisdiction or *vires*
   * + “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”
4. Drawing jurisdictional lines b/w two or more competing specialized tribunals

* Court is clear that “the move towards a single reasonableness standard does not pave the way for a more intrusive review by courts”
  + ML suggests that it will inevitably devolve into a spectrum of deference according to the factors considered
* **Deference is both an attitude of the court and requirement of the law of judicial review**
  + Imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law
* Exam Application:
  + In practice, you will have to argue for or against persuasive jurisprudence. If no persuasive jurisprudence available, must argue within the context of the SOR analysis.
  + On the exam, we don’t have access to a wealth of jurisprudence. For that reason, always go to Step 2. Will help make a more effective argument.

Changes from the Pragmatic & Functional Approach

* Role of the Privative Clause
  + Seems to render the privative clause otiose; creates a presumption of reasonableness only
    - Ought not to treat a privative clause as conclusive, but it is “more than just another ‘factor’ in the hopper of “pragmatism and functionality”
  + “single standard of reasonableness cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause”
  + Also discussed uncertainty about the weight that a statutory appeal exerts against the weight of a privative clause
* Issues of Jurisdiction
  + Issues of jurisdiction seem to have been eliminated; subsumed into the four exceptions outlined above
  + Troubling to rely on precedent to defend a standard of review based on a superseded legal test, while hinting that the current test would have yielded a different result (AB Teachers)
* What is a question of central importance to the legal system as a whole?
  + Binnie in AB Teachers offers a broader and more generic exception for questions of law that “raise matters of legal importance beyond administrative aspects of the statutory scheme under review” and do not lie “within the core function and expertise of the decision maker”
  + Few cases have disputed whether a legal question fits within the exemption
  + Commonly arise in the case of human rights tribunals
    - May be jurisdictional issue; courts have protected their right to adjudicate on matters of human rights
    - However in *Mowat*, SCC left it to the CHRT to determine if they had the ability to award legal costs under the statute; not an issue of central legal importance
  + What about inconsistent rulings?
    - Per Domtar, inconsistent interpretations of a given statutory provision do not supply an independent ground for stricter judicial scrutiny
    - “it accords with the rule of law that a public statute that applies equally to all affected citizens should have a universally accepted interpretation”
      * Driven by the values of certainty and consistency in the law

**Aside:** Why do we have reasonableness at all? Why isn’t the standard always correctness?

* Appeal courts apply a standard of correctness to all questions of law in lower courts; issues of fact are shown deference to the trial judge while issues of mixed fact and law are typically questions of correctness
* However, I would argue that administrative tribunals are different
  + First, they are not bound by *stare decisis*. Meaning that they don’t have to follow themselves exactly. They may likely come to a different decision in different cases, despite striving for consistency.
  + Secondly, without deference, the purpose of administrative tribunals would be thwarted. They were designed to promote efficiency and ensure access to justice for large groups of individuals (think labour boards and res ten boards). If everything was reviewed on a standard of correctness, admin tribunals essentially become a lower court and individuals would have reason to consistently seek JR.

2. True Questions of Jurisdiction

* “True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be **presumed that the appropriate standard of review is reasonableness**.” (Rothstein in Alberta Teachers)
* However, disagreement exists. Binnie & Cromwell argue that “the concept of jurisdiction is fundamental to judicial review of administrative tribunals and, more generally, to the rule of law” – role of s. 96 courts to check powers of gov’t

**Aside:** What is jurisdiction?

* Narrow jurisdiction – i.e. outlined in Dunsmuir
  + Does the admin body actually have the jurisdiction to make this decision?  SOR = correctness
  + Per Conway, possible that DM can award a remedy under s. 24 and s. 52 if they are able to decide questions of law
* Jurisdiction over procedural fairness – i.e. outlined in Baker
  + Not acting in accordance with proper procedure based on the statute; out their “procedural jurisdiction”
  1. Did not follow proper procedure (re: reasons)  SOR = fairness
  2. Showed reasonable apprehension of and actual bias (re: racist comments) SOR = fairness
  3. Unreasonable (re: by not considering the important factors adequately)  SOR analysis required

3. Presumptions for Reasonableness Review (Alberta Teachers)

* REASONABLENESS will be the presumptive standard regarding outcome when:
  + a specialized or expert tribunal
  + interpreting its enabling or home statute
  + on a question of fact or mixed fact and law or (in some cases) law
  + or on a question of law involving interpretation of the home statute
  + or exercising broad statutory discretion concerning an individualized decision
  + or exercising broad statutory discretion concerning an individualized decision that affects a *Charter* value (Dore)
  + correctly applies all legal principles or tests
  + to construct an interpretation of its statutory powers that falls within range of possible acceptable interpretations
  + resulting in a decision that demonstrates justification, transparency and intelligibility usually, but not always, through the provision of reasons
  + supported by adequate reasons
  + and produces a reasonable outcome which is defensible in respect of the facts and law.

# Standard of Review – Correctness

1. Statutory Interpretation: Approaches and Models

* **Modern Approach (Driedger)** – approach is “always” applied; cannot argue for another method
  + In practice, most tribunals engage in *dynamic interpretation* – equivalent to “living tree” doctrine
  + Look to provide an interpretation of their home statute that best meets changing circumstances; based on their understanding of relevant social situations and political factors
    - Remedial legislation must be interpreted broadly, liberally and dynamically to reflect societal changes
* Words are read in:
  1. The entire context
  2. In their grammatical and ordinary sense when not defined
  3. Harmoniously with the scheme of the Act, the purpose or object of the Act, and the intention of Parliament
  4. Using a textual, contextual and purposive to analysis
* What does this mean?
  + Guided by rules of construction, **courts must read the entire statute to understand the legislative scheme** – how the provision fits, or conflicts with other areas of the statute
  + May require courts to examine the legislative history; particularly where there is ambiguity or the provision has been amended (i.e. Nicholson v Haldimand)
    - To understand why Parliament chose to amend a particular provision
* Legislative History
  + Hansard debates
  + Minister’s statements affirming statutory purpose in subsequent amendments
  + Legislative silences regarding potential amendments (oversight or intentional exclusion?)
    - i.e. Mossop – Parliament chose not to amend the *Human Rights Act* to include sexual orientation
* **Judicial Interpretation:**
  + Determine if the statutory purposes have been affirmed in jurisprudence
  + Or a functional analysis of institutional relations and positions
  + Rules of construction:
    - express intent or silence
    - absurd results
    - structural analysis
    - consistent expression across a number of related statutes – consider statutory interpretation of the same provision or provisions within the same statute
* **Agency Interpretation:**
  + Agency precedents
  + Reasons
  + Statements regarding statutory purpose(s) by Agency Officials
  + Soft law – will help you get your argument off the ground; per Baker, items such as the tribunals “guidebook” or website are very influential
* Expert Evidence:
  + Witnesses
  + Outside experts (i.e. academics, technicians, scientists) provide contextual information that is not for use in actual interpretation – such as scholarly writings

Models of Statutory Interpretation [see handout]

* Modern approach suggests that there can be a “right” statutory interpretation
  + Criticisms:
    - Approach is unpredictable
    - Scope for discretion is much broader than suggested by the approach itself; suggests that interpretation is minimal and governed by some other authority
* However, **statutory interpretation always includes an “interpretive act”**
  + Always subject to reasonable disagreement; this accords w/ the courts statement that there are often a variety of reasonable interpretations or reasonable outcomes in the cases faced by tribunals
* Different approaches to statutory interpretation play out in the jurisprudence and throughout the court
  + i.e. some judges lean heavily to one approach or another
* **Plain Meaning vs. Purposive and Contextual Approach**
  + Where plain meaning limits the meaning of the statute
    - Often leads judges to use the dictionary to find the defined meaning of a word or concept
  + Where purposive and contextual readings are a more activist approach
    - Applied frequently in human rights cases; puts the judge in an “activist” position
      * Contentious when the court is pushing the law ahead of society (i.e. Mossop)
      * Means that tribunals play a part in this push and pull; addressing issues the legislature is avoiding
    - i.e. Roncarelli – Rand J used the rule of law to limit the plain meaning of the statute and inform the statute’s meaning; dissent read the statute in its plain meaning and was willing to accord unfettered discretion to Archambault
* **Means that tribunals are empowered to interpret law in a way that is accessible to a larger subset of Canadians**
  + Counsel must provide the DM with a “mini research paper” regarding the interpretation; not difficult to do a good job, but must draw on plain meaning or provide reasoning for a purposive approach

2. Correctness Review

* Rationales Underlying Correctness Review

1. Supervise jurisdiction of administrative decision-makers
   * + Generalist judges are uniquely placed and independent of the executive
2. Exhibit expertise in matters over which administrative decision-makers are less adept and knowledgeable
3. Ensures consistency and predictability in the legal system

* No obligation under correctness review for the court to look at the reasons; no legal requirement
  + Court essentially conducts a *de novo* review; ask only whether the tribunal’s decision was correct
  + No deference owed to the reasoning process or the reasons
  + Permits a substitution of the courts interpretation of the correct answer
* Clear demarcation b/w reasonableness and correctness
* Example: Mossop v Canada (apply correctness to CHRT’s interpretation of family status)
  + Lamer describes as question of general importance to the legal system = applied correctness
    - Looked at legislative intent – found that Parliament had deliberately omitted sexual orientation from protected grounds and same-sex relationships from family status
    - Mossop’s remedy was a Charter challenge or the political process
  + LHD, in dissent, applies patent unreasonableness
    - Took a broad and purposive approach to statutory interpretation – looked at the overall context, the purpose of the Act, the wording in both English and French. Finds that family status is not a legal term and continues in her analysis.
* Example: Northrup Grumman v Canada (military contract lost; jurisdiction of CITT)
  + True issue of jurisdiction = correctness
    - Can the CITT hear a complaint from an American company?
  + Parliament’s clear and unambiguous intent: Domestic free trade
  + Purposes and Objects: Promoting domestic trade, efficient dispute resolution system and not undermining Canada’s bargaining position on the international scene

**Aside:** Expertise in Human Rights

* Some administrative bodies are considered to possess specific, discrete sets of expertise that are not possessed by judges
* However human rights are seen to be at the “core” of the judiciary’s interpretive role; unlike areas of labour arbitration, economics or transportation that are outside of the judiciary’s typical expertise
* As a result, judiciary has been particularly protective of human rights cases and particularly, statutory interpretation around human rights (Mossop)
* Post-Dunsmuir, we presume reasonableness outside of the exceptions

**Aside:** What SOR applies to a Tribunal decision that overturns itself? Is it reasonable to overturn past decisions without adequate reasons? (Northrup Grumman v Canada; had previously held they could not hear claims from American suppliers)

* Where the adequacy reasons is an issue of substantive review rather than procedural fairness
* Compare with Mossop and Domtar
  + CHRT in Mossop extended the law; did not necessarily reverse itself
  + Domtar allows for conflicting interpretations of statutory provisions; however this was two different Tribunals
* May be relevant where the question was one of general importance to the law
  + Consider something like costs – a CL area that is central to the law generally; court may not accord deference to any Tribunal b/c it is fundamental to the legal system
* However tribunals must be able to respond to changing circumstances; need for dynamic interpretation
  + i.e. Consolidated Bathurst – “full board meeting”
  + Allowed the Board to change the past jurisprudence; able to consider past decisions and current societal norms
  + Process by which Tribunals can overturn their past decisions or trends

Aside: Could Rothstein J in Northrup Grumman have reached the same result using reasonableness?

* Difficult to tell as the SCC judgment doesn’t adequately engage w/ the reasoning of the Tribunal
  + Maybe? Unsure of what the compelling arguments made by the Tribunal were
* While it is an expert tribunal interpreting in their home statute, the SCC construes this as a matter of narrow jurisdiction; area where the court seems to feel that it has expertise;
* Aside: To what extent does a judge’s expertise affect their perception of expertise of Tribunals and other admin bodies?
  + Consider that Rothstein possesses significant expertise in domestic and international trade; seems to take judicial notice of American tax system

# Standard of Review – Reasonableness Review

Reasonableness – “takes its colour from the context”

* What does reasonableness mean?
  + Developed in Southam; interpreted in Khosa
* Reasonableness requires (Dunsmuir):
  + an outcome that is possible under the statute; outcomes that are beyond the bounds of the statute would be beyond the DMs jurisdiction
  + consideration of the appropriate factors under the statute; a failure to consider relevant factors or consideration of irrelevant factors may render the decision unreasonable
  + a DM that is authorized under the statute (true issue of jurisdiction)

1. Reasonableness Review Revisited

* National Corngrowers, 1990 (decision by the Canadian Import Tribunal)
  + Disagreement b/w Gonthier and Wilson regarding the appropriate approach; both found the decision reasonable
  + Gonthier pre-figures the reasonableness *simpliciter* standard
    - Engages in detail with the reasons given by the decision maker and the statute
  + Wilson accused Gonthier of engaging in correctness review under the guise of patent unreasonableness
* Mossop, 1993 (decision by CHRT to expand family status)
  + 3 judgements chose correctness; LHD chose patent unreasonableness
  + LHD analysis is a model of reasonableness review and the purposive & contextual approach to statutory interp.
    - Her approach was more intrusive that PU demanded at the time; scrutinized the statutory context
* Southam, 1997 (decision by Competition Tribunal to order divestiture of paper)
  + Case creates the reasonableness *simpliciter* standard
  + Iacobucci argues that courts must carefully engage with the reasons of the tribunal to justify any disagreement
    - “… An **unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination**. Accordingly, a court reviewing a conclusion on the reasonableness standard **MUST look to see whether any reasons support it**. The defect, if there is one, could presumably be in the **evidentiary foundation** itself or in the **logical process** by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.”
  + Adequacy of reasons is part of substantive review; provision of reasons is part of procedural fairness review
* Law Society of NB v Ryan [2003] SCC (lawyer lied to his clients about progress and court awards)
  + SCC begins dialogue around a range of possible interpretations
  + “There is a further reason that courts testing for unreasonableness must **avoid asking the question of whether the decision is correct**. Unlike a review for correctness, there will often be **no single right answer** to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court’s role to seek this out when deciding if the decision was unreasonable.”
* Dunsmuir, 2008 (government employee and office holder)
  + High point of reasonableness review; adoption of the cleaner and more easily applied framework (SOR analysis)
  + Courts must construe what the legislature intended; it is counsels job to paint this picture
    - May need to engage with the day-to-day context of the decision maker
    - May need to provide normative guidance and/or examine the politics of the decision
  + **Must ask – does it fall within a range of reasonable interpretations and outcomes?**
* Objectives of the statute; power of the statute
* Type of decision (law, mixed, fact)
* Public policy or adjudicative matter b/w parties
* Does the statute demand the DM to strike a proper balance (or achieve proportionality) b/w the adverse impact of a decision on the rights and interest of the applicant or are others directly affected?
* weigh against the public purpose which is sought to be advanced (polycentricity)
  + **Reasonableness does not include the reweighing of the different factors at hand** (Khosa)
  + Will be “degrees of deference” within the reasonableness standard

2. Reasonableness Review in Practice

Canada v Khosa (Indian permanent resident; exported on basis of serious criminal re: street racing causing death)

* Deference isn’t owed only in the presence of a privative clause; the court must still consider all of the relevant factors to establish the appropriate SOR
* Reasonableness does not pave the way for more intrusive review; JR cannot re-weigh the evidence
* Legislature has the power to specify a SOR; however, where the legislative language permits, the courts:
  1. will not interpret grounds of review as standards of review
  2. will apply *Dunsmuir* principles to determine the appropriate approach to JR in a particular situation, and
  3. will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (deference)
* Reasonableness is a single standard contextually applied (Binnie J for the majority)

Catalyst Paper v North Cowichan (increased tax rates for industrial zoned areas)

* Municipal government has a democratic mandate; owed a maximum level of deference
* However the range of reasonable outcomes is circumscribed by the purview of the legislative scheme that empowers the municipality
* “Where the parties differ is on what the standard of reasonableness requires in the context of this case. This is the nub of the dispute before us.”
* The court engages with the range of deference available under the reasonableness standard (in accordance with Binnie’s argument in Khosa)
* Also example of the court “supplementing” the reasons of a municipal council; not held to the same standard

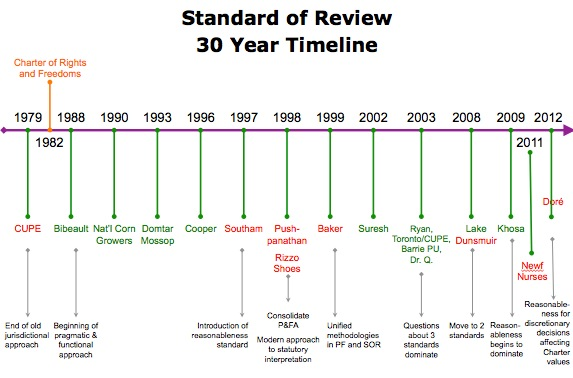
Agraira v Canada (application denied on security grounds; sought H&C relief)

* Per Abella J in NFLD Nurses “…the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes”
  + “the reviewing court must consider the tribunal’s decision as a whole, in the context of the underlying record, to determine whether it was reasonable”
  + In these circumstances, we may “consider the reasons that could be offered for the [Minister’s] decision when conducting a reasonableness review” of that decision”
* Example of supplementing reasons in a reasonableness review
  + However unlike Alberta Teachers, they supplemented the reasons based on “implied reasoning” rather than internal jurisprudence of the Tribunal
* Example of statutory interpretation – legislative history, purpose of the statute, context of the provision
* Case also runs a legitimate expectations argument (based on the Guidelines); that certain factors would be taken into account and weighed more heavily; however the court rejects this argument

**Aside:** Difference b/w Correctness & Reasonableness

* Correctness: Court essentially conducts a *de novo* review; court is able to review the entire case and supplement their own reasons and authority
* Reasonableness: Court is required to engage with the reasons and assess the reasonableness thereof – did they consider all the relevant factors?
  + Cannot re-weigh the factors
* Reasonableness+: Court supplements minimal reasons based on “implied reasoning,” internal jurisprudence or based on other circumstances of the case (Alberta Teachers & Agraira)

3. Standard of Review 30 Year Timeline



# Standard of Review – Charter Rights & Substantive Review

***Oakes* Test Review** (Dickson in Slaight)

* **Section 1:** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
  + Definition of “law” includes only statutes and regulations; does not include decisions that are individualized and made on a case by case basis (Multani v CSMB)
  + Discretionary decision involving an individual case are not “law” in the real sense of the word; inappropriate to review it under the Charter (*Oakes* test)
    - Will be reviewed under administrative law even when they involve a *Charter* right (Dore); includes a proportionality analysis skin to s. 1
    - Ongoing Question: Does this require the court to re-weigh?
  + Likely to be reviewed on a reasonableness standard (Dore); though correctness may apply
* ***Oakes* Test** 
  + There must be a pressing and substantial objective.
  + The means chosen must be **proportional**:
    - The means chosen must be rationally connected to the objective;
    - The means chosen must minimally impair rights;
    - Proportionality between the infringement and objective must be demonstrated.
  + Where the legislature is permitted a “margin of appreciation” regarding level of impairment
    - This permits some deference to the other branches of government by the reviewing court

1. Test for Agency Jurisdiction(Nova Scotia v Martin; workers comp did not include chronic pain sufferers)

* Re: Cooper states that tribunals may be able to consider constitutional questions under s. 52 where the legislature has expressly conferred authority or the P&FA infers jurisdiction
  + Able to render provisions inapplicable only; striking down legislation reserved for the courts
* Re: Conway states that tribunals are able to provide s. 24 remedies if they have jurisdiction to determine questions of law, if the statute gives express or implied jurisdiction and if the legislature does not appear to withdraw jurisdiction.
  + Must be applied on a case-by-case basis for each tribunal and each remedy
* **Overturns Cooper** – if able to consider a question of law, then law includes the Constitution and the Charter
  + Vindicates CJ McLachlin’s dissent
* Look to enabling legislation for intent to confer jurisdiction explicitly or implicitly to decide **questions of law** under challenged provision(s)
  1. Explicit jurisdiction must be found in terms granting authority in the enabling statute
  2. Implied jurisdiction must found by looking at the statute as a whole
     + Look at: statutory mandate; if necessary to agency functioning; interaction with other elements in the administrative system; adjudicative nature; practical considerations
* If jurisdiction found, power **presumed** to include authority to decide constitutional questions
  + Burden of **rebutting** presumption of explicit or implied jurisdiction lies on party challenging the admin body
* Note: Do not cite for the correctness SOR; this is overturned in Dore

2. Charter Review: Express vs. Imprecise Authority (Slaight v Davidson; wrongful dismissal; letter; s. 2(b) challenge)

* Court outlined a 2-step methodology for the judicial review of decisions engaging a *Charter* right:
  1. Examine administrative decision to determine if infringes a *Charter* right
     + Relevant to analysis of jurisdiction, purpose of the statute, determination of facts and application of law
     + Charter infringement means administrative tribunal has exceeded its jurisdiction; ~~should apply a standard of correctness~~ (leaves the door open for the future)
       - Overturned by Dore and considered by dissent in Multani
  2. Turn to s. 1 review for more critical justificatory analysis
     + Resolve contending values
* However, Lamer’s (in dissent) discussion of express authority vs. imprecise discretion to infringe the Charter created much confusion going forward – overridden in Dore
  + Cannot interpret legislation conferring a discretion to infringe the *Charter* unless it is **expressly conferred** or necessarily implied
  + If no, but confers an **imprecise** **discretio**n limiting the right or freedom, then the order is subject to *Charter* analysis
* Note: Can also cite for unusual and creative remedies
* Summary: Multani v CSMB (boy wearing kirpan to school)
  + If discretionary decisionis not exercised according to enabling legislation, then it is not prescribed by law and cannot be justified under s. 1
  + If it is a discretionary decision, then court must determine if decision falls within “range of reasonable alternatives”
  + If a discretionary decision violates the Charter, the legislation remains valid, but the remedy is found under s. 24(1)

3. Reasons and Justifications Revisited (Lake v Canada; convicted of trafficking in Canada; facing extradition to US)

* Note: ML describes as a hybrid mess – case considers decision on both admin and Charter grounds
* Even in light of *Charter* rights, the threshold for reasons is relatively low
  + Need only understand the basis for the decision; court must be able to assess the validity of the decision
* In contrast w/ Slaight and Multani, court holds that “reasonableness is the appropriate standard of review for the Minister’s decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*”

# Discretionary Decision-Making

What is discretion?

* The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries
  + As KC Davis wrote in *Discretionary Justice*: A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction (Baker, para 52)
* Discretion is pervasive in government and in law; plays out in every element of this course

How to Recognize Discretion in Statutory Language

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

1. Traditional Grounds of Review for the Abuse of Discretion

* The traditional grounds:
  + *Bad faith*
  + Dictation/influence
  + Unlawful delegation of powers
  + *Fettering*
  + Improper purpose or motive
  + Unreasonableness/irrationality
  + Omission of relevant factors / consideration of irrelevant factors
* All had problems – difficult to support with evidence
* JR of decisions still further affected by the DM in question and the courts opinion thereof

Roncarelli v Duplessis [1959] SCC

* **Ratio:** Early example of statutory interpretation wrt to discretionary decision making
  + Where Roncarelli sued in tort for abuse of public office; barred by statute from seeking JR
* Cartwright in dissent:
  + “…I am **unable to find that the Legislature has, either expressly or by necessary implication, laid down any rules to guide the Commission** as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted…in the case at bar, on the contrary, **no standards or conditions are indicated** and **I am forced to conclude that the Legislature intended the commission "to be a law unto itself.”**
* Rand J:
  + Reads in purposes, structure and constraint into the provision; engages the cannons of statutory interpretation
  + “That, in the presence of expanding administrative regulation of economic activi­ties, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded **by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty,** would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our con­stitutional structure.”
  + “In public regulation of this sort there is **no such thing as absolute and untrammelled “discretion”,** that is that action can be taken on **any ground** or for **any reason** that can be suggested to the mind of the administrator; **no legislative Act can, without express language,** be taken to contemplate an unlimited arbitrary power **exercisable for any purpose**, however **capricious or irrelevant**, **regardless of the nature or purpose** of the statute…”

Interpretive Background: Cartwright v Rand

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

2. Example: Bad Faith and Improper Motives (Thorne’s Hardware; expansion of National Harbour Board)

* Bad faith is a very high threshold; must be able to prove fraud, corruption or malevolence. Have to have real proof; mere suspicion is not enough
  + Convincing a court of bias or bad faith is challenging; must be able to buttress this argument
  + Roncarelli v Duplessis was unusual in that Duplessis held a press conference; provided the “smoking gun”
* Summary:
  + Decisions involving public convenience and general policy are final and not reviewable in judicial proceedings
    - Re: legislative exmpetion
  + Decisions made by GIC pursuant to a statute are reviewable for jurisdictional error and procedural error
  + Quashing (remedy) an Order in Council requires an “egregious case”
* Aside: Distinguish from Catalyst Paper and Homex
  + Not a municipality – DM is federal gov’t making a policy with disproportionate effects on one individual/person
    - Owed greater level of deference
  + Similar to Catalyst Paper in that a democratically mandated body chose to change a structure that would impact a large number of individuals; unlike Homex in that it was not seemingly aimed directly at Thorne’s Hardware

3. Example: Fettering and Guidelines (Thamotharem v Canada; use of guidelines instead of rules)

* Administrative DMs may be guided by previous decisions, guidelines and rules
  + However guidelines under the *IRPA* are “soft law” – cannot bind; only provide guidance
* Procedural fairness requires that individual decision-makers have adequate discretion to weigh factors in light of the unique circumstances and decide each case on its merits (independence, impartiality and bias)
  + Government direction regarding processes is not an unlawful fettering
* What happens when a DM treats the guidelines as if they were mandatory?
  + Would be a mistake; guidelines cannot control discretion that way
  + Turning guidelines into rules (i.e. 3 is always the most important factor) would thwart discretion in and of itself – issue of institutional bias

4. Elimination of Traditional Grounds (Baker)

* Review of discretionary decisions no longer on traditional limited grounds; more general review available
  + Pulled into the existing legal framework; role of the court to review these decisions like other areas of law
* Considerable deference automatically applies b/c of the nature of discretionary decisions
  + Is that DM acting within the bounds of discretion conferred with the statute? With the CL? Constitution?
* **Effect:**
  + Brings review of error of law (jurisdiction/*ultra vires*) and review of discretion together
  + Challenging to determine the limits of discretion – it is fact? Law? Or mixed fact and law?

5. Weight and Re-Weighing

* Per Southam, reasonableness review does not allow the courts to re-weight the factors considered by the DM. However, Baker stated that the DM did not give “serious weight” to the concerns of the children.
* Resolved in Suresh (deportation to torture):
  + **Minister** (not court) obliged to give proper weight to relevant factors
  + Courts review whether DM failed to consider and weigh implied limitations or patently relevant factors only
    - Whereas in Baker*,* Minister and delegate failed to comply with **self-imposed** guidelines

6. Charter Values & Reasonableness Review of Discretionary Decisions (Dore v Barreau; lawyer suspended for offensive letter)

* **When reviewing a discretionary decision which engages a Charter right or value, apply a reasonableness standard that incorporates considerations of proportionality similar to s. 1**
  + Cannot apply Oakes b/c discretionary decisions are not a form of “law” contemplated by s. 52
* Compare Oakes w/ SOR
  + Oakes: Does the law interfere with the right no more than is reasonably necessary to achieve the objectives?
    - **If yes**, then it is a proportionate and reasonable limit under s. 1
  + SOR: Has the decision-maker disproportionately and unreasonably limited a *Charter* right/value when exercising a statutory discretion?
    - **If no**, then the right is not unreasonably limited and an appropriate balance between the right and objectives is recognized
* **Decision-Makers Methodology:** How does an admin DM apply Charter values in exercise of a statutory discretion?
  + DM balances *Charter* value with statutory objective
    - Benefit? Can make broader argument to the court about Charter values rather than Charter rights
    - Look at CL jurisprudence (Hill v Church of Scientology; Baker)
  + DM asks how *Charter* value will be best protected in light of statutory objective
  + DM engages in proportionality analysis = balancing the severity of interference with statutory objectives
  + DM choses outcome which “falls within a range of possible, acceptable outcomes” and is explained by reasons exhibiting “justification, transparency and intelligibility” (Dunsmuir)
* **Reviewing Court’s Methodology:** How does a court review a discretionary decision that affects a Charter right?
  + Framework: Administrative law proportionality review
  + SOR = **reasonableness (contextually applied)** (picks up on Multani v CSMB)
    - Past jurisprudence (if satisfactory) may indicate how much of deference was owed in an analogous case
    - BUT, DM is in best position to determine impact of *Charter* values on the **specific facts of the case**
  + Consider the factors from the SOR analysis to assist with the determination of what is reasonable & proportionate
    - Privative clause
    - Purpose of tribunal from interpretation of enabling legislation
    - Nature of the question
    - Expertise of the specialized tribunal
      * Where administrative bodies are empowered and required to consider Charter values within scope of expertise
      * Where more deference is owed to tribunals w/ skills necessary to recognize, weigh and balance Charter values in relation to specific facts and statutory purposes
  + Court will determine if the **outcome disproportionately harms** a *Charter* value
    - Focus of the court is on the outcome; whether the balancing of the values is reasonable
    - Challenging in that the court is not supposed to re-weigh the considerations of the DM
* Per Abella, the central concern becomes whether the decision reflects a proportionate balancing of the *Charter* values
  + Must integrate the spirit of s. 1; should be conceptual harmony b/w reasonableness review and *Oakes* framework
* Avoids individuals challenging on both grounds and the courts considering the decision on only one basis
  + European law has held that proportionality is one of the main principles of public law; infuses everything including parts of private law as the Charter guides the development of the common law
* Case also narrows the scope of correctness review
  + Charter does not result in the courts being less deferential in light of administrative law and Charter values/rights
  + Believe that reasonableness can protect rights and the justifiable limits on rights thereof

Reasonableness Review – SOR Framework vs. Procedural Fairness Framework

1. What is Being Challenged PF: Nature of the decision and the process followed

SOR: Question of law, fact, mixed fact and law, or discretion

1. Statute PF: Nature of the statutory scheme and the terms of review

SOR: Language/purpose of the provision and within the Act as a whole

1. Right, Interest or Privilege PF: Importance of the decision to the individual(s) affected

SOR: Decisions must reflect the “fundamental importance” of Charter values but this factor remains implicit and is not explicitly part of the SOR analysis

1. Promise, Representation or Regular Practice

PF: Legitimate expectations of the person(s) challenging the decision

1. Expertise PF: Respect agency expertise in determining and following own procedures

SOR: Expertise of the tribunal

1. Privative Clause Considered Separately

SOR: Privative clause

* Both frameworks are not exhaustive; can be added to as necessary
  + Need to keep Charter values in mind as you engage in the SOR analysis; not an explicit factor to be considered

7. What don’t we know?

* Whether or not Dore affects all discretionary decision making throughout the state; ML argues they don’t seem to have thought about this
  + i.e. police make an enormous number of discretionary decisions; does Dore have any impact on criminal law?
* Will the courts need to backtrack on their imposed rule that they ought not re-weigh?
  + How else will you assess whether or not a Charter value was proportionality treated appropriately?
  + i.e. weighed against competing objectives
* Will this lead to too much deference in the under-enforcement of Charter rights?
* Will it become a disguised correctness review?
* Will we need to think about reasons differently? Is the low threshold currently in place for reasons adequate in the light of Charter values?
  + Inadequate or boilerplate reasons seem to be the norm
* Will government need to respond positively to this demand? (i.e. training programs)
  + Far too many admin DM to expect adequate knowledge of Charter rights; must at least correctly identify the Charter right or value at stake
* Also don’t know how this will affect the BC ATA – since it takes away the ability to consider constitutional and Charter question. But do they still have the ability to consider Charter values?
* Highly unlikely we’re expected to do a proportionality analysis on the exam\*\*
  + Do need to understand these concepts generally and be able to speak to these challenges in this area intelligently

**Aside:** How do you feel about applying reasonableness to Charter questions?

* Deferential approach is incongruous with court’s historical protectiveness over human rights legislation and decisions
  + Should correctness review not apply to this type of decision?
* Dependent on how the endorsement of decisions through a reasonableness standard plays out – i.e. to what level does this create precedent that is binding on other DM’s? Or the courts?
  + Court is generally giving guidance on larger administrative questions – i.e. the bigger questions of the SOR, procedural fairness, etc.
  + However, the small questions will remain as precedent within the sub-areas of the law
  + Differences b/w substance and procedure
    - Admin = procedural issues
    - Substance = actual decision
      * Will hold some precedential value going forward; i.e. if a decision within similar fact patterns is decided this way by the admin body, then it would be expected to be decided the same way
      * This is particularly challenging – especially in light of a decision that engages Charter values, the reasons minimally engage with the decision, and the court supplements/endorses the decision when applying a reasonableness SOR (Agraira)
* What about where the decisions are inadequate? Should courts be supplementing the reasons of decision makers where Charter rights are at play?
  + To what extent will this result in correctness review anyways?
  + Does a right/value pull reasonableness towards the “less deferential” end without sliding into correctness review? Seems as though this will be how the jurisprudence will play out
* Per Dore, the reasons are essentially s. 1 – they allow the courts to determine if the proportionality analysis has taken place

**Aside:** Charter “Values”

* To what extent does such a broad def’n of Charter values result in every single admin decision engaging Charter values? And to what extent can we actually expect DM’s to directly engage with and identify all of the Charter values and provide intelligible reasons therein?
  + ML suggests that legislation may be tightened up to identify the Charter values that should be considered in making decisions; can also increase the breadth of guidelines
  + Further suggests that all DM’s will need to receive a mini-lesson on Charter values and jurisprudence so that they understand these values and can appropriately engage with them
  + Is this a substantive change? DM’s have been engaging with these Charter values all the way through; its just become apparent now

# BC Administrative Tribunals Act

Statutory Procedural Codes

* Created in response to demand for a more streamlined judicial review process; must time was wasted trying to “fit your claim” into one of the prerogative writs
* Reform Objectives:
  + Clarify procedure
  + Streamline application procedures for JR to combine supersede common law prerogative writs
  + Set out grounds
  + State relief sought
  + Simplify remedies
  + State who many be parties – i.e. Attorney-General
  + Provide right of appeal to provincial appellate court
  + Expand JR to any “exercise of statutory power” rather than a final “decision”
* BC Judicial Review Procedure Act (JRPA) aims to simplify the JR process; including application for JR
* BC Administrative Tribunal Act (ATA) applies to internal administrative processes but has implications for JR

1. BC ATA Overview

* Provincial initiative to review the administrative justice system in BC
* Key parts:
  + Appointments – introduced a merit based appointment system in order to improve the quality of the appointment system; courts have treated these bodies
  + General Reform
  + Codifies the common law
* Note: The ATQ and BC ATA have both withstood constitutional challenges
* **Process:** Always check the ATA to see if it applies
  + Is there a PC? SOR may be set out on that basis under ss. 58 & 59
  + Determine the nature of the question
  + Pick out the appropriate SOR; look to the jurisprudence
* Don’t need to know the substance of the statute; need only a general idea of how the BC ATA has modified JR in BC
* Debate at recent admin law conference:
  + Why did the legislature remove the ability of Tribunal’s to hear human rights claims?
  + What did the ATA remove the ability to hear constitutional and Charter questions?

2. Part 1: Appointments

* Provides guaranteed term limits for Chairs and members; including a guaranteed opportunity for extension
* Can only be terminated for cause (very important change; do not serve “at pleasure”)
* Brar v College of Vets (long hearing; adjudicator requested extension) – demonstrates how difficult it is to displace the common law presumption of impartiality for adjudicators
  + RAB is easy to raise, but difficult to prove

3. Codification of Patent Unreasonableness – ss. 58 & 59

* Purpose of ATA: Minimize confusion around SOR; drafters included explicit directions for the application of SORs
* However this was pre-Dunsmuir and three options were available; patent unreasonableness has since been eliminated
  + Result in judicial review operating differently in BC than in other provinces

4. Patent Unreasonableness & the *Dunsmuir-Khosa* Confusion

* Binnie J for the majority in *Khosa* says in *obiter*:
  + [19] Despite *Dunsmuir*, **“patent unreasonableness” will live on in British Columbia**, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.
* Rothstein J in *Khosa*
  + [115] The record of the proceedings of the B.C. legislature also **makes clear the legislature’s intent to codify standards of review** that would oust a duplicative common law standard of review analysis.
  + [116] It would be troubling, I believe, to the B.C. legislature to think that, despite its effort to codify standard of review and shift the focus of judicial review to the merits of the case, this Court would re-impose a duplicative *Dunsmuir*-type analysis in cases arising under the *B.C. ATA*.
* *Created confusion in BC courts* – does this mean that patent unreasonableness continued to operate as an SOR in BC? Or did it mean that a high level of deference should be given effect to under the reasonableness standard?

5. Section 59 – BC Jurisprudence on Relationship b/w Common Law and ATA re: Patent Unreasonableness

* Common law developments cannot overrule clear statutory direction in the ATA which is determinative regarding the standard of review (Lavender Co-operative Housing)
  + Common law is relevant only where ss. 58 and 59 don’t apply
* Courts may not use the CL to amend the legislature’s clear intention to use pre-existing terms such as “patently unreasonable” and it is therefore defined by CL immediately prior to *Dunsmuir (*Manz, Jensen, Coast Mountain)
  + Therefore not obliged to undertake SOR analysis where the standard is made clear
* Patent unreasonableness requires the highest level of deference (Viking Logistics)
  + Court must not undertake its own reasoning analysis and measure tribunal’s decision against that analysis
  + Court must not re-weigh evidence, second guess conclusions, substitute different findings of fact or conclude evidence is insufficient to support result
* Content of the pre-*Dunsmuir* common law definition includes:
  + Patently unreasonable means openly, evidently unreasonable or clearly irrational
  + A decision based on no evidence is PU, but insufficient evidence is not
  + Review applies to the result, not to the reasons leading to the result
  + Decision set aside only where administrative body commits jurisdictional error
  + High degree of deference regarding reasons offered or could be offered to support the impugned decision (Jensen)
* The common law can be used to “fill in the gaps” left by the statute (Coast Mountain; JR of labour adjudicator re: disabled employees); however legislative intent, where clear, must be respected
* In BC, legislative intent should be respected and the standard of PU will live on (Figliola; challenge workers comp scheme at two tribunals)
  + However, the application of the standard seems to be akin to reasonableness; rather than PU pre-Dunsmuir

# Aboriginal Administrative Law

Introduction

* Intersection among Aboriginal law, administrative law and Canadian indigenous legal orders
* Examine the application of concepts of natural justice and procedural fairness to Aboriginal decision-making

1. Constitutional Bases

* Re: Constitution is bigger than the written text
  + British documents, Canadian conceptions of politics, morality and values and unwritten constitutional principles
* *Royal Proclamation of 1763* – origin of the honour of the Crown
  + Political treaty b/w Prince George III and Aboriginal sovereigns; rationale was military alliance in order to expand what was to become the British Empire; also known as the Magna Carta of Indian rights
    - Origin of the principle of the honour of the Crown
  + Makes a number of promises:
    - Offers protection to Aboriginal groups benefitting from British occupation
    - Acknowledges abusive relationship that existed b/w the settlers and Aboriginal peoples via fraudulent or coercive sales of land
    - Restricts the purchase of Indian land to government in order to maintain good relationships and alliances
      * Establishes the *sui generis* relationship b/w Aboriginal rights and the Crown
* Section 91(24) of the *Constitution Act, 1867*
  + Fiduciary duty that lies on Crown agents found in s. 91(2) Indians and Lands reserved for the Indians
    - Creates a trust relationship b/w Indian peoples and the Crown
    - Paternalistic relationship; assumes the vulnerability and dependency of Aboriginal groups on the Crown
  + Period of Aboriginal law that directly contradicts the promises in the Royal Proclamation
* Section 35 of the *Constitution Act, 1982*
  + Recognition and affirmation of existing Aboriginal & treaty rights; provision meant to be read broadly and liberally
  + Jurisprudence has developed its own s. 1 style limit on Aboriginal rights (proportionality analysis)
  + Realize the limits created by the Royal Proclamation in terms of Aboriginal title and freedom of alienation; Aboriginal peoples restricted from developing/dealing with their land in a fee simple fashion
    - Requires the use of lands to be consistent with Aboriginal rights

**Current Role of the Legal System wrt Honour of the Crown (Unwritten Principle)**

* Converts a moral and political duty into an effective legal obligation (Haida Nation)
  + Court affirms and demands this historically continuing legal obligation
* Realize a large and liberal interpretation of Aboriginal rights
  + Which informs the duty to consult and accommodate even when they are “unproven” rights and interests
* Protect Aboriginal rights—proved and unproven—through legally controlled institutional processes
* Checks the power of the Crown and eliminates unstructured discretion
  + To ensure it complies with the ROL, statutes and constitutional principles and norms

Aboriginal Modes of Self-government

* Bottom Line from Haida at para 25
  + “Put simply, Canada's Aboriginal peoples were here when Europeans came, and **were never conquered**. …**The honour of the Crown requires that these rights be determined, recognized and respected**. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.”
* Treaty negotiations re-work this relationship; however Aboriginal sovereignty informs the duty to consult & accommodate
* **A redistribution of sovereignty and a recognition of legal pluralism**
  + Sovereignty and self-government (e.g. Nisga’a Agreement)
  + Self-management and self-administration (e.g. Band councils under the *Indian Act*)
  + Co-management and joint management (e.g. Impact Review Board (public); Impact Benefit Agreements (private); Reconciliation Agreements)
  + Participation in government (e.g. Nunavut)
* Future Prospects (as suggested by Liston)
  + Repeal the *Indian Act*
  + Recognize Aboriginal sovereignty and laws
  + Shared jurisdiction; which will increase the complexity of Canadian federalism
  + Facilitate a variety of modes of Aboriginal self-government

2. Aboriginal Administrative Justice – Connections w/ Administrative Law

* Applies to delegated statutory authority through *Indian Act* or other legislation
  + Variety of Aboriginal decision-makers: band councils, settlement councils, tribunals
  + Variety of actions taken: decision, enact by-laws, codes of conduct, run elections, etc.
  + 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.
* **All statutory delegates are potentially subject to JR** – jurisdiction of Federal Court (Sparvier)
  + Review of reasonableness/correctness of decisions taken by public authorities
* **Individual RAB in Aboriginal Self Government** (Sparvier v Cowessess Indian Band; election redone)
  + Rothstein J states that “minimum standards of natural justice or PF must be met”
    - Contextual analysis needed to account for the many different purposes and procedures of admin bodies
  + **Minimum Req’ts**: an unbiased tribunal, notice and the opportunity to make representations
  + Cite for the court recognizing the challenges of importing Canadian-European conceptions of natural justice into indigenous legal systems – Rothstein J “Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.”
* **Institutional RAB in Aboriginal Self Government** (CP v Matsqui Indian Band; taxation scheme)
  + Per Sparvier, minimum standards of natural justice apply. Majority found a RAB on the part of the appeal tribunal.
  + How relevant is self-government as the intent and purpose of the administrative body?
    - 43 …evidence indicates that the **purpose** of the tax assessment scheme is to promote the interests of Aboriginal peoples and to **further the aims of self-gov’t**… The scheme seeks to provide gov’tal experience to Aboriginal bands, allowing them to develop the skills which they will need for self-gov’t.
    - 44 …It is not unreasonable to conclude that **since the scheme is part of the policy of promoting Aboriginal self-government,** **issues should be resolved within the system** developed by Aboriginal peoples before recourse is taken to external institutions.
      * Reasonable to conclude that the appeal procedures developed by the bands should be respected
  + In *obiter*:
    - 101 Suggests that Indian bands allow the federal government to appoint tribunal members “to conform to the requirements of institutional independence”
    - Institutional independence and the discretion to provide for institutional independence (or not to so provide) are very different things. Independence premised on discretion is illusory.
      * Can’t get more independence unless you cede some power; therefore your appeal scheme will fail on an analysis of independence on the CL basis

3. Duty to Consult Framework – Haida Nation v BC (Minister of Forests) [2004] SCC

* Honour of the Crown informs the duty; is always at stake in its dealings with Aboriginal people
* Objective:
  + Reconcile pre-existing Aboriginal sovereignty with *de facto* (but not *de jure*) Crown sovereignty: “…consultation is key to the achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation” (Mikisew Cree)
* Fact Patten: Haida claimed Aboriginal title over the Haida Gwaii island; have lived there permanently since the 1700s; insist that they were never conquered and have never surrendered their rights by treaty
  + Had a strong claim to title; lands are not subject to any overlapping claims from other First Nations
    - Concerned about the logging/harvest of old growth cedar
  + Government issued/approved the transfer of a forestry license; Minister refused to consult with Haida when asked
  + Haida challenged the license approvals, transfer and gov’t action despite their explicit objections
  + At trial, the court ruled that the government had a moral but not a legal duty to negotiate
  + CA reversed; saying that both the government and industry had a legal duty to consult
* Ratio: **Government had a legal duty to consult and accommodate** prior to making decisions that might adversely affect their unproven Aboriginal rights and titles claims; industry is not subject to this duty but could become liable under an assumed duty

**Content of the Duty for the Crown**

* Crown cannot act unilaterally; must always consult
  + Cannot act arbitrarily; however what this means in practice develops over time
* Ultimate decision-maker must hear the concerns of affected Aboriginal communities
* Duty cannot be (sub) delegated; rests on federal and provincial gov’ts and agents/representatives/delegated authorities
  + Can be a duty on various government bodies; but cannot be delegated to private third parties
* Duty inheres in a process; but review includes both process and substance (SOR = reasonableness)
  + ML: Its procedural fairness on a reasonableness standard
  + Similar to way that the court consider *Charter* analysis in Dore
* Process must be fair and in good faith
* May fund Aboriginal participation
  + Consider the funding of groups to participate in environmental assessment processes
* Crown must justify action(s)
* Crown may have to accommodate
  + Where the action will have a serious impact or where the Aboriginal right or treaty claim is strong
* No duty to agree

**Content of the Duty for Aboriginal Peoples**

* Good faith consultation
* Clarity of claims – vague or uncertain articulation of claims will not produce a clear duty to consult and accommodate
* 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 – consistent with the fact that there is no duty to agree

**Post-Haida Framework**

|  |  |  |
| --- | --- | --- |
| STAGE 0 | | No review, Crown’s discretion |
| STAGE 1 | |  |
| Step 1 of the Test  “The Trigger” | * **Crown has knowledge (real or constructive) of a potential Aboriginal right or title**   + low threshold for knowledge + credible Aboriginal claim     - meaning gov’t should nearly always be considering their duty   + actual knowledge = claim filed in court or advanced in negotiations or when treaty right impacted (Mikisew Cree)   + constructive knowledge = know or reasonably know that lands were traditionally occupied and reasonably anticipate impact on rights | Knowledge of adverse impact  = fact, reasonableness standard |
| Step 2 of the Test  Decision to Act | * **Crown contemplates action/decides to act**   + not confined to gov’t exercise of statutory powers (Huu-Ay-Aht FN)     - includes broad policy decisions; even those that would be subject to a legislative exemption under PF claims   + only potential impact necessary, not immediate impact – duty captures “strategic, higher level decisions” |
| Step 3 of Test  Potential Adverse Effect | * **Conduct may potentially adversely affect an Aboriginal right or claim**   + duty to consult kicks in as a **positive obligation** on gov’t (Halfway River)   + must be new, not historic or continuing, impact (Carrier Sekani)   + ONUS on **claimant** to show causal relationship between conduct and potential adverse impact; low threshold     - similar to other administrative law claims |
| STAGE 2 – “the spectrum” | |  |
| Determine the Scope of the Duty | * **Proportionate with**   + strength of Aboriginal claim     - where tenuous claims will attract merely a duty of notice   + potential impact > is it a significant or minor impact?   + multiple variables or contextual factors (e.g. public interest)     - Increasing polycentricity will lower the duty to consult     - Often very polycentric decisions – impacts on a broad scope of individuals; very political and economic decisions | Spectrum analysis  = correctness\* regarding strength of claim & severity of impact as questions of law  \*unless large degree of factual determination, then it is mixed fact and law = reasonableness |
| STAGE 3 – Consultation | |  |
| See Procedural Components of the Consultation Process (below) | * Consultation should be meaningful but it also need only be adequate * **Burden** on Crown   + identify relevant Aboriginal and non-aboriginal parties * **Burden** on Aboriginal claimants   + must assert rights and specify nature of potential infringements | Consultative process  = reasonableness/  fairness regarding adequacy of process |
| STAGE 4 – Accommodation | |  |
| Accommodation | * *May* be required * DM must demonstrate that Aboriginal interests were considered usually through reasons * DM balances competing interests [proportionality analysis] * *May* require modification of decision or policy to minimize impact on Aboriginal peoples | Accommodation  = adequacy of the required consultation, reasonableness (Haida) or correctness (Little Salmon)  = outcomes and balancing of interests, apply reasonableness (unlikely correctness) |

Procedural Components of the Consultation Process (Overlap with PF)

* Not act unilaterally
* Timely notice and early consultation
* Crown must inform itself of impact of proposed project
  + Greater responsibility on government to seek out information and inform itself of its impacts
* Crown must communicate its findings
* Comprehensive disclosure of Crown’s knowledge
* Provide meaningful opportunity to be heard such as formal participation in decision-making
  + Depends on the factors regarding the strength of the claim
* Allow submissions and arguments in reply
* Must provide meaningful engagement (i.e. direct meetings)
* Crown must listen and respond carefully to representations; demonstrate that Aboriginal groups/concerns have been heard
* 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

* [61] **The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty.** However, it is typically **premised on an assessment of the fact**s. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate…**the standard of review is likely to be reasonableness**. To the extent that the **issue is one of pure** law, and can be isolated from the issues of fact, the **standard is correctness**. However, where the two are inextricably entwined, the standard will likely be reasonableness …
* [62] **The process itself would likely fall to be examined on a standard of reasonableness**. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”
* [63] **Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness**. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government’s process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

4. Comparison to the Duty of Fairness

* Haida – requires Crown to consult with Aboriginal communities both before and after the proof or settlement of the Aboriginal or treaty right at stake
  + Forward looking; applies to current Crown decisions and projects (Carrier Sekani)
* SCC stated “regard may be had to the procedural safeguards of natural justice *mandated by administrative law*” in discharging the duty to consult
  + “administrative law is flexible enough to give full weight to the constitutional interest of the First Nation”
* **Threshold/Trigger:**
  + Triggered when government contemplates conduct that may adversely affect the exercise of an Aboriginal right
  + Both are relatively easily triggered; contextualized through content
* **Broad Spectrum of Content:**
  + Content of the duty to consult is determined by:
    - A preliminary assessment of the strength of the rights claimed (where unproven) and;
    - The seriousness of the potential adverse impacts of the Crown action
  + Where a small impact merits consultation obligations at the lower end of the spectrum
* What about accommodation?
  + Per Haida, accommodation only required where “appropriate” as determined through the spectrum analysis
  + About “seeking compromise” through “good faith efforts to understand each other’s concerns and move to address them”
  + Criticism: Lack of consent requirements means the structure of the duty is not capable of respecting Aboriginal perspectives and aspirations
    - UNDRIP (endorsed by Parliament in 2010) sets out the consultation standards and “free, prior and informed consent” of indigenous peoples to activities affecting their lands or territories (Article 32)
* Challenges:
  1. Identifying the appropriate Aboriginal consultation partners
  2. Identifying the requirements of meaningful consultation – may be lesser where the right is lesser
  3. Identify the scope of the duty – though Carrier Sekani determined that there is no duty to consult for past impacts or infringements, the case law has not precluded the consideration of cumulative impacts of development where the current Crown conduct is not clearly detached from the adverse effects of past Crown conduct

Standard of Review (connect w/ above)

* Deference remains a driving concept – meaning reasonableness will likely apply to the process and outcome
  + Deference is owed to DMs in determining the legal and constitutional limits of their discretion
  + However “a decision maker who proceeds on the basis of inadequate consultation errs in law”
* CJ Finch elaborates on “meaningful consultation” – “a reasonable process is one that recognizes and gives full consideration to the rights of Aboriginal peoples and also recognizes and respects the rights and interest of the broader community”
* Is there a basis for treating the question whether the duty to consult has been met differently from the question whether the duty of fairness has been met?
  + Issues of procedural fairness > apply fairness (akin to correctness)
  + Process of consultation > apply reasonableness
* Why the difference?
  + Duty to consult reaches into the realm of self-government and facilitating respect for Aboriginal jurisdiction
  + Process and depth of consultation required might change along the way; in light of information exchanged
  + “Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interest. Compromise is a difficult, if not impossible, thing to assess on a correctness standard.” (Haida)
  + State of implementation – unlike procedural fairness within the context of statutes and established administrative structure; governments have not developed a consultation process or body to administer the duty to consult

Constitutional Nature of the Duty

* Constitutional **obligation** that rests with the Crown; not a constitutional “right” that belongs to the Aboriginal communities
  + Been described as a “valuable adjunct” to the unwritten constitutional principles
  + An “essentially corollary to the honourable process of reconciliation that s. 35 demands…that preserves the Aboriginal interest pending claims resolution”
* Aboriginal rights are found in s. 35; the duty to consult and accommodate is a constitutional duty that arises in relation to those rights, by means of the honour of the Crown

Application to Legislative Exemption

* Applies to strategic or planning decision that would be excluded from the duty of fairness under the legislative exemption
* Why does it apply?
  + Duty to consult and accommodate encompasses participation in the design of the decision-making process
* But what about remedies?
  + ABCA provided a declarative remedy; considered whether quashing an order in council would be available
  + Could argue that a substantive constitutional remedy based on procedural obligations is premised on the constitutional nature of the duty to consult; unlike procedural fairness (CL issue)
  + Wells v NFLD – “even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future polices and actions.”

3. Balancing and Procedural Fairness (Beckman v Little Salmon; modern treaty does not oust duty to consult)

* Duty to consult is derived from the honour of the Crown. While it may be limited through modern treaties or land claims agreement, the modern treaty is unlikely to provide a “complete code” and as a result, the duty to consult lives on.
  + Reconciliation is not a fact, it is a “work in progress”
* Part of the essential legal framework of public law
  + Yukon gov’t was required to consult w/ the FN to determine the nature and extent of such adverse effects
* Aboriginal peoples are entitled to review of decisions even in light of comprehensive treaties
  + PF warrants judicial intervention if the Crown does not appear to satisfy fairness; onus on Crown to justify adequacy of consultation
* However, the duty to consult and the substantive outcomes will likely be judged on a reasonableness standard

4. Remedies for Past Consultation Rio Tinto v Carrier Sekani (sought consultation wrt to energy purchase agreement)

* Courts are concerned with current injustice and possible preventing future injustice (where appropriate)
  + Per Chinese Head Tax case, there is no remedy for past wrongs. Seemingly a “statute of limitations” in public law.
* Consultation is a forward looking concept; gov’t and Aboriginal groups must work together to reconcile
  + [49] “The question is whether there is a claim or right that potentially **may be adversely impacted by the *current* government conduct or decision in question.** Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.
* Duty applies only where current gov’t conduct or decisions will adversely impact; prior and continuing breaches will only trigger the duty if the present decision has the potential to cause a novel adverse impact on a present claim or existing right
  + Aboriginal groups must seek damages for previous breaches
* Note: Case also deals with the jurisdiction of the Tribunal to consider constitutional questions

5. The Scope of the Duty (West Moberly FN v BC; coal exploration license)

* Matter of interpretation
  + Up to the DM to identify their duty and determine the appropriate scope of consultation
  + Up to the FN to fully describe what will be affected by this decision
* Must adhere to both the process of consultation and the substantive requirements of accommodation
* **The duty to consult should consider the past impacts of Crown action and the future impacts the present decision will have on the Aboriginal right in questio**n
  + In contrast w/ Carrier Sekani’s description of the “forward looking” nature of the duty
    - Distinguish: Current action is a new impact on the Aboriginal right. Once current decision impacts current Aboriginal right, past and future impacts can be considered.
  + BCCA approves the consideration of past impacts on the Burnt Pine caribou herd and considers the possibility of future impacts from full scale coal extraction operations
    - Government biologist indicate that “It is short-sighted and misleading to evaluate this proposal for bulk sampling without also considering the longer term consequences of more widespread mining activity occurring over the entire property”; suggested that the assessment of impacts under the mining exploration license application should include the full use scenario where all available coal is mined and the cumulative effects of the project
* Other key points:
  + Aboriginal rights to hunt and fish include an interest in the species in which they hunt and fish
  + Adequate consultation must be meaningful
    - [144] To be considered reasonable, I think the consultation process, and hence the “rationale”, would have to provide an explanation to the petitioners that, not only had their position been fully considered, but that there were persuasive reasons why the course of action the petitioners proposed was either not necessary, was impractical, or was otherwise unreasonable.