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| Introduction  * Public Law is vertical and general * Admin: judicial review, not vires * Private law is horizontal * Distinction matters because it affects remedy * Administrative Actor * Delivers public program * Acts controlled by legi * Delegated authority * Who: Executive, ministers, municipalities, school boards, appointees, agencies, commissions, inquiries, tribunals * What: Regulate, Licence, Discipline, confer benefits, adjudicate, confer/deny/revoke status * Courts’ Jurisdiction * Common law (RvD): inherent review executive * Constitutional: Preamble & s96 (provincial)  Principles:  * Normative standard, no result * Guide judgment and discretion of public officials, judges * Weighty in Statutory Interp * Princ: * democracy, federalism, protect minority, RoL [Succ Ref] * RoL defn and limits [Imp Tobacco] (preamble) * Tribunal not bound to RoL, per Def [Domtar] * Deference [Baker] (demo and jud restraint) * Honour of Crown [Haida] (pre occupation) * Princ of Natural Justice (not const, Ocean Port)  Discretion:  * Baker brings into admin law * Free to make choice among possible action/inact (Bak52) * More desc, less court * Boundaries: statute, RoL, princ of Admin, funda values of cdn society, princ of charter | Regulations and Rule MakingRisks: Principle Agent Problem  * Risk for accountability (pub, princ, agent) and transparency due to lack of expertise: agent must not subvert the purpose intended by the princ * But delegate due to expertise: sign of deference * Four Approaches  1. Structuring Discretion: appoint, lgl constraint, guidance 2. Legislative Oversight: direct legi control  * Experience, motivation, expertise  1. Judicial Review: court super  * Def and policy means may not intervene [Inuit] * Weak at cabinet and minist lvl [Thorne]  1. Process Requirements: stakeholder or pub involv  * Can be captured, may not have all info  Types: Orders in Council [Thorne]   * Justiciable, but to quash requires egregious * Not court duty or right to investi possible improp mtvs * Governments not required to provide reasons   Guidelines/Soft Law [Thamotharem]   * Voluntarily: coherence, consistency, no ad hoc * But cannot Fetter (xform into rule, maint mix l and f) * Fettering high bar: if exception in sceme practice must be norm in 100% cases   Regulations [Imm Consultants]   * Policy analysis and legislative, so soln is ballot box   Process Requirements [Enbridge]   * Can structure discretion so that as long as hit PF requirements, there is no jud rev  Thorne Hardware: Orders in council and bylaws are substantive example of no rev of legi  * Decision to extend bay, purp to increase $? * Valid reason, made sub, not enough to quach  Thamotharem – fettering high bar  * Refugee speak to ROP before Counsel > efficient? * Vast change to procedures: inquis, informal, efficient, shorter, ROP drives - > but exception possible so not fettering  Imm Consultants – Regulations require little PF  * Remove status, possible capture of gov * Court declined overturn since amount of policy analysis and legislative in nature  Enbridge – example of structuring discretion for overview  * Gas billing change in provision, notice and comment provisions, expertise, so no lack of PF * Example of correctness, but think post duns |

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| Rule of Law:  * Core: **non-arbitrariness = legality** * Stands for: all public power must be legally bound to be valid and legitimate * Underpin adminl: **Parliamentary sov vs RoL** * Expli constr: 1) E statute 2) cons 3) lger body of pub law * Impl constr: legi purpose, fair procedures (jud interp) * Unwritten princ – so arbitrary? Thus movmt to interp princ * Legitimacy of jud rev in inherent super jurisd * Jud pwr curtailed by standard of review * Competing conceptions; Aspirational  1. Common law model (Dicey)  * i) No arbitrary authority ii) formal equality iii) constitutional is part of ordinary law * distrust of admin state; court must review (can’t last)  1. Laws of Lawfulness (Fuller, only non oxford)  * Principle based regulation makes lawful; trust  1. Guidance (Raz)  * Law gives guidance, decision making is responsive, can trust in larger institution  1. Rights Based (Dworkin)  * Judge check on admin pwr; judicial activism per const  1. Deference as Respect (Dyzenhaus)  * **Canadian model:** Deference is an attitude  Judicial InterpretationCanada v PHS Community Services Society [Insite] (2011)  * Decision: Mstr Health * Issue: decision violate s7? Yes. * Statute: discretion w/ exceptions interped by mstr – valid statute * Jurisd: Courts not make policy, but charter involved * Court arb? Found s7 viol; No section 1 * Arb: facts bene>risk; purpose of statute wrong * Decision: arb and grossly disproportionate * (c) sent back with guidance (a) jud no trust of gov (e) start with room for disagmt def🡪 (d) indiv right #1 * ***Succession Ref Princ***: * **Protection of minority**: drug * **RoL**: mstr not above * **Democracy**: judicial undermining by activism * **Federalism**: cooperation btw fed and prov  BC v Imperial Tobacco – scope of RoL (2005)  * Issue: retroactive statute violate RoL? * Decision: cannot strike down with an unwritten princ * RoL would undermine democracy * Narrows scope of RoL – **Definition of RoL**  1. Law is supreme over all (a) 2. Requires creation and maintenance of +ive laws 3. Relnshp btw gov and indiv to be regulated by law | Roncarelli v Duplessis (1959) – no unconstrained descretion  * Issue: Abuse of Process? Yes. * Statute barred access to j – so use tort (a) * Martland+2: functional analysis (prob if not go public) * Rand[c]: no unlmt discretion, need basis in statute (prob if religion listed as ok factor) * Cartwright[d]: high discretion to legi, law onto itself * Outcome: QU Charter of Rights: forward looking  Deference as RespectNational Corn Growers Assn (1990)  * Issue: tribunal prop interp SIMA? Yes. * If Dom legi unclr, can look to internat even in prelim * Wilson [c] move from (a) 🡪 (e) * Both reject (d); * ***Table A*** – disagreement shows shift in law on role of priv cl and intensity of review (resolved by ***Southam***)  Role of RoL in Stdrd of Rev  * Legi designed priv cl to oust jur discretion * Current Interp: ought to show deference as is a authoritative signal of leg intent  Dunsmuir (2008)  * Bastarche+4 (e) – deference is central; just need reasonableness * Binnie (e)(c) – priv cl more then just a factor; review of reasonableness would be subjective to judge; reasonableness should just be outer limits * Dechamps +2 (a) – superior courts are protectors  Khosa (2009)  * Deference still unsettled, see comparison w/Duns in ***Table B***  Reasons and RoL  * Baker: “certain circum” “some form” needed (43) * For RoL: only way to know whether should respect decision maker  Cooper (1996)  * Issue: agency use the const (s52) on E Statute? * Lamer – part of exec, so setting own limits counter to sep of pwrs; almost (a) since s52 belongs to court * Concern about appoint, access to justice: pwr of ex * La Forest +3 – use statu interp to find legi intent * not experts; would block up admin proc * no exp or imp authority, pure admin; eStatute must grant jurist either exp or implic; correct stdrd * McLachlin +1– large liberal interp, democracy plays a role – if can interp law then constitution is a law * most just since gives most access to justice * can consider ? of law (inclu charter), but only to determin if rsb chance of success [**wins in *Martin*]** |

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| RemediesJurisdiction:  * Tribunal: look to estatute * Courts: **Read the Statute** * Inherent to review executive, legi cannot oust s96 jurisd with tribunal [Res Tenancies] * Admin trib: no precedent   **1**) **estatute must provide right of appeal** (legi intent)   * Express legis intent?; internat limits? * Inferred intent from expertise and efficiency values? * Challenging: Institu structure * internal mechanisms [first: Harelkin]; * external non-court mech; * external court mech (statu appeal, judicial rev); * private law remedies   **2)** **BC Admin Trib Act**  **3) Fed Court Act:** 18(1) remedies; 18(4) grounds 4 JR; 17(1) jurisd where relief claimed against crown Types of Remedies:  |  |  |  | | --- | --- | --- | |  | Tribunal (E stat **explic or implic**) | Judicial (in public law) | | Admin | * Decl Order * Enforce obli/duty/right * Mandamus * Ongoing seizin * Quo warranto * Req court to enf order * Internal appeal * Reconsider/rehear | * Centiorari * Decl * Enforce obli/duty/right * Habeas corpus * Injuct * Mandamus * Quo warranto | | Const | * S52: non applicat of inconsis law * S24: just and equitab (Conway) | * S52: decl of invalid * S24: just and equitab | | Civil | * Costs, Compensation, Damages, Discipline, Fines, Licences , Restitution | * Costs, Compensation, Damages, Restitution, Contempt | | Crim | * Crown fines and imprisonment for quasi | * Contempt, Fines, Impriso, * Prosecution | | **Non-Leg** | * Change agent (polycent, when broad remedial) * Conciliate/mediate * Constulat - Education * Equitable: anything fits * Expert - Monitor - Policy * Ombus, inquiries, special bodies, media | * Change agent * Equitable * Ref question |  * **JR Prerogative Writs**: **Certiorari** (quash) - **Prohibition** (where unlawful jurisdiction) –**declaration** (declare action ultra vires) – **habeas corpus** (ensure no arb detention) – **quo warranto** (challenge basis of authority to justify acts * **Mandamus** (order duty) 1) demon lgl right to have thing done in manner and by person 2) duty lies on official at time 3) duty purely ministerial (no disc) 4) demand for and refusal to perform [**Insite**]  R v Conway – charter remedies: tirb can be court of cJ  * **Charter Remed**: 1) jurisd for ?s of law 2) express or implied jurisd 3) legi not clearly withdrawn jurisd 4) this rem ful statu purp and trib func? | Novel and Effective RemediesMcKinnon v Ontario  * Facts: discrim in workforce, wants systematic change * Issue: human rights commission improve? * No: finality and resources concerns * But: issue: did they do in good faith? Implicit RoL * Get deference if: accountable, competent, critically think when using authority * Novel: 5 ministry wide, detention specific awareness training, publication, paid leave of absence, professional assistance, final resp assigned to dep minis (contempt of court) & trib remains seized * Cost: >2 million and 1988-2011 and new depu mnstr * Enforcement must be granted by estat or depend on c  Domtar v Quebec – high level of deference  * Issue: conflicting admin interp an indep basis for jr? * No – “principle of the RoL must itself be qualified” * **Trib not bound by precedent** * Creation of new entity best novel? super trib in QU: expertise, intern review, princ of consist, RoL and demo  Judicial ReviewMcDonald v APS – Public Function Test  * **Modern rule of statutory interp** in context of two statutes and 2 non laws * Take into account all legis intent: prupose, contest, presumptions, admissible external aids * Adopt appropriate interp: a) plausibility (compliance w/ text); b) efficacy (promote legi purpose); c) acceptability (rsb and just) * **Public Function Factors:** * Source of pwrs – functions and duties – implied devolution of pwr – extent of gov direct/indir control – power over public at large – nature (member& appoint) – how funded – nature of board’s decisions – constituting documents show need for duty of fairness – relation to other statutes/parts of gov  Harelikin v U of Regina – Judicial Discretion Factors  * Must exhaust internal review first * Beetz & maj:(e) procedure on appeal – composition of app committee – more likely to re-try – burden of previous finding – efficiency, expediency, costs * **Do not use pwr for delay unless no other way to protect a right** * Dickson: (a)- delay – nature of error (nat justice) – right of appeal to court – capacity of remedial body – alternative rem: convenience and adequacy  TeleZone  * Issue: fed court has concurrent jurisd? Go this way? * Binnie: Access to justice: a) persue chosen rem with no detours b) focus: quash invalid decisions and force speedy acts * Context is financial here, no remedy for Christie |

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| Procedural Duty of Fairness  * Historically: no duty if not judicial or quasi j * Now: * S7 princ of fundamental justice: get full hearing * Ask: is this a decision that ought to attract a duty of fairness (Baker) – if duty exists no def to failure * Better decision making, public pol out and resp * Pure legis: nothing  Nicholson v Haldimand – begnning of modern era  * Issue: cannot claim statu fair since <18m, any remedy? * Laskin +3 – yes: must be treated fairly not arb, should have reasons – admin: general cl duty on sliding scale * Martland (d)+3 – no: purely admin so no requirement  Cardinal v Kent Institution – Threshold Test – Emergency  * Issue: director decision not to release from sol conf * Court: has broad disc but should inform of reasons, give op to make representations, habeas corpus issues * (1) every public authority [cannot be private] (2) making an administrative decision (3) not of a legislative nature [parl supremacy] (4) and which affects the rights, privileges or interests of an individual [much lower threshold then before]  Exemptions:Canada v Inuit Tapirisat – legis and pure policy no fairness  * Issue: rate fixing by cabinet warrant fairness? No * Court: is it legislative action? many parties, broad grand of discretion – trying to get out of review by characteri?  Ref Re Canada Assistance Plan – minis on grounds of public policy no fairness  * Issue: fed change plan in budget w/o prov input * **Doctrine of Legitimate Expectations**: 1) representation 2) within scope of author 3) clear, unambiguous, unqualified 4) procedural in nature 5) no conflict with decision maker’s statutory duty * Court: here was purely ministerial dec on grounds of public policy  Homex Reality v Wyoming – subordinate legis  * Issue: bylaw froze prop sale, no op to spk to final decisi * Court: bylaw showed proc fair by implication; was quasi-judicial decision BUT not entitled to discretionary remedy  Wells v NFL – general decision  * Issue: legis decision to restructure board? no fair  Knight v Indian Head School Division – public officers under k  * Issue: if under k, no fair unless in statute (**tbl C empl**) * Court: dismissal cannot be arbit; pub has int in proper use of pwr; admin bodies master of own proc; PF applies to statutory and prerogative; at pleasure no rea | 1) Duty to Hear Other Side:  * Content: Baker questions  Baker Case (1999) – Baker Framework for Duty to Hear  * Decision: Mstr Cit and Imm; O Caden (notes)? * Issue: **must** **child** wellbeing be **primary** in immigration considering not **express** ratified conv? Yes. * Domestic: Imm A (partial priv cl: review if serious ? of gen import); Regs; fairness; charter values * Internat: conv on rights of child (int incur); other jurisd * Not Law: immi guidelns (soft); fundi values; academ * Dissent: not enough def, jud act to incorporate * Remedy: Decision maker to review * Baker Ethos: * Fairness is the floor and contextual – procedures essential to just exercise of pwr – rsbness informs DoF – procedures need only be adequate – princ of def (master of own procedure) – participatory right * See trends of weighing based on assessment of indiv right v public good (*Baker*) or type of harm (*Insite*) * Priv Cl irrelevant since jurisdictional, but may explicitly oust PF – in which case look to Charter  Blencoe v BC  * Issue: tribunal delay violate charter or PF? Wants stay * Bastarache(m): gives accelerated review (symbol) * Charter: Applies: statu autho, pwr or compulsion, gov quality, implements gov prog, adjudicatory charact. Test: Life (no), Liber (no), security of person (little), accordance with princ of funda just? * S7 – no generalized right to dignity, delay insuf * PF: 1) unacceptable delay and sig prejudice 2) bring system of justice into disrepute – No * Lebel (pd): abusive admin delay is wrong & charter cannot solve all or we risk freezing cl  Reasons and PF  * Satisfy princ of demo, RoL, accountability, good gov * Look to statute and procedural code, and baker facs * **fairness** = standard (like correctness, some def) * remedy: quash and seek reasons (strategic!) * Reasons where: nature of dec involves rights and jud-type environ 2) statut schme includes appeal  NFL Nurses – Absence is Procedural; adequacy is substantive  * Functions: disclose expertise, transparent justification (justice), outcome is rsb (not arb) * Deference as respect: sufficient not perfect, not freestanding reason for appeal, read as whole  AB Teachers – where no duty or limited r required – court use deference to consider possible reasons |

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| 2) Right to an IIB decision maker  * Constitutional sources: UK Act of Settlement 1701, preamble, judicature provisions in s99, 100 * Judicial ≠ Administrative (see **Table D**) * Look for statutory indications of: **discretion, fairness, delegation, adj v adm**   Independent (**Table E)** –inst autonomy gives cond of impar   * Flexible CL Test in context of operation of tribunal and func set out in legi and practice: ***The apprehension of bias must be a rsb one, held by rsb, rights minded person, applying self to question – what would an informed p, viewing matter realistically and practically and thought the matter through conclude. Think that conc or uncon dm would decide fairly?*** (Comm for Just and Liberty) * Grounds must be substantial * Valente Princ apply to tribunals; but not same deg ind  Ocean Port – statutory privisions trump; no constitutional guarantee of tribunal indep  * Issue: trib w/ adj functions can be at pleasure (part time, fixed term appts) – yes * Statute override cl nat just; assume intended PJ if silent; only oust clear with charter * 1ray func of trib: policy makers and implementers * Decision: unambiguous statute, characterize as licensing body that happens to have crim penalties * Natural justice is not const principle, arg arb and rol  Keen v Canada – Relationship btw adm and ministers  * Issue: at pleasure? Yes. at pleasure get PF? No (Duns) * Directives from exec (legal) followed by bill going against statutory authorization (health v nuc safe) * Letter and ‘carefully considered subm’ sufficient  CP v Matsqui  * Independence issue with band tribunal? Yes. * Agree: Princ of Nat justice apply to band trib bodies and allegations speculative * Lamer - adj func so like court: discretionary, appointed by those that object, no sec of tenure or remuneration – appeal trib not sufficient * Sopinka – show deference, delay test until get decision, appeal trib sufficient | Bias/Impartiality –perception of part/judge w/open mind   * Unbiased – reasonable and right minded: same cl test * Focus on perception of bias * Legal fiction – judge view really? * Strong presump of impartial – real likelihood of bias, high threshold and heavy onus * Standard varies by context : *Baker* factors * Must be substantial apprehension; presumption of impartiality (*Weywaykum* – Binnie was counsel ok) * Inconsistency looks like bias (Domtar) * Working for own benefit (Roncarelli) * Closed mind (Cardinal) * Need change agent (Mckinnon) * **Personal bias -** 4 grounds exist at CL (bring @ 1st instan**)**:  1. pecuniary or material interest 2. personal reln w/ those involved in dispute 3. prior know or info about matter 4. attitudinal predisp towards the outcome  * Clear indications * Aggressive adjudicator * Counsel highly interventionist * Utter comments that show no open mind * Expertise is not bias; statu bias ok unless unconstitu * May be unconscious (Chretien)  Chretien v Canada – individual bias  * Inquisitorial commission – commissioner acting like judge * Look to terms of reference to see if authorized bias * Court: cumulative effect of comments show bias * **Institutional bias**  1. Rsb apprehension of bias in mind of fully informed person in a **sub number of cases**? (having regard to a # of factors incl conf of int) 2. No -> then bring personal not institutional  Consolidated Bathurst – Full Board Meetings  * Issue: full board meeting create pressure on dm? * Purpose: promote discussion and share know * Structure usually succeeds in beating imp and bias * Ensures like cases treated like * Watch for PF issue: notice…  Geza v Canada – lead cases not vio if aim right: consistancy  * Issue: consistency outweigh bias concern (Mnstr part of IRB)? yes. but no here. 🡪 litigate case by case * Want consistency in immigration (many since Singh) * Adjudicative, and rights at issue, intend to drop imm * Test: rsb app in sub number of cases? Yes – no single fact but # dropping and email trail says this was intent  Jaroslav v Canada – close connections do not sever indep  * Mnstr pub policy stmsts and deep involve w IRB-> drop in #s but still no bias and is indep * High hurdle even for clever counsel |

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| Substantive Duty: Standard of Rev  * Pg 75 – reasonableness presumptive when  Jurisdiction  1. Legal author or pwr  * Admin do not have unlmt authority, nor final autho on scope of mandate  1. Gen gov pwr to exercise author over 2. Pwr over issues/areas conveyed by statute  * Explicit or implicit * Question of Law -> courts interpret statute in **scope** and **purpose** for **intent** of legis  1. Scope of court’s inherent pwr to decide case, gr remedy  * Construe narrowly on correctness in favour of statu actor * Deference constitutional princ of law   **Privative cl**: finality, leave requirement, ouster   * Parl supre vs RoL – so reinterp through deference * Orig soln: Doctrine of Statu Interp 🡪 correct and ltl def  1. **In Jurisd**: parties, remedies, fact/law, decision-mk area 2. Prelim Question: if prelim incorrect per court the out  * ***Bell***: wrong on prelim ‘self contained dwelling’  1. Ask the Wrong Question: statu comm incl ?, consi right  * ***Metro life***: not cond of members but person elig? * Legal realist (always correct) vs Raz role morality  Cupe v NB Liquor Corp-relation btw court and admin reformulated based on deference  * Issue: strike, strong priv cl, CoA overrule trib * Trib in jurisd; 7 poss interp; **trib entitled to err** RSB REV  Canada v Southam – New: Reasonableness turns on Expertise  * Issue: econ ? re market participation = RSB REV * Legi sig for exper so def: purp econ, mix f&l,? in trib exp * Unrsb: not suppor by reasons that stand up: evid or logi * Obviousness of defect is diff btw Unrsb and Pat Unrsb. * Did not give weight to some evid, so diffi but not unrsb * **Error in law not to give reasons.**  Pushpanathan v Canada – Pragmatic and Functional test  * Issue: consp to traffic, denied refug, contra to un conv? * Out of Jurisd when wrong on correctness issue * Serious ? of gen import so = COR REV * Pragmatic and Functional Analysis – assess, apply and weigh 4 push factors to calc inded def and stdrd of rev * **Priv Cl**: finality , partia/equiv, statu appe[*live issue*] * ****: relative (Mnstr , [*live issue*]), interp w/ respect aims, in estatu, specialized know of dm, special procedure for disp reso, comp w/ judi skills/procd * **Purpose of act as whole and prov in particular**: legi scheme, princ of polyc infor purp, rights protect/lim * **Nature of Prob**: law v f fl, legi intent re ? of law, no clear line, generalized prop of law=correct, discre pwr | Applying the Standard of Review AnalysisDunsmuir v NB – Standard of review analy and no Punrsb  * Issue: dismissed from work: RSB REV   **Standard of Review Analysis:** (Jurisdictional questions)   1. Look to past jurisp: sastifactory? 2. Contextually analyze factors in Standard of Review Analysis (was P&F)  * **Reasonable Presumptive** where:   1) Specialized or Expert 2) interp EStatu 3)?f or ?fl 4) broad statu disc 5) correctly applies legal princ or tests 6) interp of pwrs w/I range of acceptable interp (*CUPE*) 7) decision demo justification, transparency and intelligibly (analysis and facts) 8) Rsb outcome in respect to f and l (covert prop test) (reasons important).   * **Correctness Presumptive** where:   1) constitutional 2) general law both a) central import & b) outside specialized area of expert 3) jurisd lines btw >2 competing specializ trib 4) true vires   * Loss of P UNrsb: but per factors will need to calibrate def – judges leaning diff ways (Binnie don’t lose) – lieing to be more determinate? [*live issue*]  Khosa – shows movement in deference btw judges - issue  * Issue: st racing death, immig: RSB REV * Desc decis but impact on rights and crim law * Binnie Maj: intent was Rsb rev – show def, crim does not make ? of central or take jurisd from trib (mid) * Rost: priv cl most import: [admin more predictab] * Fish: standard Rsb – but unrsb, reweighing denial? “def ends where unreasonableness begins” (a) * None look at reasons, map in **Table F**  Reasons and Substantive DutyNFL Nurses – Absence is Procedural; adequacy is substantive  * Gray areas with distinction: * Reasons so deficient that no longer count as reasons? * Deficient reasons supplemented by court b4 replaced? * Adequate Reasons: - justification, transparent, intelligibility (Duns) – parties understand why – facilitate appeal process and JR – rev c sast that trib grappled w/ live issues – Rev c understand how outcome within range of outcomes * Inadequate Reasons: - bare conc – opaque conc – no intelligible path – conc not supported by princs – glaring inconsistencies – lack of evid – irrelevant considers/relevant omitted – min reasons to effectively immunize from accountability - ‘trust us we got it right’ attitude |
| Stdrd of Rev ContStatutory Interp  * Modern Principle [Rizzo Shoes] **Table G** * Agencies have soft law guidelines * Models **Table H** * Statutes never free of legal ambiguity – how courts are * Diceyan: plain meaning 🡪 COR REV – no discretion, weighing, transparent or answr to priv cl issue * Romantic: judges endorse value decisions – need reasons – does not solve priv cl issue  Correctness Review  * Rationals  1. Supervise Jurisdiction (judges uniquely indep of exec) 2. Expertise in matters over which admin dm less adept and know 3. Ensure consistency and predictability  * [issue: trib prefer corr or rsb? & conceptions]  Canada v Mossop – statu interp then see if correct  * Issue: fam statu incl mm? Human right act & coll agree * Fed Crt A: s28(1)- jurisd where error of law, no stdrd * Tribunal: read in/do not apply and send to re-determi * No clear and plain meaning * Human rights: dynamic, progressive, akin to liv tree * Legi evid one factor, academic liter, purp of scheme * SCC – five decisions **Table I** – L’HD only one to do test * If today?  Northrop Grumman v Canada – statu interp can be biased  * Issue: military procure, not cdn, trib hear anyways * Roth – all cdn, did not weigh one term – so rem: j rev * Skeptic says to solve issue of us bene w/o being bound * Issues: bifurcated process, protectionism, formalism, tribunal overturn yrs of decisions  Reasonableness Review Progression:   * ***CUPE*** (model) * ***National Corn Growers*** (dispute foreshadowed: cannot evaluate RSBness w/o looking at the reasons) * ***Canada v Southam*** (somewhat probing analysis into evidentiary found and logical process) * ***Mossop*** (L’HD – correct methodology: choose standard, track reasons (obj but crit), do not re-weigh (but ***Baker***?)) * ***Ryan*** (courts not looking for right answer, objectives in tension, just one from range, def requires step back) * ***Dunsmuir*** (choice made by SCC for CL to trump labour act w/o justification/transparency) * ***Khosa*** (four judges choose rsb – so how apply?) * ***Celgene*** (standard not disputed, but is it an issue for the courts to determine, not counsel. Also, modern interp based on **princ of demo and judic restraint** – develop law: access to info becoming broad) * ***Catalyst Paper*** (muni gets def based on demo princ) | Charter Procedural Fairness  * Constitutional sources * Cdn Bill of rights: presumption that laws conform, * 2(e) inclu princ of funda justice * Charter * Preamble principles: RoL * Section 7 – informed by cl but narrower * Section 32 – charter applies to legi and decisions * Public Law: * Unwritten princ of dome of inter cus law – aid interp and may have legal force; exp chart since source is IL * CL: - supply legi omissio in stat interp; PF princ for s7 * Leg: override CL through clear statu lang; override Char through s 33 for 5 years * Chart: override explic legi: pream, s1, s 7-14 * Positive intern oblis: trump domo legi if incorporat * **Section 7** * Applies: everyone (Singh); cit oversea af by gov & prerogative pwrs (Khadr) * Threshold: risk to life, liberty, security (Singh) * Charter negate explicit statu language (Singh) * Oral hearing not always, but yes if credibility (Singh) * S1 justification would be extraordinary (Suresh) * Utilitarian consids cannot limit charter (Singh) * Principles: (Suresh) * Informed of case to be met * Op to respond to case presented by mnstr * Op to challenge info re validity of decision * Receive reasons (clearly articu, from d maker) * Deference: (Charkaoui) – perfect procedures not required – def for legi choice in s1 – delay delc  Singh – Application and Threshold  * Issue: s7 apply to non cit? yes. (jud activism?) * Statute clearly removes PF, imposs to reconcile w/s7 * Remedy: struck down, hard on other branch of gov. * Outcome: creation of expensive imm and ref board  Suresh – common law framework  * Issue: no info re decision to name terrorist and deport to torture. * Statute silent on PF – so used Baker factors * Onus to establish pf risk before minister considers * PF if facing deportation: disclosure, participation and reasons  Charkaoui  * Using imi act as cc w/o PF * Act: non refoulement adopted but explicitly limited * Judge stuck: not impartial, RoL, jud indp –unbi dm * Outcome: special advocate system, delay  Khadr - Remedies  * S52 decl of violation, no s24 rem: preog and sep pwr |

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| Charter Substantive **Review under the charter**   * Define prob – generate alts – evaluate - decide   **Remedies**   * Unless legi clearly wdraws, trib can use charter (Martin)  1. look to e statu for explic (terms) or impl (statu as a whole) intent ?l 2. if juris found: presume author to decide const 3. burden of rebutting: exp or imp intent to wd   **Approaches to review**   * **Orthodox 2 step** (Slaight maj & Multani maj)  **OLD**  1. admin decision infringe a charter right 2. yes: use section 1 analysis no: review w/ admin law  * **Oakes** (rsb limits prescribed by **law**): interfere w/ right no more then rsb necessary to achieve object?  1. Pressing and Substantial Objective 2. Proportion means: a) rationally connected b) minimal impair c) proportionality btw infring and obj  * legi permitte margin of appreciation re lvl imp (Slaight) * **Mixed approach** (Slaight Lamer)  1. Admin law princ to review legality of decision (jurist, fact, applicat, interp, unrsb disc) 2. if pass, then Charter analysis under s1  * justification: limitations flow down chain of statu autho to ap to regs, by-laws, order, decision, actions: statute covers provision and order (which is law) * diff from positivism view that law=rule * **Standard of Review Approach** (Multani diss, ***Dore***): dm disproport and unrsb limited a charter right? * SoR **decisions** affect **c rights and values** (?) is **RSBNESS** * Exam: assume rsb then track reasons * Value: we hold dear in cdn soc (Baker – imp multicult) * DM apply charter values:  1. DM balances charter value w statu obj 2. DM asks how Charter value best protect in light of obj 3. DM eng w prop anal: sev of interf w statu obj 4. DM chooses outcome w/i range of and explained by reasons exhib justific, transparenc, and intelligi  * Court review desc decision affecting charter right  1. Past jurisp satisfactory assess lvl of def? 2. Contextually analyze factors w/ Std of Rev analysis  * Think: how change other decisions w/ disc? (Khosa) * ?: if id wrong value rsb or corr? Course for dm? values? | Nova Scotia v Martin – Cooper Dissent wins  * Issue: injure at work, trib: statu viola charter, no effect * Gontier (4 crt)If empowered to decide ?s of law – chart * Justification: princ of const supre, admin rev provides record for jud, adm trib reviewed on correctness sdtrd * Did not want bifurcated syst, trib most accessible  Slaight Communications – orders a law?  * Issue: wrong dismissed, disc craft remed on equit grnd: positive order or neg order infringe s2b, justify s1? OK * Dickson (+maj) – chart challenge then use chart, obj is to protect from inequity – justified * Lamer (concurring) – mixed approach  Multani – Discretionary decisions a law?  * Issue: carry religious Kirpan, decision that cannot, NOK * Maj: orthodox: const in admin reduce r&f (but insite?) * Desch & Abella (Diss) – admin for deci/orders, c for norm of law, maintain analy tools of each, should not start w const review, cannot disregard change in std rev just since rights-disc need, prag & func to determ s  Dore – Discretionary decisions/orders are not law  * Issue: man to man lead to discipline? OK. |

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| BC Admin Trib Act  * QU: one trib: expert, generalist, jud proc, indep * UK: unified trib w/ 2 tiers: full ind and full exp in mat l * BC: codification of stdrd of review, control jurisd of jud   **Section 58 – Priv cl presumptively indicates expertise**   * 2(a) Finding of f or l or disc reviewed on patently unrsb * 2(b) nat just and proc fairness: trib act fairly in circ? * 2(c) all other: stdrd is correctness * 3 p unrsb a) arb or in bad fth b) imporp purp c)base ent or predom on irrlev fac d) fails to take statu req into acc   **Section 59 – no Priv cl**   * Expertise irrelev under s 29 (Coast Mountain Bus) * 1 correctness: all decisions * 2 finding of fact strev: punrsb (Coast Mountain Bus) * mixed f&l (application of legal princ to set of facts) = Correctness (Coast Mountain Bus) * Reject: correct only where issue of law extractable and error of l made & rsb otherwise (trib argu CMB) * 3 disc decision reviewable on p unrsb * 4 p unrsb a) arb or in bad fth b) imporp purp c)base ent or predom on irrlev fac d) fails to take statu req into acc * no other ways of being arb in BC (Figliola)   **Historic Approaches to interp of codification**   * P unrsb no longer in common law (Dunsmuir) * Repeal code? Read down to rsbness? Gov amend the act? Stuck at that moment in time?\* * Pat Unrsb will live on in BC, need to be calibrated to Admin law Princ (Khosa, Binnie in obiter) * This overreaches court positi, no def to intent to oust stdrd of review analy (Khosa, Roth)  Principles Informing Patently Unrsb (Jensen)  * Defined by cl immed prior to Duns * Calibrate according to gen princ of admin law (Khosa) * Clearly irrational, evidentiary unrsb, no rat basis * Priv cl = highest degree of def * Do not: reweigh, 2nd guess, substitute, conc evid insuf * Yet need to follow to be transparent? (Figliola did) * Review result, not reasons leading to it * Set aside only where jurisdictional error * No evid is PU, insufficient evid is not * High degree of def for reasons – may supplement * Adequacy of reasons less onerous in BC | Case LawJensen – Principles informing Patently Unsrb  * Issue: fell when unloading cause arthritis? S58 not pu  Coast Mountain Bus – mix f&l, no priv on correct  * Issue: absenteeism discrim on ability? S59 mix f&l?  Figliola – only 59(4) is arb in bc  * Issue: discrim on age and race, comm decided to review board – CL would have been under rsb * Court: orig deci was not punrsb, so no desc to hear  Approach:  * E statute * Incorporate ATA stdrs of Rec? * No 🡪 go to CL * Determ if priv cl and go to 58 or 59 * 58/59 complete codes (Figliola) * Identify the type of question (f, l, m) * Identify the strd of rev * If PU (58(2)(a) and f or l w/i exclusive jurist: follow jup guidance re content * If PU and desc (58(2)(a)) – apply defn of PU set out in 58(3) |

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| Aboriginal Admin Law  * Constitutional Basis * Royal Proclam 1763 – source of special reln w crown, assumes underlying title in crown, no abolition a law * BNA 1867 – share btw fed and prov, 91(24) – honour * CA 1982 – 35(1) existing rights r&a * Role of Legal System * Moral and political duty 🡪 lgl obligation [Haida] * Affirm and demand historically cont lgl oblig * Realize lg and lib interp of a rights * Protect both proven and unp rights through lgl insitu * Effective: consul in NZ much better w Maori * Check pwr of crown and elim unstructured disc * Future prospects * Repeal IA, Recog A sov and laws, share jurisd, facil variety of self gov, complexify cdn fed (euok) * Current lgl pluralism * Self gov is evolving * Sov and sg (Nisga); self mng and self admin (band coun under IA); co mng and joint mng (priv and pub); particip in gov (Nunavut)  Connection w/ admin: Delegated Authority  * Through IA or other leg * Variety of A dm: band councils, elders * Variety of actions: decisions, bylaws, codes, judgem * Ap of PF by: a authorities and non-a authorities * Members deserve PF too and will get it from the courts [Rothstein in *Sparvier*] * Indepen may be issue: trump self determ [Matsqui] * Interaction btw process and substance * Review of rsb or corr of decisions  Matsqui – JR of AB decision  * no finc sec, tenure, ob appear of indp (no bias issue) * intent – further self governance * Lamer: statu interp, more amb then muni * Chance to correct based on autonomy, eff [*Harelkin*] but found need to make ap indp * Process controls substance * Sopinka: broad interp for rights, wait to see a case * Need substance to get know for process  Haida – framwork for duty to consult; hoc unwrit princ  * Old growth logging, strong title claim – duty strong  Beckman v Little Salmon – treaty lg and lib interp, min PF  * Trap line, consultation as fn, private indv involve * PF: notice, op to be heard, submissions, meeting * C: courte (pwr), misread lgl ob (but still get right result) * Binnie: Purp is relshp for future based on ancient greiv, not comprehen code, DtC part of ord law so fill gaps for fairn * But “Somebody has to bring consult to end and weigh respective interests”(gov? court?): claim and effect wk * non attendance = lots of weight (not like Khosa?) | Conn w Admin: Duty to Consult and Accom  * Animating Princ: honour of crown [H], * obj reconcile – if bad job, risk to POGG, RoL no violence * Previous tool: injunction, hard to get, used agains * C&A: new polycentric remedy [Haida] (lots of policy, but huge burden on Ab groups to show up >80/d) * Procedure in substance here – so no Baker   **Haida Framework**  0 Trigger: Crown contemp action w/ know affect rig  1 D to act: pot adversely addrect unprov r [duty start]   * ? of fact: **RSB** * need to find this moment in time   2 Scope: prop w strength, pot impact, other (pub int)   * ? of law, const right, strength and severity: **CORR** * adeq of consult: **RSB** [H] or **CORR** [Ltl Salmon] * creates another spectrum   3 Consultation   * **RSB** re adequacy of process * Burden on Crown: must consult * Burden on Ab claimants: assert r and specify infring   4 Accommodation – may be required   * **RSB** re outcome and balancing of interests * demonstrate consideration of interests and balancing (prop) * may require modification * Duties – must justify through whole (reasons)  |  |  | | --- | --- | | Crown  - not unilat  - dm must hear  - always consult  - no delegation of duty  - rests on fed and prov  - duty is process  - process fair and in good fth  - may fund partic  - justify actions  - may need accom  - no duty to agree | Ab Peoples  - good faith consultation  - clarity of claims  - evid to assess impact  - not frustrate crown  - attempt to meet mut sast soln  - no veto (but internal law says yes) [ltl Salmon] |  * PF [Haida] – consultation may be suf PF [Ltl Salmon] * Not act unilaterally (per RoL) * Timely notice and early consult * Crown inform self of impact * Crown communicate its findings * Comprehensive disclosure of crown know * Provide meaningful opportunity to be heard (formal part in decision making) * Allow submissions and arguments in reply * Meaningful engagement eg direct meetings * Crown listen and respond carefully to reps * Written reasons * Good faith: intend and attempt to min impacts and address concerns (bolstered from HoC) * Concerns integrated into plan when ever possible * Consent (in certain cases) |
| Discretionary Decision Making  * **Discretion:** decision where law does not dictate specific outcome, choice of options w/I staut imposed set of boundaries. Public officer: when ever limits leave him free to make a choice among possible action or inaction [Baker] * ID: **‘may’, general or vague language, subjective [Tbl J]** * Was: Trad grounds: bad faith, dictation, unlawful deleg, fettering, improp use, unrsb/irrat, omi rel/consid irrel * Matter of law, never absolute [RvD] * Now: SoR factors used to rev and if nec constrain discretion [Baker] * brings review of jurisd and review of discret together * Unreasonable when in conflict w/ purpose of grant of discretion [Baker] * Presumption is deference [Baker] onus on complain  Reading through proportionality Framework  * old view: positive law = donut; problem of the hole * rule filling by judges folded in to become part, timbit * disc outside of law – unfettered and free [Dicey] * positivist, Dechampes in Khosa * using disc in context of principled approa [Dworken] * Binnie in Khosa [**Tbl K**] * Courts should not reweigh [Suresh] * Reweighed factors and dissent attack as inapprop [Baker] * Disc decisions affecting charter rights is RSB and is contextually applied [Dore, Baker] [**tbl L**] * Dore: impossible to engage in prop w/o reweigh * Good feedback, only court’s rule to change, transparent what they were doing already but lose legitimacy if judges don’t have constraint of defer * Folding of Std of Rev with PF? * Minister in best position to weigh [Lake] * only needs to give persuasive factors  Tools to argue Reasonableness and Deference:  * Baker: presumption is deference -> RSB * Suresh exception: minister has high defer, expert -> RSB * Lake: prev jurip: rsb; largly f driven, no priv, specialized expert in internat obli and foreign affairs, balance char w/ other consideration -> RSB * Nemeth: Exceptions to non refoul in statu -> RSB * Lake: key reasons (understand why and allow review), Baker: certain circ, some form | Roncarelli v Duplessis – discretion is reviewableBaker – deference means use SoR when review discretion  * Unrsb use fo discretion when decision inconsist w/ values underlying grant of discretion * Guidelines and Internal law used * Conflicts w humanitarian, did not consider important factor, did not weigh sufficiently  Suresh – multiple stndrds of rev in one case  * Constu of deport is ?l COR, danger is ?lf PURSB, actually at risk is ?f PURSB * Unrsb here, but could be unrsb and still defer in another case: Suresh exception  Lake – limited reasons ok, mnst in best position  * Drug behave, extra to more severe crim RSB? Yes. * Extra test: no intervention unless shock consc of can  Nemeth – can be extradited if conditions change and crim  * Criminal refugee, no loss of status, extra rsb? No. * Did not sufficiently weigh severity of crime factor |