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# General Principles

## The expansive and pluralistic administrative state

* The need for efficiency, reduced cost, and specialization all militate in favour of an administrative state. However, the massive expansive of the administrative state from the late 18th century onwards also changed the model of govt.
* Today there are a variety of administrative bodies: some are court-like, some combine adjudicative functions with broad policy-making, and others are purely administrative. Numerous decisions that were once made by judges are now made by administrative decision-makers.
* As L’Heureux-Dube noted in *Baker* (1999), quoting Sedley LJ: “In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people’s lives than the decisions of courts…”.
* While this new model of government is administratively efficient, it may be that this expansion of the pluralistic administrative state has also brought about an erosion in the rule of law.
* This is the tension underlying administrative law: between the rule of law and legislative supremacy, and, relatedly, between court intervention in administrative decision-making and non-intervention.

## The rule of law

* As Mary Liston suggests, “the rule of law represents a normative standard by which all legal subjects can evaluate and challenge the use of public power”. This is a principle “animated by the need to prevent and constrain arbitrariness within the exercise of public authority by political and legal officials in terms of process, jurisdiction, and substance”.
* The **Diceyan model** sees it as the job of the courts to uphold the rule of law, particularly with respect to administrative decision-makers who are free from the “sunlight of scrutiny” that polices the legislative branch of govt. Dicey’s conception of the rule of law involves three features: (1) the absence of arbitrary govt authority; (2) formal legal equality for every person, including public officials; and (3) constitutional law as a binding part of domestic law.
* In ***Roncarelli*** (1959), Rand J (SCC), in a concurring judgment for the majority, discussed how public officials are always constrained by the rule of law: “… 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; […] there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption”. Rand J further said: “…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”.
* Similarly, in ***Baker***(1999)*,* L’H-D wrote that discretionary decisions, despite being afforded greater deference, must nevertheless respect the rule of law: “…though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with… the principles of the rule of law...” (para 56)

## The Diceyan camp (intervention) *versus* the Willis camp (non-intervention)

### The Diceyan camp: in favour of court intervention in administrative decision-making

* Dicey, a law professor at Oxford in the late 19th cent, was a proponent of legal formalism.
* Dicey emphasized the role of courts as the upholder of individual rights, and was in favour of courts limiting, supervising, overseeing, and constraining the admin state.
* Legal formalism is characterized by four principles: (1) the belief that law is composed of “scientific” rules discoverable through careful study and the application of legal principles; (2) the belief that these rules are best discerned by closely examining previously decided cases; (3) the belief that legal documents speak for themselves, i.e. that judges could discover the meaning of legal documents through the “plain meaning” of the words; and (4) the belief that judges can ignore the policy implications of their decisions.

### The Willis camp: in favour of non-intervention in administrative decision-making

* Willis, a Cdn legal academic and a proponent of the admin state, argued against court intervention in admin action, and argued in favour of giving “a wide discretionary latitude for bureaucrats… to get things done”.
* Willis argued that courts were not well suited to reviewing the decisions of administrative tribunals because doing so involved asking “the amateur” to “upset the expert”.

## The current progressive agenda of courts?

* Historically, the pendulum has swung back and forth in Canada between intervention and non-intervention by courts in administrative decision-making.
* Pre-*CUPE,* the pendulum lay on the side of intervention: courts were eager to review admin decisions to impede the development of the modern regulatory state and uphold the rule of law by applying the doctrine of jurisdictional error.
* Following *CUPE* (1979)*,* the pendulum swung in the opposite direction, towards non-intervention: courts were willing to show increased deference to admin decision-makers, reflecting respect for the legislative supremacy.
* The jury is still out about where the pendulum currently lies.
  + Decisions like *Baker* (1999) suggest that the pendulum may be swinging back towards intervention: courts may be willing to intervene in admin decision-making to support a larger progressive of agenda, for example, protecting human rights and the rights of children. L’Heureux-Dube, writing for a majority of the SCC in *Baker,* found that a reasonableness *simpliciter* standard applied to the Minister’s decision not to grant an exemption on humanitarian and compassionate grounds, but that this decision was unreasonable because it failed to “give serious weight and consideration to the interests of the children” and also failed to give sufficient weight to Baker’s mental illness and the harm that might occur in the event of her deportation.
  + On the other hand, decisions like *Khosa* (2009) suggest that courts are still willing to give administrative decision-makers a wide birth. In *Khosa,* Binnie J, writing for a majority of the SCC, found that, even in the absence of a privative clause, deference to administrative decision-makes may be owed on some Qs of law. This reflects a pluralistic approach to constitutional ordering, wherein the courts and administrative decision-makers engage in a dialogue of public justification.

## Courts have an inherent, constitutionally-recognized right to judicial review (even if there is a privative clause)

* The superior courts in each province have the *inherent, constitutionally-recognized jurisdiction* to review administrative decision-making, at least with respect to questions of jurisdiction, and are themselves immune from judicial review. This means that a superior court, even in the face of the most strongly worded privative clause, is constitutionally entitled to judicially review the jurisdiction of an administrative decision-maker. This inherent jurisdiction was articulated by Laskin CJ for a unanimous SCC in ***Crevier* (1981)**, and is derived from s. 96 of the *Constitution Act, 1867*. A privative clause cannot completely insulate an administrative body from judicial review. This expansive interpretation of s. 96 of the *Constitution Act, 1867* tips the balance in the tension between the rule of law and legislative supremacy towards the rule of law and judicial intervention.
* In ***MacMillan Bloedel* (1995)**, Lamer CJ (SCC) reiterated this: “The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction, which forms this core, cannot be removed from the superior courts by either level of government, without amending the Constitution.”
* In ***Pasienchyk* (1997),** L’H-D J similarly said: “[s]ince, as a matter of constitutional law, a legislature may not, however clearly it expresses itself, protect an administrative body from review on matters of jurisdiction, it also cannot be left to decide freely which matters are jurisdictional and which come within the Board’s exclusive jurisdiction”.

# Procedural Fairness

## Introduction to procedural fairness

* Procedural fairness entails decision-making in accordance with the common law rules of natural justice, summarized in two Latin maxims: *audi alteram partem* (decisions makers must “hear the other side”), and *nemo judex in sua causa* (a man cannot be a “judge in his own cause”). In other words, the duty involves two rights: (1) right to be heard; (2) right to an independent, impartial hearing.
* As Huscroft clarifies: “The duty of fairness is concerned with ensuring that public authorities act fairly in the course of *making* decisions, not with the fairness of the actual decisions they *make*.”
* The duty of fairness promotes the accountability of administrative decision-makers, upholds the rule of law, and ensures that people are able to participate meaningfully in administrative decision-making processes that affect them.
* As L’Heureux-Dube, writing for a majority of the SCC in *Baker* (1999), held: “The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected 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 decision.”

## The principle of procedural fairness is easy to grasp but difficult to apply

* In ***Dunsmuir* (2008)***,* Bastarache and Lebel JJ (majority) noted the importance of procedural fairness in Canadian administrative law but acknowledged that the principle is a difficult one to apply: “Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”…” (para 79).

## The “threshold” question: where should the “bright line” be drawn?

* At the outset, a court will ask itself: *Is this a kind of admin decision that should attract some kind of procedural fairness?* The standard of review for this threshold question is correctness.
* The question of where this threshold, or “bright line”, should be drawn is debatable. *Should this bright line be drawn between preliminary and final decisions? Between decisions that are judicial and quasi-judicial in nature, and those that are administrative and legislative in nature? Between legislative decisions and all other decisions?*

### The common law duty of fairness applies to (most) administrative decisions

* + Historically, the bright line between decisions that invoke natural justice and those that did not rested on the distinction between judicial/quasi-judicial decisions and administrative decisions.
  + The SCC altered this historical distinction in ***Nicholson* (1978)**. Laskin CJ (majority) stated: “What rightly lies behind this emergence of a notion of fairness involving something less than full natural justice is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely effected, regardless of the classification of the function in question…”
  + In ***Cardinal* (1985)**, Le Dain J, speaking for a unanimous SCC, affirmed the existence of a general common law duty of procedural fairness “lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual”. L’Heureux-Dube J (majority) echoed this in ***Baker* (1999)**, saying “the fact that a decision is administrative and affects “the rights, privileges or interests of an individual” is sufficient to trigger the application of the duty of fairness”.
  + However, in his dissenting judgment in ***Nicholson* (1978)**, Martland J (dissent) suggested that purely administrative decisions should not attract a duty of fairness: “[The Police Board’s] decision was purely administrative. This being so, it was under no duty to explain to the appellant why his services were no longer required, or to give him an opportunity to be heard.” (p 335)

### The common law duty of fairness does not apply to preliminary decisions

* + Generally, preliminary decisions do not attract the duty of fairness. Only final decisions are subject to procedural fairness, as L’Heureux-Dube (majority) suggested in ***Baker* (1999)**.

### But the distinction b/w preliminary and final decisions is problematic

* + The distinction between preliminary and final decisions is problematic. It may be sometimes difficult to distinguish between “final” and “preliminary” decisions. This divide may lead to “all or nothing” outcomes.
  + If a preliminary decision has de facto finality, courts may find that a duty of fairness is owing. This is because investigations and advisory processes, like public inquiries, may have an impact on the reputation of individuals. Also, even though a decision may not be “final” until ultimate decision-maker accepts the prelim decision-maker or investigator’s advice/findings, the real decision may be made at preliminary stage.
    - ***Abel* (1980):** A resident of a forensic psychiatric facility sought disclosure of files kept by the institution. These files were submitted to a Review Board who annually advised the Lt Governor re: the continued institutionalization of residents; the Lt Governor was the final decision-maker. The Ontario CA affirmed the Divisional Court’s decision that Abel had a right to procedural fairness that required the Review Board to at least consider whether these reports should be released, regardless of the fact that these reports were technically two steps removed from the final decision-maker. [note: similar distance between the actual decision-maker, Officer Lorenz, and the final decision-maker, the Minister, in *Baker* (1999) too]
    - ***Irvine* (1987):** A company under investigation for potentially unlawful trade practices argued that the issuance of an initial report by a hearing officer violated their right to procedural fairness b/c this report was akin to a public inquiry that could damage the company’s reputation (even though the final decision would be made in a full public inquiry before the Competition Tribunal). The SCC acknowledged the potential impact of the initial report on the company’s reputation, but found that it was sufficient that the company have the opportunity to observe and make submissions prior to the issuance of this initial report; the SCC found that the duty of procedural fairness did not involve a right of cross-examination for the company.

### The common law duty of fairness does not apply to legislative/political decisions

* + As the SCC held in ***Inuit Tapirisat* (1980)**, ***Re Canada Assistance Plan* (1991)**, and ***Wells* (1999)**, the duty of fairness does not apply to legislative decisions, even where those decisions impact the rights, privileges, or interests of individuals (as they legislative decisions commonly do).
  + Rationale: the separation of powers b/w the legislative and judicial branches of govt and the principle of parliamentary sovereignty make judges hesitant to wade into “political” areas. Also, the theory that Cabinet members, in their legislative capacities, are accountable by the “court” of public opinion. This alternate accountability makes court intervention unnecessary.
    - In ***Wells* (1999)**, the SCC said: “Legislatures are subject to constitutional requirements for valid-law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate.” (para 59)
    - In ***Authorson* (2003)**, Parliament passed retroactive legislation limiting money owed to disabled war veterans, none of whom were given notice of this proposed change. The SCC held that “the only procedure due any citizen of Canada” by the legislatures “is that proposed legislation receive three readings… and that it receive Royal Assent” (para 37). There was no duty of fairness owed by Cabinet wearing its “legislative hat”.

### But the current distinction b/w legislative/political and judicial/administrative decisions is problematic

* + The distinction between legislative/political and judicial/administrative decisions is problematic. What qualifies as “legislative” or “political” can be ambiguous. This divide may lead to “all or nothing” outcomes.
  + **Legislative/political decisions:** in some cases, it may be easy for a defendant to characterize Cabinet and ministerial decisions, decisions made pursuant to subordinate legislation, or policy decisions, as political/legislative, not administrative/judicial.
    - **Cabinet decisions**  **no duty:** In *Inuit Tapirisat* (1980), the federal Cabinet rejected an appeal from an applicant group regarding a CRTC decision without allowing the group to have a hearing. Estey J (SCC) concluded that Cabinet’s decision was “legislative action in its purest form” and so declined to extend the duty of fairness. As Huscroft explains, Estey J was reluctant to burden Cabinet with procedural requirements or undermine Cabinet’s public policy-making role.
    - **Ministerial decisions**  **no duty:** In *Idziak* (1992), the Minister of Justice exercised discretionary authority to issue a warrant of surrender in an extradition case. Cory J (SCC) concluded that “the Minister’s review should be characterized at the extreme legislative end of the *continuum* of administrative decision-making”.
    - **Subordinate law-making by municipality**  **duty:** In *Homex* (1980), the SCC held that the passage of a bylaw was subject to the duty of fairness because the municipality’s motivation for passing it was to target a particular developer (the Court characterized the by-law as quasi-judicial rather than legislative in substance). This decision suggests that, when considering whether the leg exemption for procedural fairness applies, courts may be more concerned with substance, rather than form.
    - **Policy decisions**  **no duty:** In *Knight* (1990), L’Heureux-Dube (SCC) noted that many administrative bodies are now tasked with policy-making duties traditionally performed by legislatures; she distinguished between “decisions of a legislative and general nature” and “acts of a more administrative and specific nature”. But it can be difficulty to identify policy decisions. As Huscroft suggests, it may be easy for courts to characterize an administrative decision as a policy decision if it does not want to interfere.
    - **Employment decisions involving public office holders**  **no duty:** In *Nicholson* (1978), a majority of the SCC drew a distinction between contractual employees (generally not entitled to procedural fairness) and public office holders (generally entitled to some procedural fairness). But in *Dunsmuir* (2008), the SCC abandoned this distinction. Bastarache and Lebel JJ said: “What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship  regardless of an employee’s status as an office holder.” (para 112) The threshold test for procedural fairness is only met in a public employment context if the public office holder is subject to an “at pleasure” appointment (Bastarache and Lebel JJ, at para 115, say: “Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.”), or where a duty of fairness is necessarily implied from statute.

## The “content” of procedural fairness: a spectrum

* If a court determines that the threshold for some kind of procedural fairness has been met, it must then address the content of that duty, the standard of review for this content being correctness

### The content of the duty of fairness is flexible and context-specific

* + In ***Nicholson* (1978)**, the SCC held that the content of the duty was flexible and context-specific. Laskin CJ (majority) stated: “…as was pointed out by Tucker LJ in *Russell v Duke of Norfolk,* …the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.” Laskin CJ also quoted Lord Denning in *Selvarajan*: “… that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it”.
  + In ***Cardinal* (1985)**, the SCC considered the degree of procedural fairness owed in the prison context. Le Dain J, speaking for a unanimous SCC, held that the prison director’s original decision to send the appellants to segregation was procedurally fair, even though there were no reasons for his decision and the appellants were not given an opportunity to respond. However, Le Dain J agreed with Anderson JA (CA dissent) and McEachern CJ (trial) that the Director had breached his duty of procedural fairness to the appellants after the Segregation Review Board recommended that they be returned to general population. Quoting Anderson JA, Le Dain J said: “While the respondent was not entitled to a full hearing or to confront witnesses or to counsel, at the very least he ought to have been given an opportunity to make representations as to why he should no longer be kept in solitary confinement.” Le Dain J also held that the appellants ought to have been given reasons for their continued confinement. Le Dain J said: “These [reasons and the opportunity to respond] were in my opinion the minimal or essential requirements of procedural fairness in the circumstances, and they are fully compatible with the concern that the process of prison administration, because of its special nature and exigencies, should not be unduly burdened or obstructed by the imposition of unreasonable or inappropriate procedural requirements.”
  + In ***Baker* (1999)**, L’H-D affirmed that the following 5 factors, identified by the SCC in *Knight* (1990)*,* were relevant to determining the general scope of the duty: (1) the nature of the decision and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision; and (5) the procedures chosen by the tribunal. These 5 factors are not exhaustive, and represent the spectrum of procedural fairness. The SCC concluded that Baker was entitled to procedural fairness but that this duty was minimal: she was entitled to written reasons (Officer Lorenzo’s memo satisfied this requirement), but no oral hearing.

### The need to balance the content of the duty of fairness w/ administrative efficiency

* + Even though the standard of review for procedural fairness is correctness, there is some room for deference because courts will take into account the procedural choices made by the decision-maker.
  + In ***Nicholson* (1978)**, Laskin CJ (majority) suggested that there is a need to balance the content of procedural fairness with the need to ensure administrative efficiency, quoting Lord Pearson in *Pearlberg*: “Fairness… does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed…” (p 326)
  + Likewise, in ***Baker* (1999)**, L’H-D emphasized the importance of respecting the needs of ADMs: “The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. […] …the aim is not to create “procedural perfection” but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome” (para 49).

### Specific requirements of the duty of fairness

* + Once a court determines what general level of procedural fairness applies, it will then determine specific procedures required under that duty. These may include: notice, information disclosure, the opportunity to participate, the right to a full hearing, the opportunity to give evidence and cross examine, a right to counsel, and a right to oral or written reasons.

#### Should the duty of fairness include the right to an oral hearing**?**

* + - Oral hearings will sometimes be required under the duty of fairness, but not always.
    - *Reasons for requiring an oral hearing:*
      * Where a decision depends on findings of witness credibility.
      * Where a decision is of great importance to an individual (but note: the SCC in ***Baker* (1999)** found that Baker was not entitled to an oral hearing).
    - *Reasons for not requiring an oral hearing:*
      * The modern regulatory state would have difficulty function if an oral hearing was required for every administrative decision. Potential for great expense and delay.

#### Should the duty of fairness include the duty to give reasons?

* + - Pre-*Baker*, administrative decision-makers did not have a duty to provide reasons.
    - In ***Baker* (1999)***,* L’H-D J laid out a number of situations in which reasons may be required, including: (a) where a decision is of great importance to an individual (as in *Baker*), decision-makers should provide reasons to justify their decisions out of respect to the individual and their dignity; and, (b) where there is a statutory right of appeal decision-makers should provide reasons explaining their decisions to facilitate the appeal process. L’H-D J also left door open for “other circumstances”.
    - However, in ***Keen* (2009),** the Federal Court found that Linda Keen, who was dismissed mid-way through her second 5-year term as President of the Canadian Nuclear Safety Commission, had been provided with adequate procedural fairness: the Minister of Natural Resources wrote to Ms. Keen, telling her that he was considering recommending her termination to the Governor in Council, stated the reasons for his concern, and offered her the opportunity to respond. There were no final reasons for her termination, even though Ms. Keen arguably lost her livelihood as a result of this decision.
    - *What satisfies the requirement to provide reasons?*
      * In ***Baker* (1999)***,* L’Heureux-Dube J suggested that administrative decision-makers need only provide “some form of reasons”. Thus the required content of reasons can vary widely, e.g. in *Baker,* Officer Lorenzo’s informal memo to the senior officer satisfied the duty.
      * In ***Newfoundland Nurses Union* (2011)**, Abella J (SCC) held that alleged deficiencies in reasons provided are a matter for substantive review, not procedural review. If there are reasons, no breach of the duty of fairness.
    - As Dyzenhaus has suggested, **the requirement to give reasons can invite judicial activism and may distort the administrative process**. This is because, on a substantive reasonableness analysis, a court may find that the reasons given are in some way inadequate or defective: where this is the case, as Bastarache and Lebel JJ in ***Dunsmuir* (2008)** suggested, courts should pay “respectful attention to the reasons offered *or which could be offered*” to support a decision (para 48). Considering reasons “which could be offered” may be an important feature of deference, but may also involve courts reformulating a decision-maker’s reasons to render it reasonable. As the BCCA suggested in ***Petro-Canada* (2009)**, showing respectful attention to reasons that could have been offered should not be a “carte blanche to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result”.

## The consequences of quashing a decision may actually limit the protection of procedural fairness

* An administrative decision which, on a correctness standard, is found to breach the duty of fairness is void: a court will send the matter back to the decision-maker to decide again.
* However, **the** **retrospective nature of procedural review and the far-reaching consequences of quashing an administrative decision might actually limit the protection of this right**. Sending a decision back to a decision-making can be costly to all parties involved – both in time and in money – and may therefore harm the public interest. As Huscroft suggests, courts may be compelled to err on the side of finding that the duty of fairness has been met, to avoid these consequences of quashing a decision: “As long as quashing is the usual remedy for breach of fairness, courts may be circumspect in expanding the scope and content of the duty of fairness.”

# Independence, Impartiality & Bias = Elements of Procedural Fairness

## Introduction to tribunal independence, impartiality and bias

* A key characteristic of a **fair** **proceeding** is that the decision-maker and the decision-making process be independent and impartial, i.e. free from undue government pressure, not driven by preconceived notions or prejudice, and not based on undue preferential treatment. *Audi alteram* requires that the decision-maker focus on the relevant facts and law, not on irrelevant considerations. *Nemo judex* requires that the decision-maker avoid making decisions for personal gain or benefit, or decisions that are otherwise partial. This is important to the individuals impacted by the tribunal’s decision; this is also important to the public’s confidence in the administration of justice.
* **Bias** = the perception of partiality towards a particular outcome; there can be perceptions of *individual bias* and perceptions of *institutional bias.* The test for bias is based on perception, i.e. a reasonable apprehension of bias: whether a reasonable, well-informed person having thought the matter through would conclude than an administrative decision-maker is sufficiently free of factors that could interfere with his or her ability to make impartial judgments. This test was articulated by DeGrandpre J (SCC) in *Committee for Justice and Liberty* (1978).
* **Impartiality** = the ideal state of the decision-maker, characterized by open-minded decision-making, i.e. decision-making that is free from inappropriate interference or influence.
* **Independence** = the means for achieving impartiality.

## The extent to which administrative bodies should be independent of the branches of govt that created them

### Underlying tension b/w deference and asserting judicial paradigms

* There is a continual oscillation in Canadian administrative law between allowing **deference to administrative and legislative decision-making** on the one hand, and **asserting judicial paradigms** to resolve issues of independence, impartiality and bias, on the other hand.
* This oscillation so far consists of three waves: first, the use of judicial independence as a foundation on which to mould the concept of tribunal independence; second, the development of the idea that there is no constitutional guarantee of tribunal independence, marked by *Ocean Port*; and, third, the retrenchment of the idea that (in some cases) tribunal independence is constitutionally guaranteed.

#### Wave 1: the concept of judicial independence may extend to administrative tribunals

* Judicial independence was described by Dickson CJ in ***Beauregard* (1986)** as: “…the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.”
* Three necessary conditions for judicial independence are:
  + **Security of tenure**: s. 99 of the *Constitution Act, 1867* provides that judges can only be removed by the government with cause; before removal, judges must also have the opportunity to respond to the allegations against them; tenure prevents the govt from removing a judge simply because he/she rendered a decision the govt did not approve of.
  + **Financial security**: s. 100 of the *Constitution Act, 1867* guarantees judges a fixed salary; judges must also be paid an amount that is sufficient to keep them from seeking alternative means of supplementing their income (e.g. accepting bribes).
  + **Institutional control**: finally, judges are guaranteed control of the manner in which the affairs of the court are administered, e.g. assignment of cases, budgetary allocations.
* The purpose of judicial independence is to enhance public confidence in the administrative of justice. The *perception* of judicial independence is just as important as its existence.
* In ***Valente* (1985)**, the SCC suggested that judicial independence might also apply to admin tribunals.
* Subsequently, however, the SCC held that the standard for tribunal independence is not as strict as that for judicial independence, largely b/c of the plurality of tribunal structures and fcns. Example: in ***Matsqui* (1985)**, Lamer CJ (SCC) suggested the test for tribunal independence should be “applied in light of the functions being performed by the particular tribunal at issue”: “The requisite level of institutional independence (i.e. security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.”

#### Wave 2: there is no free-standing constitutional guarantee of tribunal independence (*Ocean Port*)

* In ***Ocean Port* (2001)***,* the issue was the “at pleasure” appointment of the Liquor Appeal Board. McLachlin CJ, speaking for a unanimous SCC, held that there is no free-standing constitutional guarantee of independence for administrative tribunals. For two underlying reasons:
  + First, unlike the courts, administrative tribunals are not separate from the executive branch of govt. It is therefore up to the legislature to determine the appropriate degree of independence required by a particular tribunal. McLachlin CJ noted that administrative tribunals “are, in fact, created precisely for the purpose of implementing government policy” and “may be seen as spanning the constitutional divide between the executive and judicial branches of government”.
  + Second, natural justice is a common law principle. The degree of tribunal independence required at common law can always be overridden by express statutory language. Some administrative tribunals, like the Quebec Liquor Board in ***Regie* (1996)** may be subject to a statutory, quasi-constitutional requirement for independence (e.g. under the Quebec Charter). However, other administrative tribunals, like the BC Liquor Appeal Board, are not subject to a similar constitutional restraint. It is up to the legislature to determine the degree of independence required by an administrative tribunals, and courts must respect this choice.

#### Wave 3: retrenchment of tribunal independence as constitutionally guaranteed

* In ***Bell Canada* (2003)**, the SCC suggested that there was a spectrum of procedural fairness owing to different administrative tribunals. Tribunals that were highly adjudicative (i.e. quasi-judicial) should attract a higher degree of procedural fairness, including a higher degree of independence from the executive branch. On the other hand, tribunals that were administrative in nature, e.g. tasked primarily with developing or supervising the implementation of govt policies, should attract a lesser degree of procedural fairness, including a less degree of independence from the executive branch.
* In ***McKenzie* (2007)**, the BCSC held that the constitutional guarantee of judicial independence should apply to residential tenancy arbitrators b/c they fell on the far adjudicative/quasi-judicial end of the admin tribunal spectrum. The jurisdiction of RT arbitrators was taken directly from the courts.
* *But what about administrative tribunals that fall in the middle of the spectrum, i.e. have both an adjudicative and a policy-making function? Should the constitutional guarantee of judicial independence also extend to these administrative tribunals?*
* **More broadly:** this retrenchment is an example of **judicial activism**, i.e. the courts (re)asserting judicial paradigms to resolve the issues of independence, impartiality and bias in administrative law (rather than deferring to administrative and legislative decision-making, which appeared to be the case in *Ocean Port, Keen,* and *Consolidated Bathurst*). Better approach: Sopinka J (dissent) in *CB.*

### “At pleasure” appointments and tribunal independence: free-standing constitutional guarantee?

* **Security of tenure** is one of the three necessary conditions for judicial independence, guaranteed in s. 99 of the *Constitution Act, 1867* for superior court judges, and extended through the application of unwritten constitutional principles to provincial judges (*PEI Reference*), justices of the peace (*Alberta v Ell*), and deputy judges in small claims court (*Ontario Deputy Judges’ Association*). Tenure prevents the govt from removing a judge simply because he or she rendered a decision that the govt did not approve of.

#### *Ocean Port*: at pleasure appointments can satisfy the requirement for tribunal independence

* + In ***Regie* (1996)**, the SCC held that the requirement for tribunal independence did not necessitate that administrative decision-makers hold office for life; they could simply not face the possibility of termination at pleasure. In *Regie,* the directors of Quebec’s liquor licensing board had fixed-term appointments, could only be dismissed for specific reasons, and, if dismissed, had a right of appeal.
  + In ***Ocean Port* (2001)**, the McLachlin CJ, writing for a unanimous SCC, distinguished *Regie* (1996) because the Quebec liquor board was subject to the Quebec Charter’s quasi-constitutional guarantee of tribunal independence (whereas the BC Liquor Appeal Board was not subject to a similar statute). In *Ocean Port,* McLachlin CJ held that the at-pleasure appointment of Liquor Appeal Board members did not undermine the tribunal’s independence enough to render the Board’s decisions invalid. She concluded that a variety of tribunal appointments, including at pleasure appointments, can satisfy the requirement for tribunal independence, so long as: (a) the terms of appointment are derived from constitutionally valid legislation, and (b) there are no overriding constitutional standards at play. In other words, there is no free-standing constitutional guarantee for tribunal independence.
    - McLachlin CJ suggested that the two principles underlying this conclusion were: first, the fundamental distinction between administrative tribunals and courts, and, second, the fundamental principle of law that statutory regimes prevail over common law principles of justice (absent constitutional constraints).

#### *Ocean Port*: the fundamental distinction between administrative tribunals and courts

* + In ***Ocean Port* (2001)**, McLachlin CJ for a unanimous SCC highlighted the fundamental distinction between administrative tribunals and courts. Judicial independence, including security of tenure, developed to insulate the judiciary from the executive. McLachlin CJ suggested: “Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and the judicial branches of government. […] While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not.”

#### *Ocean Port*: legislative will prevails over CL principles of natural justice (absent constitutional constraints)

* + In ***Ocean Port* (2001)**, the appellant decision-maker argued, and McLachlin CJ for a unanimous SCC agreed, that it is a fundamental principle of law that, “absent a constitutional challenge, a statutory regime prevails over common law principles of natural justice”. The degree of independence required of a particular decision-maker or tribunal is, absent constitutional constraints, to be determined by the decision-maker or tribunal’s enabling statute. McLachlin CJ added: “It is the legislature or Parliament that determines the degree of independence required of tribunal members. […] **It is not open to a court to apply a common law rule in the face of clear statutory discretion.** Courts engaged in judicial review of administrative decisions must defer to the legislator’s intention in assessing the degree of independence required of the tribunal in question.” McLachlin CJ reiterated this point: “Where the intention of the legislature… is unequivocal, there is no room to import common law doctrines of independence, “however inviting it may be for a Court to do so”…”
  + **If legislation is silent or ambiguous**, McLachlin CJ in *Ocean Port* (2001) suggested that courts will generally “infer that Parliament or the legislature intended the tribunal’s process to comport with principles of natural justice.” In *Ocean Port,* McLachlin CJ notes that the BC Legislature was very clear in s. 30(2)(a) of the *Liquor Control and Licensing Act* that members of the Appeal Board served at the pleasure of the Lieutenant Governor in Council.
  + The only exception to the paramountcy of the legislature’s will over the common law principles of natural justice exists where there is a **constitutional or quasi-constitutional guarantee of tribunal independence.** For example, in *Regis,* the SCC held that at pleasure appointments violated the requirement for tribunal independence guaranteed by the Quebec Charter, a quasi-constitutional doc.

#### Argument: crts should recognize a constitutional guarantee of independence for quasi-judicial tribunals

* + In ***Ocean Port* (2001)**, the respondent Hotel argued that the preamble of the *Constitution Act, 1867* mandates a minimum degree of independence for at least some tribunals (i.e. those that exercise adjudicative functions), relying on Lamer CJ’s discussion of judicial independence in ***Provincial Court Judges Reference* (1997)***.* McLachlin CJ, writing for a unanimous SCC, disagreed, noting that the *Judges Reference* concerned the extension of the guarantee of judicial independence to provincial courts: “The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. […] The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body.”
  + However, as McLachlin CJ herself acknowledges in *Ocean Port* (2001), the Constitution is an organic document that should be interpreted flexibly to reflect changing circumstances.
  + If some administrative tribunals are *functionally* similar to courts, should the constitutional guarantee of independence not apply to these tribunals too? For example, in ***McKenzie* (2007)**, the BCSC held that the constitutional guarantee of judicial independence should apply to residential tenancy arbitrators b/c they fell on the far adjudicative/quasi-judicial end of the admin tribunal spectrum. The jurisdiction of residential tenancy arbitrators was taken directly from the courts, and so it makes sense to extend this constitutional guarantee. The realities of an expanding administrative state should not compromise individuals’ right to, as L’Heureux-Dube J, writing for a majority of the SCC in ***Baker* (1999)**, described: “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 decision.”
  + Counterargument to recognizing a free-standing constitutional guarantee of tribunal independence:
    - Hard to distinguish between quasi-judicial and other tribunals. Often, the functions of administrative tribunals are mixed: adjudicative and policy-making and implementation.
    - Courts shouldn’t turn to the preamble of the *Constitution Act, 1867,* to find this kind of constitutional guarantee for quasi-judicial administrative tribunals > the legislatures can enact quasi-constitutional statutes, like the Quebec Charter, if they want to ensure that procedural fairness, especially tribunal independence, is guaranteed for certain administrative processes.

#### Legislative push towards fixed-term appointments

* + Since ***Ocean Port* (2001)***,* there has been a legis push towards fixed-term appointments for ADMs.
  + Section 3 of the **BC *Administrative Tribunals Act***(ATA), enacted in 2004, provides that members of the provincial tribunals listed in the Act should be appointed for an initial fixed term of 2 to 4 years, and then subsequently reappointment for additional fixed terms of up to 5 years.
  + Section 38 of the **Quebec *Administrative Justice Act*** (AJA)was amended in 2005 so that members of administrative tribunals could have tenure on good behaviour (i.e. be appointed for life, provided that they maintained good behaviour). Tenure under AJA is equivalent to the security of tenure for judges.
  + In 2007, the United Kingdom enacted the ***Tribunals, Courts and Enforcement Act 2007***, which guarantees administrative decision-makers the same independence as judges.

### Do “at pleasure” appointments attract a duty of fairness? What is the content of this duty?

#### Historically, at pleasure appointments attracted no common law duty of fairness

* + Historically, courts treated “at pleasure” appointments as attracting no duty of fairness. In *Baldwin* (1963), Lord Reid of the House of Lords set out a distinction between three public employment relationships: (1) the master-servant relationship, i.e. contractual employment; (2) public offices held “at pleasure”; and, (3) public officers where there must be cause for dismissal. As Bastarache and Lebel JJ (majority) explained in ***Dunsmuir* (2008)**, “only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed “at pleasure” could be dismissed without reason”.
  + For example, in ***Nicholson* (1978)**, Martland J (writing the dissenting judgment for himself and three others) held that a person who holds office at pleasure has no right to reasons or a hearing: “…there are many cases where a man holds office at pleasure. […] It has always been held… that such an officer has no right to be heard before he is dismissed, and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reasons.” Laskin CJ (majority) found that Nicholson’s dismissal without notice and reasons was void because he fell into Lord Reid’s third category of office holder, and therefore was entitled to procedural fairness.
  + However, in ***Knight* (1990),** L’H-D (majority), contrary to Lord Reid’s holding, recognized that the duty of fairness *did* extend to office holders “at pleasure”. This assertion was later qualified/toned down by the SCC in ***Dunsmuir* (2008)**: “to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed”.

#### The common law duty of fairness owed to at-pleasure appointees

* + In ***Dunsmuir* (2008)**, the SCC held that, *in the absence of an employment contract,* a public office holder who holds their office “at pleasure” is owed a public law duty of fairness: “Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously”. But in the presence of an employment K, Bastarache and Lebel JJ (majority) held that a public officer is not entitled to a common law duty of fairness: “Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of the employee’s status as an office holder.”
  + Though ***Dunsmuir* (2008)** suggests that truly at-pleasure appointees are owed a common law duty of fairness (in the absence of legislation to the contrary), the content of this duty appears to be minimal.
  + In ***Keen* (2009)**, the Federal Court held that the termination of at-pleasure appointees did not require final reasons. Ms. Keen, the President of Canada’s Nuclear Safety Commission, was removed from her job over a decision to keep a nuclear power plant closed for its failure to meet safety standards (this nuclear reactor was also a primary source of medical isotopes). Ms. Keen was in her second 5-year term as President. The Commission reported to the Minister of Natural Resources. The Minister wrote to Ms. Keen, advising her that he was considering recommending to the Governor in Council that she be removed from her position, stating the reasons for his concern, and offering her the opportunity to respond. The Federal Court found that Ms. Keen had been provided w/ adequate procedural fairness. From *Keen,* it is possible to draw two conclusions:
    - Either the common law duty of fairness owed to all at-pleasure appointees is minimal, i.e. the content of this duty does not include the requirement to provide reasons.
    - Or the common law duty of fairness owed to Ms. Keen was minimal given the nature of the decision and the function of the Nuclear Safety Commission as a whole, i.e. not court-like > policy-driven. This conclusion could be arrived at by applying the five *Baker* factors to determine the scope of procedural fairness owed in a given case. Arguably, however, another factor – the importance of this decision to Ms. Keen’s career – militates in favour of a greater content of procedural fairness, including reasons.

#### Argument: the common law duty of fairness owed to at-pleasure appointees should be more robust

* + In ***Nicholson* (1978),** Laskin CJ (majority) found that Nicholson was not an office holder “at pleasure” but noted, in dicta, that “the old common law rule… that a person engaged as an office holder at pleasure may be put out without reasons or prior notice ought itself to be re-examined”. Quoting de Smith, Laskin CJ suggested that office holders at pleasure should not be dismissed arbitrarily, and that the very nature of their appointments should be entitled them to procedural fairness: “indeed, the unreviewability of the substantive grounds for removal indicates that procedural protection may be all the more necessary”. (p 323)

### Tension b/w the policy-making & adjudicative functions of a tribunal

* Houle and Sossin suggest that **administrative tribunals engage in policy-making** in three ways: (1) decision-making; (2) informal rule-making through the use of “soft law” tools, e.g. guidelines, bulletins, manuals; and, (3) formal rule-making through delegated legislation. This policy-making tends to: (a) develop the law under the statute that the tribunal has been mandated to administer; (b) ensure consistency in the decisions rendered by the tribunal; and (c) render the tribunal’s decision-making process more efficient.
* Similarly, in ***Ocean Port* (2001)**, McLachlin CJ (SCC) suggested that administrative tribunals are “created precisely for the purpose of implementing government policy”. B/c of this primary policy-making function, the degree of independence owed by a particular tribunal is best determined by the legislature, not the crts. [Note: *In light of Ocean Port, can any administrative tribunals be said to be purely adjudicative? Do all administrative tribunals create policy through their decision-making? Think: residential tenancy arbitrator.]*
* An example of the **multifunctionality** of a single administrative tribunal is the Canadian International Trade Tribunal (CITT). The CITT has both broad policy-development powers and broad adjudicative powers.
* **But tensions may exist b/w the various functions of an admin tribunal:**
  + For example, a tension may exist b/w the value of collaboration (promoting efficient, consistent decision-making) and the importance of impartiality (i.e. adjudicative independence).
    - In ***Consolidated Bathurst* (1990)**, the Labour Relations Board held a full board meeting to discuss a draft decision. There was no express statutory in the *Labour Relations Act,* the Board’s enabling statute, that provided the authority for holding full board meetings.
  + Tensions may also arise b/w the various functions of a single decision-maker or single tribunal.
    - In ***Ocean Port* (2001),** the Senior Inspector who issued the initial 2-day liquor licence suspension was both the investigator, the prosecutor, and the decision-maker. The respondent Hotel argued that this multifunctionality gave rise to a reasonable apprehension of bias. McLachlin CJ (for a unanimous SCC) disagreed, finding that the “mere fact that senior inspectors functioned both as investigators and as decision makers does not automatically establish a reasonable apprehension of bias”. McLachlin CJ added: “The overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role…”.
* In ***Ocean Port* (2001)**, McLachlin CJ (for a unanimous SCC) concluded that, “absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias”, and other common law rules of natural justice. This suggests that the multifunctionality of administrative tribunals is not only a reality that can coexist with the rules of natural justice, but its existence may also supersede the rules of natural justice, absent constitutional constraints.

### Full board meetings & institutionalized decision-making: adequate tribunal independence?

* Full board meetings – a form of institutionalized decision-making – are a way to promote consistency in the decisions rendered by an administrative tribunal, as well as a way to render the tribunal’s decision-making process more efficient (e.g. the decision-maker can benefit from the input, expertise of other tribunal members). Full board meetings involve the discussion of a particular matter by all tribunal members, not just those members tasked with hearing and deciding the matter. **However, there is also the potential that full board meetings compromise the adjudicative independence of those members tasked with hearing and deciding the matter,** as Sopinka J (dissent) suggested in *Consolidated Bathurst* (1990).

#### Majority: Full board meetings promote knowledge sharing and achieve uniformity in decision-making

* + In ***Consolidated Bathurst* (1990)**, Gonthier J, representing 5 of a 7 member panel of the SCC, noted that the purpose of the full board meeting was to promote knowledge sharing and achieve uniformity in decision-making. The Chair of the Ontario Labour Relations Board described the purpose of the full board meeting as achieving “a maximum regulatory effectiveness in a labour relations setting” (p 316). Gonthier J echoed this: “…the full board meetings held by the Board are designed to promote discussion on important policy issues and to provide an opportunity for members to share their personal experiences in the regulation of labour relations.”

#### Majority: Balancing efficiency and uniformity with the rules of natural justice

* + In ***Consolidated Bathurst* (1990),** Gonthier J (majority SCC) said: “…the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law.” Later, Gonthier J added: “The advantages of the practice of holding full board meetings must be weighed against the disadvantages involved in holding discussions in the absence of the parties.” Gonthier J also suggested that allowing parties to be present at full board meetings to answer arguments “would entail… difficulties since their presence would necessitate some formal procedure and involve organizational difficulties as well.” It was sufficient the Board’s usual practice at full board meetings was to not keep minutes, not take attendance, not vote, and limit discussion to policy implications of draft decisions.
  + The Labour Relations Board handled 3189 cases in 1982-83 and employed 48 full-time and part-time board members. The Board’s full-time Chair and Vice-Chair handled an average of 266 cases per year.

#### Dissent: Efficiency and uniformity should not be achieved at the expense of the rules of natural justice

* + In ***Consolidated Bathurst* (1990),** Sopinka J (dissent SCC) argues that, “[w]hile achieving uniformity in the decisions of individual boards is a laudable purpose, it cannot be done at the expense of the rules of natural justice”.

#### Majority: The presence of other members at full board meetings is not amount to “participation”

* + In ***Consolidated Bathurst* (1990),** Gonthier J (majority SCC) suggests that “the presence of other Board members at the full board meeting” cannot “amount to “participation” in the final decision, and posits that, “discussions with colleagues do not constitute, in and of themselves, infringements on the panel members’ capacity to decide the issues at stake independently”. “Whatever discussion may take place,” he says, “the ultimate decision will be that of the decision maker”.

#### Dissent: Full board meetings are potentially influential, and sufficient that there is an appearance of injustice

* + In ***Consolidated Bathurst* (1990),** Sopinka J (dissent SCC) disagrees with Gonthier J, suggesting that the views expressed at full board meetings are potentially very influential on the three panel members: “Given the number of Board members present and the fact that included were an alternate Chairman, Vice-chairman and solicitors, the views expressed were potentially very influential.”
  + Sopinka J also notes the impossibility of achieving uniformity in Board decisions w/o affecting the decisions of individual panels: “Uniformity can only be achieved if some decisions are brought into line with others by the uniform application of policy.”
  + Finally, Sopinka J says that it is sufficient that there is an *appearance* of injustice. He notes that, “in matters affecting the integrity of the decision-making process, it is sufficient if there is an appearance of injustice”, and refers to the oft-quoted “justice should not only be done but manifestly and undoubtedly be seen to be done”.

#### Further breaking down the majority’s participation/influence argument in *Consolidated Bathurst*

* + While Gonthier J (majority SCC) suggests that “the presence of other Board members at the full board meeting” cannot “amount to “participation” in the final decision, he acknowledges, in the same sentence, that “their contribution to the discussions which took place at that meeting can be seen as a “participation” in the decision-making process in the widest sense of that expression.”
  + Gonthier J (majority SCC) also acknowledges the influence that colleagues may have on one another: “…decisions makers are entitled to change their minds whether this change of mind is the result of discussions with colleagues or the result of their own reflection on the matter. A decision maker may also be swayed by the opinion of the majority of his colleagues in the interest of adjudicative coherence since this is a relevant criterion to be taken into consideration…”
  + Finally, Gonthier J’s (majority SCC) proposition that “the criteria for independence is not the absence of influence but rather the freedom to decide according to one’s own conscience and opinions” does not past muster when one’s own conscience and opinions *may be influenced by others* *>* danger is that the decision-maker’s conscience, opinions may be influenced by others who have not heard the evidence.
  + In ***Tremblay* (1992)**, the SCC held that consultation between tribunal members may give rise to a reasonable apprehension of bias. In *Tremblay,* the Commission des Affaires Sociales (CAS) had the practice of requiring that decision-makers consult with other members of the Commission when there proposed decision was contrary to previous decisions. In this situation, the SCC found that the *mandatory* consultation gave rise to the appearance of “systemic pressure”. Notably, the checks and balances present in *Consolidated Bathurst* were absent in *Tremblay*: the CAS kept minutes of the consultation meetings, took attendance, and voted.

#### The distinction between discussions about facts and discussions about law and policy

* + In ***Consolidated Bathurst* (1990)**, Gonthier J (majority SCC) asserts that policy discussions could be segregated “from the factual decisions which will determine the outcome of the case”: “The purpose of the policy discussions is not to determine which of the parties will eventually win the case bur rather to outline the various legal standards which may be adopted by the Board and discuss their relative value.” [However, Gonthier J also acknowledges that policies are adopted in a factual context: “While they are adopted in a factual context, they are an expression of principle or standards akin to law”.]
  + In contrast, Sopinka J (*Consolidated Bathurst* dissent) suggests that policy has a factual component that the law does not have. It follows that parties affected by an administrative decision should have the right to address policy issues with evidence and cross-examination. Sopinka J points to the SCC’s decision in *Innisfil,* in which the right of a party to challenge policy by evidence was affirmed. Sopinka J says: “If a party has the right to attack policy in the same fashion as fact, it follows that to deprive the party of that right is a denial of a full opportunity to present evidence and is unfair. Policy in this respect is not like the law which cannot be the subject of evidence or cross-examination.”
  + Sopinka J (*Consolidated Bathurst* dissent) also notes that **there is no single policy that is necessarily the right policy:** “Often there are competing policies, selection of the better policy being dependent on being subjected to the type of scrutiny which was ordered in *Innisfil…*”.
  + Finally, Sopinka J (*Consolidated Bathurst* dissent) argues that policy should be exercised fairly in administrative decision-making. Sopinka J quotes the following passage from Wade, *Administrative Law*: “Policy is of course the basis of administrative discretion in a great many cases, but this is no reason why the discretion should not be exercised fairly vis-à-vis any person who will be adversely affected. The decision will required the weighing of any such person’s interests against the claims of policy; and this cannot fairly be done without giving that person an opportunity to be heard.”

#### If the legislature wants full board meetings, it can allow them > back to underlying tension

* + In ***Consolidated Bathurst* (1990)**, there was no express power in the *Labour Relations Act,* the Labour Relations Board’s enabling statute, that empowered the Board to hold full board meetings. However, s. 102(13) of the Act did require that the Board give parties the full opportunity to present evidence and submissions. Sopinka J (dissent) argued that, in the absence of express authorization for full board meetings, the practice violated the principles of natural justice: “If it is the desire of the legislature that this purpose be pursued it is free to authorize the full board procedure.”
  + As McLachlin CJ for a unanimous SCC in ***Ocean Port* (2001)** said of tribunal independence more generally: “It is the legislature or Parliament that determines the degree of independence required of tribunal members. […] It is not open to a court to apply a common law rule in the face of clear statutory discretion.Courts engaged in judicial review of administrative decisions must defer to the legislator’s intention in assessing the degree of independence required of the tribunal in question.”
  + This goes back to the underlying tension between deference and asserting judicial paradigms. In ***Consolidated Bathurst* (1990)**, the majority appeared to adopt a deferential approach to full board meetings, finding that, given the institutional constraints faced by the Labour Relations Board, full board meetings were an acceptable breach of natural justice. Gonthier J (majority) held that it was sufficient that the Board’s usual practice at full board meetings was to not keep minutes, not take attendance, not vote, and limit discussion to policy implications of draft decisions. In contrast, it appears that Sopinka J (dissent) adopted a more activist approach to full board meetings. Sopinka J was unwilling to accept full board meetings as they were “at the expense of the rules of natural justice”. In the absence of clear statutory language, Sopinka J eager to uphold a more robust version of tribunal independence and procedural fairness.
  + In his conclusion to the majority’s ***Consolidated Bathurst* (1990)** judgment, Gonthier J quotes Professors Blache and Comtois: “The institutionalizing of decisions exists in our law and appears to be there to stay. The problem is thus not whether institutional decisions should be sanctioned, but to organize the process in such a way as to limit its dangers.” Gonthier J (dissent) was satisfied to do less to limit the dangers of institutional decision-making than Sopinka J (dissent) was.
  + I think Sopinka J’s approach was the better one: absent constitutional constraints, it should be the legislature that chooses to expose affected parties and the public generally to the dangers of institutional decision-making, not the courts. In other words, the legislature should be the one that chooses to expose affected parties and the public to greater risk; the courts should, in the absence of clear statutory direction, aim to uphold robust principles of procedural fairness, limiting the risk.

### Proactive measures adopted by multifunctional tribunals may hinder efficient decision-making

* An administrative tribunal that serves multiple functions, e.g. policy-making and adjudication, may adopt proactive measures to reduce the appearance or reality of institutional or adjudicative bias.
* For example, the tribunal may attempt to maintain a de facto separation of powers between these two roles.
* But this raises the question: *might overly cautious tribunals actually hinder efficient decision-making by insulating expertise developed in one area of the tribunal’s work from other areas?*
* Another example is the appointment of technical experts whose past work may give rise to a perception of bias. *If an overly cautious tribunal avoided appointment such an expert, could the quality of their decision-making suffer as a consequence?*

### Legislated standards of review for procedural fairness: a lower standard?

* Sections 58 and 59 of the BC *Administrative Tribunals Act* (ATA) provide that the standard of review to be applied to questions about “the application of the common law rules of natural justice and procedural fairness” is not correctness; rather, procedural fairness questions “must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly”. This legislated standard of review appears to be more deferential than the correctness standard that is applied, at common law, to questions of procedural fairness.

### The need to reconceive the nature and purpose of administrative tribunals

* A consistent theme throughout the case law is the need to apply a contextual approach to determine the degree of procedural fairness required by a particular administrative tribunal. This contextual approach is necessary given the vast plurality of administrative tribunals – while some serve a largely adjudicative function, others are policy-oriented, and still others perform a combination of both. It appears that there is no “one size fits all” test for procedural fairness generally, or tribunal independence and decision-maker impartiality in particular. Given this, in order to guarantee (or at least clarify the need for) an independent and impartial tribunal in administrative proceedings, it may be necessary to begin by reconceiving the very nature and purpose of administrative tribunals. *Do all administrative tribunals serve some kind of policy-making function? Is there such a thing as a purely adjudicative tribunal?*

### The need to reconceive our understanding of“impartiality” and “independence”

* It may also be that, in order to guarantee independence and impartiality in administrative proceedings, we must also reconceive our understanding of “impartiality” and “independence”. *Should the reasonable apprehension of bias test apply to all administrative decisions, or only those that are adjudicative in nature? Should independence mean independence from the executive branch, independence from other branches within an administrative tribunals, or independence from other decision-makers?*

# Standard of Review Analysis

## Philosophical Foundations

### The tension between the rule of law and legislative supremacy

* On the one hand, the rule of law prevents administrative decision-makers from being “sole judges of the validity of their own acts”. This is a Diceyan view of administrative law. As Mary Liston has suggested, the rule of law is “animated by the need to prevent and constrain arbitrariness within the exercise of public authority by political and legal officials in terms of process, jurisdiction, and substance”.
  + *But, as Dickson J suggested in* ***CUPE (1979)****, who is to say that judge-made law is the only valid law?*
* On the other hand, parliamentary supremacy demands that courts respect the will of legislators, as set out in statutes, including privative clauses. As McLachlin CJ, writing for a unanimous SCC in ***Ocean Port* (2001)**, said, “where the intention of the legislation… in unequivocal”, there is no room for courts to override or ignore that intention, “however inviting it may be for a Court to do so””. This is grounded in the idea that legislative accountability derives from oversight by the electorate.
  + *But does electorate oversight actually work in practice?* The reality could be a breakdown of micro-political accountability.

### The romantic account *versus* the skeptical account of substantive review

#### The romantic account: the pluralist model of constitutional ordering

* The pluralist model of Constitutional ordering presents a “romantic” account of substantive review, and may be linked to the growth of deference in Canadian admin law, beginning with *CUPE* (1979).
* As Wildeman suggests, this account is “modeled not as a matter of judges patrolling the legal limits of administrative action, but rather as an expression of a wider constitutional project shared among the legislative, judicial, and executive/administrative branches”. The pluralist model expresses a constitutional ordering wherein the three branches of government collaborate in a shared project of public justification. The different perspectives and capacities of actors, including the courts and administrative bodies, is thought to reinforce, rather than undermine, this common project.
* The pluralist model involves a dialogue between the three branches of government. The rule of law is upheld not just by the courts, but by all three branches of government, as well as individual Canadians. As Cartier explains: “Legislatures and administrative tribunals have a role in the determination of the values considered fundamental to the Canadian social, political and legal order, as do the parties who challenge the state to show that its exercises of public power are accountable to those underlying values.”

#### The skeptical account: the Diceyan model of administrative state ordering

* The Diceyan model of administrative state ordering presents a less collaborative, less romantic account of substantive review, dubbed the “skeptical” account. The Diceyan model proscribes the strict separation of powers between the three branches of government. As Wildeman explains, “on the Diceyan model, the legislature is the proper source of the laws conferring authority on administrative decision-makers; administrative decision-makers executive or exercise the authority so conferred; and judges apply their law-interpretive capacities to ensure that administrative action remains within the limits of legislative intent”.
* In this model, the role of courts is to police administrative action and uphold the rule of law. The tension between the rule of law and legislative supremacy is also accentuated. According to Wildeman, “the Diceyan judge is caught between conflicting signals: to respect Parliamentary sovereignty and legislative intent by ceding decision-making authority to administrative decision-makers, and to ensure that administrative decision-makers remain within the limits of the law”.

### Standard of review analysis is just a shell *versus* standard of review analysis is a necessary inquiry

#### Standard of review analysis is just a shell

* According to some, standard of review analysis is simply a hoop through which judges (and litigants) must jump through on their way to the judge’s desired result. From this perspective, standard of review analysis is simply a shell.
* An example of this may be the majority’s judgment in ***Dunsmuir* (2008)**: the majority applied the standard of review analysis to find that the applicable standard was reasonableness, but nevertheless concluded that the adjudicator’s decision was unreasonable. This might also be the case in ***Baker* (1999)**: the majority applied the pragmatic and functional approach to find that the standard was reasonableness *simpliciter,* but nevertheless concluded that the decision to deny Ms. Baker a humanitarian and compassionate exemption was unreasonable. In both of these cases, it could be argued that standard of review analysis did not drive the result.

#### Standard of review analysis is a necessary inquiry

* The opposite view is that standard of review analysis *does* matter b/c judges may legitimately ask themselves: “am I the right person to decide this issue?”
* For example, in ***CUPE* (1979)**, Dickson J acknowledged that the *Public Service Labour Relations Act* called for “a delicate balance between the need to maintain public services, and the need to maintain collective bargaining”; to meet the twin purposes of this legislation, “considerable sensitivity and unique expertise on the part of Board members” was required. Dickson J (unanimous SCC) concluded that the Board’s interpretation of s. 102(3)(a) of the Act was protected from review unless patently unreasonable, and that, in this case, that Board’s interpretation was “at least as reasonable as the alternative interpretations suggested in the Court of Appeal”.
* Likewise, in ***Mossop* (1993)**, L’Heureux-Dube (dissenting) held that the Human Rights Tribunal was a “highly specialized administrative body” and better suited than the courts to interpret “family status” in s. 3 of its home statute.

### Competing approaches to statutory interpretation: positivist *versus* normative

* The competing approaches to statutory interpretation imply competing models of the separation of powers between the judicial, administrative, and legislative branches of government.

#### The positivist approach to statutory interpretation

* The positivist approach to statutory interpretation presumes that statutory language contains a single, unified meaning that does not change over time, i.e. there is a single “correct” interpretation or one “right” answer to questions of law. Tied to this approach is the idea that the law is a self-contained, stable system of formal concepts. The positivist approach tends to work ***against deference***, and aligns most closely to the **skeptical account of substantive review**.
* For example, the positivist approach appears to be at odds with the idea that there may be more than one reasonable interpretation of contested statutory language. Rather, under the positivist approach, statutory interpretation and legal reasoning are, as La Forest J suggested in *Mossop* (1993), deemed to be “matters within the province of the judiciary”. Likewise, in *Khosa* (2009), Rothstein J cited the relative expertise of courts as one of the two rationales for applying the correctness standard to questions of law in the absence of a privative clause: “appellate and reviewing courts have greater law-making expertise relative to trial judges and administrative decision-makers”.
* However, in the face of privative clauses, the positivist approach “suffers ambivalence”, as Wildeman suggests, b/w idea that interpretative authority rests exclusively w/ the judiciary, and the legislature’s explicit grant of exclusive interpretative authority to the administrative decision-maker.

#### The normative approach to statutory interpretation

* The normative approach to statutory interpretation presumes that contested matters of statutory interpretation cannot be resolved by relying on the text of the statute alone; rather, as Wildeman explains, the normative approach to statutory interpretation requires “judgments about the competing values or social priorities informing alternative statutory constructions”.
* Under the normative approach, there may be more than one reasonable interpretation of contested statutory language. In ***Baker* (1999)**, L’H-D J explained that “interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options”.
* The normative approach tends to work ***in favour of deference****,* and aligns most closely with the **romantic account of substantive review** wherein the rule of law reflects broader public values.
* Example of the normative approach to statutory interpretation:
  + In ***CUPE* (1979)**, Dickson J for a unanimous SCC applied a purposive approach to statutory interpretation, finding that the purpose of s. 102(3)(a) of the *Public Service Labour Relations Act* was to prevent picket-line violence, not just to ensure that striking employees’ jobs remained open. Dickson J concluded that the interpretation of s. 102(3)(a) lay at “the heart” of the Board’s “specialized jurisdiction”, and so applied a patent reasonableness standard, finding that the interpretation was “at least as reasonable as the alternative interpretations”.
* Importantly, the normative approach is not necessarily at odds with review on a correctness standard. The correctness standard may be applicable, for example, where fundamental Charter or human rights values are at stake.

## The concept of jurisdictional error

### True questions of jurisdiction: a means for courts to ignore privative clauses

* + **Privative clauses** originated to prevent courts from intervening in administrative decision-making, and to ensure the prompt, final resolution of disputes without needing to tap into scarce judicial resources. Privative clauses generally include a grant of exclusive jurisdiction over the subject matter to the ADM, a declaration of finality with respect to the outcome, and a prohibition on any court proceedings to set the outcome aside.
  + Historically, crts resisted the application of privative clauses by **characterizing matters as outside the jurisdiction of the ADM**. Decisions that fell outside the jurisdiction of the decision-maker also fell outside the ambit of a privative clause, if one existed, and so courts were entitled to review those decisions on a correctness standard. As Macklin suggests, “[t]he effectiveness of privative clauses in deterring judicial intervention depended on the ease and frequency with which courts could designate an issue as determinative of jurisdiction, therefore warranting strict judicial scrutiny”. Courts proved to be quite capable of turning almost any issue into a “preliminary or collateral question”, or framing an administrative decision-maker as “asking the wrong question” in order to intervene where the legislature deliberately excluded them.
    - In ***Bell* (1971)**, the SCC determined that the definition of “self-contained dwelling unit” was a true question of jurisdiction; in other words, as Martland J stated, the definition of this term was “an issue of law respecting the scope of the operation of the Act, and on the answer to that question depends the authority of the board to inquire into the complaint of discrimination at all… and a wrong decision on it would not enable the board to proceed further”. The SCC held that the rental unit in question was not a “self-contained dwelling unit”, and so the ON Human Rights Commission lacked jurisdiction to investigate an allegation of racial discrimination. This is an example of a **“preliminary or collateral question”** tactic to enable judicial intervention.
    - In ***Metropolitan Life Insurance* (1970)**, the SCC overstepped a privative clause in the *Labour Relations Act,* finding that a decision by the Labour Relations Board was not protected by the clause because the Board had lost its jurisdiction because it employed defective reasoning. This is an example of an **“asking the wrong question”** tactic to enable judicial intervention.
    - In ***CUPE* (1978)**, the New Brunswick Court of Appeal characterized the interpretation of s. 102(3)(a) of the *Public Service Labour Relations Act* as a “preliminary or collateral question” that was outside the jurisdiction of the Public Service Labour Relations Board. The CA said: “It is true the Board must determine the first question [*Does the Act prohibit management personnel replacing striking employees?*] to vest itself with the jurisdiction to enquire into the second [*Did management personnel replace employees?*], but it is equally true the Board cannot by wrongly deciding the first question confer a jurisdiction on itself it cannot otherwise acquire.”

## From jurisdictional error to the pragmatic and functional approach

### The doctrinal shift in *CUPE*: reconfiguring the relationship b/w courts and the administrative state

* + ***CUPE* (1979)** represents a shift in the SCC’s attitude towards the doctrine of jurisdictional error and the degree of deference owed to specialized administrative tribunals. As Macklin suggests, this decision “conveyed a spirit of curial deference, a recognition that administrative decision-makers are not merely ‘inferior tribunals’, but specialized bodies that possess a legislative mandate to apply their expertise and experience to matters that they may be better suited to address than an ‘ordinary court’.” The three sources of this doctrinal shift were:

#### A reappraisal of the respective roles of courts and administrative tribunals

* + - Specialized administrative decision-makers may be better suited to implementing regulatory regimes than generalist judges. In ***CUPE* (1979)**, Dickson J, writing for a unanimous SCC, held that the rationale the privative clause in the *Public Service Labour Relations Act* was the Board’s expertise: “The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations.” Of this expertise, Dickson J added: “The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met.” Dickson J concluded that, in light of the privative clause and specialized nature of the Board, interpretation of s. 102(3)(a) lay w/in the “specialized jurisdiction confided to the Board”.

#### The multiplicity of possible interpretations

* + - There is rarely a single correct interpretation of a statutory provision. *Given this multiplicity of possible interpretations, who is better placed to choose the “best” interpretation? An administrative decision-maker or a judge?* As Mackin suggests, “indeterminacy of meaning… underwrites the plea for judicial humility that is at the heart of *CUPE*”.
    - In ***CUPE* (1979)**, Dickson J, writing for a unanimous SCC, held that the Board’s decision was not patently unreasonable: “I find it difficult to brand as “patently unreasonable” the interpretation given to s. 102(3)(a) by the Board in this case. At a minimum, the Board’s interpretation would seem at least as reasonable as the alternative interpretations suggested in the Court of Appeal.”

#### A call for courts to move away from the doctrine of jurisdictional error

* + - In ***CUPE* (1979)**, Dickson J, writing for a unanimous SCC, held that courts should refrain from labeling matters as jurisdictional: “The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.” Dickson J disagreed with the CA’s characterization of the interpretation of s. 102(3)(a) as a true question of jurisdiction, subject to review by the courts on a correctness standard. Dickson J said: “With respect, I do not think that the language of “preliminary or collateral matter” assists in the inquiry into the Board’s jurisdiction.”

[Underlying this shift towards enhanced deference is also the beginning of a shift from **a positivist approach to statutory interpretation to a normative one**, and a shift from **a** **skeptical conception of substantive review to a romantic one**.]

[But rather ironically, *CUPE* (1979) was decided a year after *Nicholson* (1978) > *Nicholson* symbolized a new era of expanded procedural review by courts b/c it did away with the bright line between admin decisions and quasi-judicial/judicial decisions; *CUPE,* on the other hand, represented a new era of reined-in substantive review/expanded deference by crts, i.e. crts should only interfere if ADM’s decision patently unreasonable.]

### *Bibeault:* a pragmatic and functional approach to the “jurisdictional question”

* + In ***Bibeault* (1988),** Beetz J, writing for a unanimous SCC, proposed a pragmatic and functional analysis for distinguishing between true questions of jurisdiction (subject to a correctness standard and review by the courts) and questions that were within a tribunal’s jurisdiction (subject to deference, i.e. a patent unreasonableness standard [at the time of this decision]). This pragmatic and functional approach was meant to reconcile the difficulty of determining questions of jurisdiction, and do away with the formalistic analysis of the “preliminary or collateral question” approach. Beetz J said: “I doubt whether it is possible to state a simple and precise rule for identifying a question of jurisdiction, given the fluidity of the concept of jurisdiction and the many ways in which jurisdiction is conferred on administrative tribunals.”
    - First, Beetz J explained that the “preliminary or collateral question” approach to jurisdictional error was based on “the principle that the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and that such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator”. As Beetz J suggested, the theoretical basis for this idea is “unimpeachable”: “any grant of jurisdiction will necessarily include limits on the jurisdiction granted, and any grant of a power remains subject to conditions”.
    - Beetz J then criticized the *application* of the “preliminary or collateral question” approach, suggesting that this approach “does not appear to recognize that the legislator may intend to give an administrative tribunal, expressly or by implication, the power to determine whether certain conditions of law or fact placed on the exercise of its power do exist”. Rather than posing the “preliminary or collateral question”, Beetz J said that courts should ask: “Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?”
    - The three advantages of a pragmatic and functional approach, as proposed by Beetz J were:

1. Shifting crt’s inquiry from interpretation of isolated provisions to legislator’s intent.
2. Returning to the true concept of jurisdiction, which, in its strict sense, means the power to decide: “The importance of a grant of jurisdiction relates not the tribunal’s capacity or duty to decide a question but to the determining effect of its decision.”
3. Putting renewed emphasis “on the superintending and reforming function” of courts. Beetz J said: “When an administrative tribunal exceeds its jurisdiction, the illegality of its act is as serious as if it had acted in bad faith or ignored the rules of natural justice. The role of the superior courts in maintaining the rule of law is so important that is given constitutional protection: […] Yet, the importance of judicial review implies that it should not be exercised unnecessarily, lest this extraordinary remedy lose its meaning.”
   * Despite the spirit of curial deference that seems to permeate SCC’s unanimous decision in ***Bibeault* (1988),** echoing the tone in *CUPE,* Beetz J nevertheless concluded that the issue in this case was in fact a question of jurisdiction that the Quebec Labour Commission failed to answer correctly. Argubly, *Bibeault* can be viewed as a step back from *CUPE.*

## From the pragmatic and functional approach to standard of review analysis

* On the surface, from *Pushpanathan* (1998) to *Dunsmuir* (2008), there appears to be an oscillation b/w two methodologies: a default rule with exceptions versus a multi-factorial balancing test. But it may be the new standard of review analysis introduced in *Dunsmuir* is simply the old pragmatic and functional approach, with a new name.

### *Pushpanathan*:the (reformulated) pragmatic and functional approach to JR = a balancing test

* + In ***Pushpanathan* (1998)**, Bastarache J, writing for a unanimous SCC, reformulated the pragmatic and functional approach to the “jurisdictional question” articulated by Beetz J for the Court in ***Bibeault* (1988)** as follows: “*Did the legislator intend this question to attract judicial deference?”* Bastarache J set out four factors to be evaluated and weighed when determining the applicable standard of review (below). ***Pushpanathan* (1998)** was concerned w/ interpretation of a provision in the *Immigration Act* (which contained no privative clause or right of appeal; to judicially review a decision under the Act, applicant had to seek leave of the Federal Court, and an appeal of Federal Court’s decision not permissible unless trial judge certified “a serious question of general importance”).

1. **Privative clause:** under the pragmatic and functional test, the presence of privative clause weighed in favour of curial deference but was not determinative. This was a recognition that privative clauses are an expression of the legislature’s will to defer to the administrative decision-maker’s expertise. However, courts retained the authority to define the scope of that expertise.
2. **Relative expertise:** under the pragmatic and functional test, relative expertise was the most important, animating factor in standard of review analysis. In ***Mossop* (1993)**, L’H-D (dissenting) noted that the “great variety and diversity among administrative bodies” and that “not all administrative bodies are specialized or have equal expertise”. In ***Pushpanathan* (1998)**, Bastarache J identified three steps to evaluate relative expertise:“the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise”.
   1. **Where a tribunal possesses “broad relative expertise” (e.g. related to economic, financial, or technical matters), crts willing to show considerable deference.** For example, the Competition Tribunal in ***Southam* (1997)** was held by Iacobucci J to have broad relative expertise in matters of economics and commerce. Likewise, in ***Corn Growers* (1990)**, L’H-D identified “labour relations, telecommunications, financial markets and international economic relations” as examples of subject areas where courts “may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power”.
   2. **For human rights tribunals, crts less willing to show deference on the basis of relative expertise.** For example, in ***Mossop* (1993)**, La Forest (concurring) characterized the “superior expertise of a human rights tribunal” as “fact-finding and adjudication in a human rights context”. As Macklin explains that, since “[r]ights adjudication lies at the heart of the judicial function and institutional self-understanding”, courts “find it difficult to concede anything but a narrow compass of relative expertise to another body charged with tasks that so closely resemble those performed by courts”. Similarly, in ***Chamberlain* (2002)**, McLachlin CJ, writing for a majority of the SCC, held that “courts are well placed to resolve human rights issues”, and, hence, “where the decision to be made by an administrative body has a human rights dimension, this has generally lessened the amount of deference which the Court is willing to accord the decision”. Criticism: this relative expertise of the crts may not always be the case. As Gonthier J (dissenting) in ***Chamberlain* (2002)** suggested, “courts should be reluctant to assume that they possess greater expertise than administrative decision makers with respect to all questions having a human right component… courts should recognize that administrative decisions may involve a spectrum of human rights issues, not all of which are within the courts’ core area of expertise”.
   3. **For professional regulatory committees (e.g. law society discipline committees), crts more willing to show deference on the basis of relative expertise.** Even though the discipline of lawyers and other judges may seem to fully within the realm of expertise of the courts, in *Ryan* (2003), the SCC deferred to the expertise of the Law Society of New Brunswick, applying the reasonableness *simpliciter* standard, because one of its Discipline Committee members was a layperson, and so was “in a better position to understand how particular forms of conduct and choice of sanctions would affect the general public’s perception of the profession and confidence in the administration of justice”. Criticism: this seems to be inconsistent w/ crts’ unwillingness to defer to human rights tribunals.
   4. **For decision-makers that are elected officials, crts may be more willing to defer.** In *Baker* (1999), the SCC suggested that the fact that the “formal decision-maker” was the Minister of Citizenship and Immigration militated “in favour of deference”, even though the *actual* decision-maker was a delegate civil servant. Criticism: the basis for this deference is unclear. As Macklin asks, “*Is it because a minister is deemed expert in whatever portfolio he or she is assigned? Is it because the delegate is presumed to have expertise acquired through repeated processing of many humanitarian and compassionate applications? Is it because the minister is an elected official, and the grant of discretion to an elected official signals an entitlement to apply “political” factors, an activity in which politicians are more expert than judges?”*
3. **Purpose of the Act as a whole, and the impugned provision in particular:** In ***Pushpanathan* (1998)**, Bastarache J distilled the following principles from prior jurisprudence:
   1. **Where a statute or provision is “polycentric”, crts should be more willing to defer.** A provision or statute is “polycentric” if it engages in balancing multiple interests, contains a significant policy element, or articulates legal standards in vague language. Rationale: judges have less relative expertise in these situations.
   2. **Where a statute or provision is “bipolar”, crts will be less willing to defer.** A provision or statute is “bipolar” if it resembles an adversarial relationship between discrete parties or interests. Rationale: judges have more relative expertise in these situations.
   3. **If a decision-maker is granted discretion by the enabling statute, crts should be more willing to defer.** Statutory provisions that grant discretion to decision-makers tend to fall into the “polycentric” category, because, in exercising that discretion, it is assumed that the decision-maker will consider and weigh multiple factors. For example, in ***Baker* (1999)**, the SCC suggested that the fact that the Minister’s decision to grant humanitarian and compassionate exemption was discretionary militated in favour of deference.
4. **Nature of the problem (question of law, fact, or mixed fact and law?):** questions of law will attract less deference, and questions of fact will attract more deference; questions of mixed fact and law are generally treated as neutral. Criticism: the characterization of something as a question of law, or a question of mixed fact and law may not be straightforward. Also, even for some questions of law, an administrative decision-maker may possess greater expertise than a court, e.g. if the legal question relates to the interpretation of a provision of a decision-maker’s enabling/home statute. For example, in ***Mossop* (1993)**, the interpreting “family status” was arguably a question of mixed fact and law, even though the majority characterized it as matter of statutory interpretation (i.e. a question of law).
   * **Criticisms of the pragmatic and functional approach, generally:** 
     + In considering relative expertise, courts limit their analysis to the statutory role of the administrative decision-maker, ignoring the qualifications, competence, training or experience of the specific decision-maker. This approach examines the formal indicia of expertise, but does not address *actual* competence.
     + Following the introduction of the intermediate standard of review, reasonableness *simpliciter*, in ***Southam* (1997)**, it was difficult to distinguish between the two reasonableness standards. The pragmatic and functional approach, articulated by Bastarache J in *Pushpanathan* (1998), did not resolve this difficulty. Given the multiplicity of factors in the pragmatic and functional test and their varying weight, courts often balanced these factors inconsistently to determine the appropriate standard of review. As a result, lawyers and litigants faced unpredictability and a lack of guidance. As Macklin suggests, the “pragmatic and functional” test was neither pragmatic, nor functional. This impracticability and unpredictability set the stage for the return to two standards of review and a unified standard of reasonableness in ***Dunsmuir (2008)***.

### *Dunsmuir:* replacing the “p & f” balancing test with “standard of review analysis” (a defeasible rule)?

* + As Macklin suggests, although the judgments in *Dunsmuir (2008)* are not unambiguous, “the pattern of subsequent jurisprudence thus far suggests that the new standard of review methodology is no longer a balancing test, but appears to more closely resemble a defeasible rule: the default position is deference, unless one of the exceptions obtains”.

#### The two-step process: the use of precedents

* + - The majority in *Dunsmuir (2008)* also posits a 2-step process for standard of review analysis:

1. **Precedent:** “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of law”;
2. **If no precedent exists, apply the standard of review analysis: the appropriate standard is deference, unless an exception applies.**

#### The exceptions to deference: when the correctness standard applies

* + - The majority in *Dunsmuir* (2008) identified the four exceptions when deference is not warranted and a correctness standard should apply as follows:

1. Where the question of law “is of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”;
2. In constitutional questions;
3. In “true” questions of jurisdiction “where the tribunal must explicitly determine whether the statutory grant of power gives it the authority to decide a particular matter”; and,
4. In “questions regarding the jurisdictional lines” between 2+ competing specialized tribunals.

#### Critique of the majority’s approach in *Dunsmuir*

* + - **Whether the new “reasonableness” is the same or less deferential than the old “patent unreasonableness” standard.** The majority in *Dunsmuir* (2008) suggests that the “single reasonableness standard does not pave the way for a more intrusive review by courts”: “…it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. [...] …the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.” *So is the new reasonableness standard the same as the old “patent unreasonableness” standard? Or is something in between the old “reasonableness simpliciter” standard and the old “patent unreasonableness” standard? Might administrative decisions that were once upheld under the patent unreasonableness standard now be quashed under the new reasonableness standard? Or is the new reasonableness standard actually a spectrum, with varying degrees of deference depending on the circumstances?* “…defined appropriately…” suggests a spectrum.
    - **The single reasonableness standard will evolve into a sliding scale of deference.** Binnie J suggests that the majority’s single standard of reasonableness will “shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference.” He draws this analogy: “In practice, the result of today’s decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another w/o any overall saving to motorists in time or expense.” Bastarache and Lebel JJ, speaking for the majority in *Dunsmuir* (2008), themselves acknowledge that reasonableness involves “a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. Importantly, the *size* of this range is contextual. [I think Binnie J and the majority are essentially saying the same thing but Binnie J is more upfront w/ practical realities of a single reasonableness standard, i.e. that there will be a range of deference within that single standard; if pressed, I doubt the majority would deny this – they simply hide behind the word “contextual”, and retain the four factors from the older pragmatic and functional approach] Binnie J says: “The Court’s adoption in this case of a single “reasonableness” standard that covers both the degree of deference assessment and the reviewing court’s evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together. Asking courts to have regard to more than one variable is not asking too much, in my opinion.” Even Deschamps J (concurring) seems to agree that reasonableness is contextual: “No matter how this Court defines the concept [of reasonableness], any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation.”
    - **Whether the “pragmatic and functional” factors are still applicable.** The majority in *Dunsmuir* (2008) states that, “[b]ecause the phrase “pragmatic and functional approach” may have misguided the courts in the past, we prefer to refer simply to the “standard of review analysis” in the future”.Bastarache and Lebel JJ (majority) also state, at the beginning of the judgment, that the “recent history of judicial review… has been marked by… confounding tests and new words for old problems”. However, the pragmatic and functional factors appear to remain applicable, despite being cloaked in different language. The majority explains that the “new” standard of review analysis “must be contextual”: “…it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.” Binnie J (concurring) in *Dunsmuir* (2008)suggests that the majority has retained the pragmatic and functional approach, but simply called it something different: **:** “they reduce the applicable standards of review from three to two…, but retain the pragmatic and functional analysis, though now it is to be called the “standard of review analysis”. A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance…”

## The “jurisdictional question”, post-*Dunsmuir*

* **Pushed aside in *Pushpanathan* (1998)*.*** Following the reformulation of the pragmatic and functional test in *Pushpanathan* (1998), the jurisdictional question seemed to virtually disappear. In determining the applicable standard of review, courts focused on the four factors articulated by Bastarache J: (1) privative clause, (2) relative expertise, (3) the purpose of the statute as a whole and the provision in particular, and (4) the nature of the problem.
* **Recalled in *Dunsmuir (2008).*** The jurisdictional question appears to have resurfaced in *Dunsmuir (2008)*: the majority identified true questions of jurisdiction and questions regarding the jurisdictional lines between competing specialize tribunals as two of the exceptions when deference was not warranted and courts should apply a correctness standard. However, the majority in *Dunsmuir (2008)* also cautioned against the overuse of the jurisdictional question, as Dickson J did in *CUPE* (1979): “We reiterate the caution of Dickson J in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.” In fact, the SCC’s reluctance to brand matters as jurisdictional is evident in its choice to refrain from posing the question in *Dunsmuir (2008)* in jurisdictional terms. As Macklin suggests, “[w]ithout expending much effort, the Court could have transformed the question “does the statute authorize the adjudicator to inquire into the existence of cause for dismissal?” into “does the adjudicator have jurisdiction to inquire into the existence of cause for dismissal?”.
* **…does the jurisdictional question still exist, post-*Dunsmuir*? Yes, but exceptional.** In *Alberta (Information and Privacy Commissioner)* (2011), Rothstein J, writing the majority judgment, suggests that “the time has come to reconsider whether, for the purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review”. Though he poses this question, Rothstein J ultimately leaves this question unresolved, saying: “at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case”, and “at this time, true questions of jurisdiction will be exceptional”.
* **Argument:** **the other three exceptions to deference identified in *Dunsmuir* fill the shoes of the “jurisdictional question” pre-*Dunsmuir*; therefore, true questions of jurisdiction are otiose, i.e. their identification serves no practical purpose.** As Macklin suggests, “[i]n a jurisprudence chiefly notable for its lack of predictability, the correctness standard was most consistently applied to issues of procedural fairness, constitutionality, the “jurisdictional lines between competing specialized tribunals,” and to questions of law elevated to “central importance to the legal system as a whole… and outside the adjudicator’s expertise”. *For example, might not “outside the adjudicator’s expertise” be a synonym for “outside the decision-maker’s jurisdiction”?*
* **Counterargument:** **the jurisdictional question is not dead.** In *Alberta (Information and Privacy Commissioner)* (2011), Cromwell J (concurring on the result) disagreed with Rothstein J’s apparent effort to “euthanize” the “elusive “true” question of vires or jurisdiction” (Binnie J’s words), arguing that “the suggestion that jurisdictional questions may not in fact exist at all” undermines “the foundation of judicial review of administrative action”. Cromwell J refers to the underlying tension in judicial review between the rule of law (which he terms “legality”) and legislative supremacy, and agrees that “the use of the terms “jurisdiction” and “vires” have often proven unhelpful to the standard of review analysis”. However, Cromwell J argues that the unhelpfulness of these terms “should not distract us from the fundamental principles: as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is “correct”. Cromwell J concludes: “I remain of the view that correctness review exists, both as a matter of constitutional law and statutory interpretation. […] As the Court affirmed in *Dunsmuir,* “judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits”.
* **Arguably, the distinction between “jurisdiction” and “deference” is semantic, not substantive.** **Therefore while “true” questions of jurisdiction may be defunct, jurisdiction remains an important principle in administrative law.** The tension underlying judicial review in Canada – between the rule of law on the one hand and legislative supremacy on the other hand – continues to exist. Although the default, post-*Dunsmuir,* is deference, the correctness standard continues to exist, and while “true” questions of jurisdiction may be subsumed in practice into the other exceptions to deference identified in *Dunsmuir,* such that “true” questions of jurisdiction are defunct, jurisdiction remains a relevant principle that delineates the boundary between administrative action that accords with legislative intent and administrative action that does not. Though Bastarache and Lebel JJ, writing for the majority in *Dunsmuir* (2008), called for an overhaul of the approaches to judicial review characterized by “confounding tests and new words for old problems”, in reality the standard of review analysis articulated by the majority may simply substitute even newer words for old problems. The superior courts in each province have the *inherent, constitutionally-recognized jurisdiction* to review administrative decision-making, at least with respect to questions of jurisdiction, and are themselves immune from judicial review. This inherent jurisdiction was articulated by Laskin CJ for a unanimous SCC in ***Crevier* (1981)**, and is derived from s. 96 of the *Constitution Act, 1867*. This expansive interpretation of s. 96 of the *Constitution Act, 1867* tips the balance in the tension between the rule of law and legislative supremacy towards the rule of law and judicial intervention. Given that administrative decision-makers are themselves human – i.e. they have the potential to decide matters unreasonably, ignorantly, or abusively – the Dicey conception of the role of courts in limiting, supervising, overseeing, and constraining the administrative state is compelling.

## The privative clause, post-*Dunsmuir*

* Up to *CUPE* (1979), privative clauses were treated as determinative for deference, unless a court could characterize the issue as a jurisdictional question.
* Under the pragmatic and functional test, reformulated in *Pushpanathan* (1998), the privative clause was one of several factors to consider when determining the applicable standard of review. This development can be viewed as a demotion for privative clauses, i.e. no longer determinative.
* When the pragmatic and functional test was replaced in *Dunsmuir (2008)* by standard of review analysis, privative clauses appeared to be demoted yet again: now, the default position is deference and there is a single reasonableness standard, regardless of whether a privative clause exists or not. The majority held: “The existence of a privative clause or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. […] This does not mean, however, that the presence of a privative clause is determinative. […] …neither Parliament nor any legislature can completely remove the courts’ power to review the actions and decisions of administrative bodies. The power is constitutionally protected.”
* However, it may be that privative clauses remain important, given that the single reasonableness standard may, in practice, break down into a spectrum of deference.
  + In ***Dunsmuir* (2008)**, Binnie J (concurring), speaking for himself, notes that “a single standard of reasonableness cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause”, and suggests that its existence “is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court’s review”. He adds: “A system of JR based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another “factor” in the hopper of pragmatism and functionality. Its existence should presumptively foreclose JR on the basis of *outcome* on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.”
  + Similarly, in ***Khosa* (2009)**, the majority appears to revive the“pragmatic and functional” factors, placing weight on the existence of a privative clause: “A privative clause is an important indicator of legislative intent. While privative clauses deter judicial intervention, a statutory right of appeal may be at ease with it, depending on its terms.”
  + Finally, in ***Dunsmuir* (2008)**, Deschamps J (concurring), speaking for two other justices, suggests that privative clauses are important, but not determinative if question of law is *outside* an ADM’s core expertise: “Where there is a privative clause, Parliament or a legislature’s intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body. However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body’s core expertise are interpreted correctly.”
* In the alternative, it may be that privative clauses remain (or are again) determinative. In ***Khosa* (2009)**, Rothstein J (concurring) suggests that the absence of a privative clause is significant. Rothstein J appears to revert to a *CUPE* (1979)*,* pre-pragmatic and functional test framework: if there is a privative clause, the default standard of review should be deference; if there is no privative clause, the default standard of review should be correctness. Rothstein J says: “where Parliament intended a deferential standard of review,… it used clear and unambiguous language. The necessary implication is that where Parliament did not provide for deferential review, it intended the reviewing court to apply a correctness standard as it does in the regular appellate context”.

## The importance of expertise, pre- and post-*Dunsmuir*

### The emergence of expertise as an important factor militating in favour of deference

* + In ***CUPE* (1979)**, Dickson J, writing for unanimous SCC, held that the rationale the privative clause in the *Public Service Labour Relations Act* was the Board’s expertise: “The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations.” Dickson J added: “The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met.” Dickson J concluded that, in light of the privative clause and specialized nature of the Board, interpretation of s. 102(3)(a) lay w/in the “specialized jurisdiction confided to the Board”.
  + In ***Pezim* (1994)**, Iacobucci J, writing for a unanimous SCC, held that “even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters that fall squarely within the tribunal’s expertise”. Iacobucci J concluded that the interpretation of whether newly acquired information about asset value amounted to a “material change” that required disclosure went to the “core” of the BC Securities Comm’s “regulatory mandate and expertise”.

### Relative expertise as the animating factor in the pragmatic and functional approach

* + Relative expertise was also the animating factor in the pragmatic and functional approach articulated by Bastarache J in ***Pushpanathan* (1998)**. Bastarache J identified three steps to evaluate relative expertise:“the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise”.
  + **Where a tribunal possesses “broad relative expertise” (e.g. related to economic, financial, or technical matters), crts willing to show considerable deference.** For example, the Competition Tribunal in ***Southam* (1997)** was held by Iacobucci J to have broad relative expertise in matters of economics and commerce. Likewise, in ***Corn Growers* (1990)**, L’H-D identified “labour relations, telecommunications, financial markets and international economic relations” as examples of subject areas where courts “may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power”.
  + **For professional regulatory committees (e.g. law society discipline committees), crts more willing to show deference on the basis of relative expertise.** Even though the discipline of lawyers and other judges may seem to fully within the realm of expertise of the courts, in *Ryan* (2003), the SCC deferred to the expertise of the Law Society of New Brunswick, applying the reasonableness *simpliciter* standard, because one of its Discipline Committee members was a layperson, and so was “in a better position to understand how particular forms of conduct and choice of sanctions would affect the general public’s perception of the profession and confidence in the administration of justice”. Criticism: this seems to be inconsistent w/ crts’ unwillingness to defer to human rights tribunals.
  + **For decision-makers that are elected officials, crts may be more willing to defer.** In *Baker* (1999), the SCC suggested that the fact that the “formal decision-maker” was the Minister of Citizenship and Immigration militated “in favour of deference”, even though the *actual* decision-maker was a delegate civil servant. Criticism: the basis for this deference is unclear. As Macklin asks, “*Is it because a minister is deemed expert in whatever portfolio he or she is assigned? Is it because the delegate is presumed to have expertise acquired through repeated processing of many humanitarian and compassionate applications? Is it because the minister is an elected official, and the grant of discretion to an elected official signals an entitlement to apply “political” factors, an activity in which politicians are more expert than judges?”*

### Relative expertise is now presumed

* + From one perspective, compared to the pragmatic and functional approach, the standard of review analysis articulated in ***Dunsmuir* (2008)** may not give expertise the same weight as before: now, the default is deference, subject to certain exceptions. But as Macklin suggests, “the better reading of *Dunsmuir* is that the unmistakable tilt of the standard-of-review analysis towards deference presupposes the superior expertise of administrative decision-makers in interpreting and applying their home statutes, absent some indicator to the contrary”. Expertise is now treated as intrinsic to deference. As Bastarache and Lebel JJ (majority) explain: “…a policy of deference recognizes the reality that, in may instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”. The exceptions to deference articulated in *Dunsmuir* may also be seen as matters that are outside the expertise of administrative decision-makers generally: constitutional questions, questions of central importance to the legal system, and questions regarding the jurisdictional lines between two tribunals.

### Expertise also remains important b/c the pragmatic and functional factors remain alive

* I agree with Binnie J’s assertion in ***Dunsmuir* (2008)** that the single reasonableness standard will evolve into a spectrum of deference.Though Bastarache and Lebel JJ call for an overhaul of the approaches to judicial review characterized by “confounding tests and new words for old problems”, in reality the standard of review analysis articulated by the majority simply substitutes even newer words for old problems. Binnie J suggests that the majority has retained the pragmatic and functional approach, but changed its name: “Changing the name… represents a limited advance”. Binnie J appears to be correct. The majority describes the “new” standard of review analysis as “dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.” These are the same four factors as the pragmatic and functional approach.

### Counterargument: expertise is not determinative, nor is it relevant in the absence of a privative clause

* + In ***Dunsmuir* (2008)**, Deschamps J (concurring) takes the pragmatic and functional factors but puts one, the nature of the question, on a pedestal: “Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.” Deschamps J seems to suggest that, where there is a question of law and *no privative clause,* deference is not owing, regardless of whether that question of law falls within the administrative decision-maker’s core expertise. On questions of law, the reasonableness standard only applies if there is a privative clause *and* the question of law is within the decision maker’s core expertise. In this case, Deschamps J held (unlike the majority and Binnie J) that the appropriate standard of review was correctness: the adjudicator’s was a question of law and there was a privative clause, but the question of law, involving interpretation of the common law, was outside the adjudicator’s core expertise. Deschamps J’s approach to standard of review analysis seems to place less weight on expertise than the majority and Binnie J; expertise is only a factor militating in favour of deference when *coupled* with a privative clause.
  + In ***Khosa* (2009)**, Rothstein J (concurring) argued against presuming expertise, adopting a similar approach to Deschamps J in *Dunsmuir* (2008). Rothstein J said: “If the legislature intended to protect expert decision-makers from review, it did so through a privative clause.” According to Rothstein J, privative clauses are determinative. Expertise is only a basis for deference if the statute in question contains a privative clause, indicating the legislature’s intent that the decision-maker be afforded deference: “privative clauses and tribunal expertise are two sides of the same coin”. However, as Macklin points out, “[r]ather like Rip Van Winkle, Rothstein J appears to have gone to sleep shortly after *CUPE* and woken up shortly after *Dunsmuir*. Dismayed by the evolution in the case law on standard of review, he is determined to “roll back the *Dunsmuir* clock” to an era where everyone agreed that “judge knows best” about questions of law and discretion, unless a suitably worded privative clause directed otherwise.”

### Courts’ continuing unwillingness to show deference on human rights matters: this should change!

* + For human rights tribunals, courts appear less willing to show deference on the basis of relative expertise.
  + For example, in ***Mossop* (1993)**, La Forest (concurring) characterized the “superior expertise of a human rights tribunal” as “fact-finding and adjudication in a human rights context”. As Macklin explains that, since “[r]ights adjudication lies at the heart of the judicial function and institutional self-understanding”, courts “find it difficult to concede anything but a narrow compass of relative expertise to another body charged with tasks that so closely resemble those performed by courts”. In ***Chamberlain* (2002)**, McLachlin CJ, writing for a majority of the SCC, held that “courts are well placed to resolve human rights issues”, and, hence, “where the decision to be made by an administrative body has a human rights dimension, this has generally lessened the amount of deference which the Court is willing to accord the decision”. Similarly, in ***Trinity Western* (2001),** a majority SCC (L’Heureux-Dube dissenting) held that the applicable standard of review for the BC College of Teachers’ decision to exclude Trinity Western graduates was correctness its expertise did “not qualify it to interpret the scope of human rights nor to reconcile competing rights”.
  + In its “the default is deference” approach, the majority in ***Dunsmuir* (2008)** appears to recognize the expertise of *all* administrative decision-makers in interpreting and applying their home statute. Under this framework, for example, the Minister of Citizenship and Immigration would be deemed to be an expert at interpreting its home statute, the *Immigration and Refugee Protection Act,* attracting the reasonableness standard. However, it may be that courts are able to characterize certain human rights issues as of “central importance to the legal system as a whole”, therefore attracting the correctness standard.
  + I think that Gonthier J’s (dissenting) comments in ***Chamberlain* (2002)** are apt: “courts should be reluctant to assume that they possess greater expertise than administrative decision makers with respect to all questions having a human right component… courts should recognize that administrative decisions may involve a spectrum of human rights issues, not all of which are within the courts’ core area of expertise”.
  + In other words, courts should not be too eager to characterize human rights questions as questions “of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”. As the SCC stated in ***Canada (Canadian Human Rights Commission)***(2011), “not all questions of general law entrusted to the [Human Rights] Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator’s specialized area of expertise”.
  + Also, courts should not be too eager to characterize matters as human rights related such that they fall outside the expertise of an administrative decision-maker. As L’Heureux Dube J (dissenting) argued in ***Trinity Western* (2001)**: “It is a misconception to characterize the BCCT’s decision as being a balancing or interpretation of human rights values, an exercise that is beyond the tribunal’s expertise. The BCCT’s decision employed one relevant and undisputed *Charter* or human rights value, that of equality, in the narrow context of appraising the impact on the classroom environment of TWU’s proposal.” L’H-D J concluded that the appropriate standard for the College of Teacher’s decision was patent unreasonableness “because it directly engages the specialization of the tribunal”.
  + Deference on human rights matters would reflect a larger movement towards a **pluralist model of constitutional ordering**.

### Courts’ focus should shift from general, presumed expertise to actual expertise

* + Rothstein J (concurring) in ***Khosa* (2009)** makes a good point: just because tribunal expertise on certain questions of law is now presumed, and expertise was an animating factor under the pragmatic and functional approach, does not mean the SCC should not revisit its reasoning. Binnie J suggests that Rothstein J’s approach attempts “to roll back the *Dunsmuir* clock”. But, as Rothstein J suggests, even though a particular approach has been around for a long time, this longevity should not “stand in the way of this Court’s recent attempts to return conceptual clarity to the application of standard of review”.
  + With respect to the importance of expertise*,* Rothstein J says: “The fact that *Pezim* has been cited in other cases does not preclude this Court from revisiting its reasoning where there are compelling reasons to do so.” It may be that, in order to improve the existing standard of review analysis, courts should reexamine their approach to relative expertise, focusing on actual expertise rather than imputed expertise.
  + Rothstein J suggests that the current standard of review analysis involves “artificial judicial determinations of relative expertise”: “It seems quite arbitrary, for example, that courts may look at the nature of a tribunal as defined by its enabling statute, but not always conduct a full review of its actual expertise. […] In the specific context of statutory interpretation, should the reviewing court scrutinize whether or not the tribunal regularly reviews and interprets particular provisions in its home statute such that it possesses relative expertise with respect to such provisions?”

### Field sensitivity should be just as important as technical expertise

* In ***Mossop* (1993),** L’H-D J (dissent) acknowledged that, even if an administrative body is made up of “non-specialists”, administrative decision-makers “may develop a certain “field sensitivity” where that body is in a position of proximity to the community and its needs”. Thus, where a question “is one that requires a familiarity with and understanding of the context”, L’H-D J suggested that a higher degree of deference might be appropriate. In the case of the =Human Rights Tribunal’s interpretation of “family status” in s. 3 of its home statute, L’H-D J concluded that “this problem is one which the Board is eminently suited to decide and a question best decided in a context-specific setting”. The importance of context and field sensitivity was again endorsed in ***Dunsmuir* (2008)**: the majority said, “…a policy of deference “recognizes the reality that, in may instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”.
* Elevating the importance of field sensitivity in standard of review analysis would reflect a larger movement towards a **pluralist model of constitutional ordering**.

### Legislated relative expertise

* Section 58 of the BC *Administrative Tribunals Act* provides that, *in the presence of a privative clause,* “relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction”. In the absence of a privative clause, an administrative tribunal is not deemed to have relative expertise, and, under s. 59, a correctness standard must apply “for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice an procedural fairness”. These provisions in the ATA appear to support Rothstein J’s concurring argument in ***Khosa* (2009)** that, if a legislature “intended to protect expert decision-makers from review” it could do so with a privative clause.
* However, for a tribunal that does not fall under a judicial review statute such as the ATA and whose enabling statute does not contain a privative clause, courts should not *necessarily* apply a correctness standard for questions of law. It may be that, even in the absence of a privative clause, the legislature’s intent is that courts defer to the administrative decision-maker on some questions of law by virtue of that decision-maker’s expertise. Contrary to Rothstein’s assertion that “expertise alone was not interpreted as indicating a legislative intent for finality”, expertise may, even in the absence of a privative (as was the case in *Mossop*) or a clear expression of legislative intent (as in s. 59 of the ATA), indicate legislative intent for deference.

## Questions of law: deference, or no deference?

### The correctness standard

* In ***Ryan* (2003)**, Iacobucci J held that, in applying the correctness standard, “the court must undertake its own reasoning process to arrive at the result if judges correct”. Likewise, in ***Dunsmuir* (2008)**, the majority stated: “When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer.” Underlying both of these statements is a **positivist approach to statutory interpretation**.
* The concept of correctness is rooted in three ideas:
  + **Jurisdiction:** the idea that matters will fall either in or outside an administrative decision-maker’s jurisdiction. Courts have a constitutionally-recognized right to judicially review administrative action with respect to jurisdiction, located in s. 96 of the *Constitution Act, 1867.*
  + **Expertise:** the idea that questions of law and legal interpretation fall within the province of judges.
  + **The need for consistency and predictability:** as Wildeman explains, the idea that judges, “as legal generalists with the institutional capacity to produce binding precedents, are best placed to resolve contests about law interpretation where this is essential to the even-handed application of law”.

### The approach to questions of law set out in *Dunsmuir*

* The majority in *Dunsmuir* (2008) suggests that not all questions of law attract a correctness standard – some legal issues, including interpretation of an administrative decision-maker’s home statute and other general common law or civil law rules, attract a reasonableness standard. Bastarache and Lebel JJ (majority) held: “Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: […] Deference may also be warranted where an admin tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context:…”
* Binnie J (concurring) proposed a slightly different approach to the applicable standard for questions of law: the correctness standard should apply to questions of law, *except those questions of law related to an administrative decision-maker’s home statute and other closely related statutes that require the decision-maker’s expertise.* Binnie J said: “It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the law word on Qs of general law should be left to judges”. This appears to be a less deferential approach than that of the majority, for which the default is deference on Qs of law unless a particular question is “of central importance to the legal system as a whole”. Binnie J argued that majority’s characterization was “a distraction to unleash a debate in the reviewing judge’s courtroom”.
* Deschamps J (concurring), proposed a third approach: “Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.” For questions of law in the absence of a privative clause, Deschamps J held that the applicable standard was correctness (this approach is similar to the one adopted by Rothstein J in *Khosa* (2009), discussed below). However, for questions of law where there was a privative clause and the question of law was within the administrative decision-maker’s core expertise, the applicable standard was reasonableness.

### The difficulty distinguishing b/w questions of law and questions of mixed fact and law

* In *Mossop* (1993), L’Heureux-Dube pointed out how difficult it can be to distinguish between questions of law and questions of mixed fact and law. She acknowledged that less deference may be warranted for questions of law, “in part because of the finder of fact may not have developed any particular familiarity with issues of law”, but the distinction between fact and law “is not always so clear”.
* The difficulty of distinguishing between questions of law and questions of mixed fact and law may agitate the tension underlying judicial review: between legislative supremacy and the rule of law. If courts are too willing to distill questions of law, and brand them as questions of “central importance to the legal system as a whole”, this could represent a form of judicial intervention reminiscent of the older “preliminary and collateral question”. As Dickson J, writing for a unanimous SCC in ***CUPE* (1979)**, held: “The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.”

### Rothstein J’s dicta in *Khosa*: no privative clause + question of law + ADM expertise = no deference

* In *Khosa* (2009), Rothstein J (concurring) argued that the absence of a privative clause indicates the legislature’s intent that courts apply a correctness standard to questions of law, even where the administrative body in question is specialized or has expertise: “It is only with the enactment of privative clauses… that the legislature evidenced an intent to oust, or at the very least restrict, the court’s review role. […] Expertise alone was not interpreted as indicating a legislative intent for finality.”
* However, even Rothstein J acknowledged that tribunal expertise or specialization may be evidence of legislative intent in favour of deference: “Broadly speaking, it is true of course that the creation of expert administrative decision-makers evidenced a legislative intent to displace or bypass the courts as primary adjudicators in a number of areas.”
* Also, of the two reasons why, according to Rothstein J, questions of law (in the absence of a privative clause) should be reviewed on a correctness standard – the principle of universality, and the relative expertise of courts – in the context of today’s administrative state, the second reason lacks credence. Though Rothstein J argues that “appellate and reviewing courts have greater law-making expertise relative to trial judges and administrative decision-makers”, as L’Heureux-Dube (dissent) in *Mossop* (1993) argued, relative to courts, some administrative bodies may have greater expertise in deciding certain questions of law.
* Finally, the linchpin of Rothstein J’s argument – that it “is not for the court to impute tribunal expertise on legal questions, absent a privative clause and, in doing so, assume the role of the legislature to determine when deference is or is not owed” – falls apart when one acknowledges the crucial difference between the existence and the non-existence of a privative clause. The existence of a privative clause, as Rothstein J rightly suggests, signals legislative intent that courts defer to an administrative decision-maker, even on some questions of law. However, the non-existence of a privative, contrary to Rothstein J’s assertion, does not signal legislative intent that courts not defer, i.e. that they apply a correctness standard, on questions of law. It may be that, even in the absence of a privative clause, the legislature’s intent is that courts defer to the administrative decision-maker on some questions of law by virtue of that decision-maker’s expertise. Contrary to Rothstein’s assertion that “expertise alone was not interpreted as indicating a legislative intent for finality”, expertise may, even in the absence of a privative (as was the case in *Mossop*), indicate a legislative intent that deference is owing. Logically, positive assertion cannot necessarily be inferred from negative one.

### L’Heureux Dube’s dissent in *Mossop*: no privative clause + question of law + ADM expertise = deference

* Quoting Wilson J in *Corn Growers* (1990), L’H-D in *Mossop* (1993) suggested that courts “have… come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency’s constitutive statute that make sense given the broad policy context within which that agency must work”. Later in *Mossop,* she adds that the “correct” interpretation of a Q of law may, in some cases, be best determined by an administrative body, rather than a court: “even where courts might not agree with a given interpretation, the integrity of certain administrative processes may demand that deference be shown to that interpretation of law”.
* Even if an administrative body is made up of “non-specialists”, L’H-D points out that administrative decision-makers “may develop a certain “field sensitivity” where that body is in a position of proximity to the community and its needs”. L’H-D thus suggests that, where a question “is one that requires a familiarity with and understanding of the context, there is a stronger argument that a higher degree of deference may be appropriate”. In the case of the Canadian Human Rights Tribunal’s interpretation of “family status” in s. 3 of its home statute, L’H-D says that “this problem is one which the Board is eminently suited to decide and a question best decided in a context-specific setting. (p 610)
* The majority in *Dunsmuir* seemed to acknowledge a similar principle in its construction of the new standard of review analysis: the default is deference, even for questions of law related to an administrative decision-maker’s home statute.

### Even if something has been around for a long time, the SCC can still revisit its existence

* That being said, Rothstein J (concurring) in *Khosa* (2009) makes a good point: just because tribunal expertise on certain questions of law is now presumed, and expertise was an animating factor under the pragmatic and functional approach, does not mean the SCC should not revisit its reasoning. Binnie J suggests that Rothstein J’s approach attempts “to roll back the *Dunsmuir* clock”. But Rothstein J makes a good point: even though a particular approach has been around for a long time, this longevity should not “stand in the way of this Court’s recent attempts to return conceptual clarity to the application of standard of review”. With respect to the importance of expertise, applied in *Pezim,* Rothstein J says: “The fact that *Pezim* has been cited in other cases does not preclude this Court from revisiting its reasoning where there are compelling reasons to do so.”
* It may be that, in order to improve the existing standard of review analysis, courts should reexamine their approach to relative expertise, focusing on actual expertise rather than imputed expertise. Rothstein J suggests that the current standard of review analysis involves “artificial judicial determinations of relative expertise”: “It seems quite arbitrary, for example, that courts may look at the nature of a tribunal as defined by its enabling statute, but not always conduct a full review of its actual expertise. […] In the specific context of statutory interpretation, should the reviewing court scrutinize whether or not the tribunal regularly reviews and interprets particular provisions in its home statute such that it possesses relative expertise with respect to such provisions?”

### Tension between efficiency and suitability (and solution?)

* Underlying Rothstein’s approach to expertise and privative clauses in *Khosa* (2009) and L’Heureux-Dube’s approach to expertise even in the absence of a privative clause in *Mossop* (1993) is a tension between a desire and need to simplify the standard of review analysis and a need to ensure that the body tasked with a making a decision, be it an ADM or a court, is the most capable, best-suited decision-maker.
* In *Khosa* (2009), Rothstein J suggested that, post-*Dunsmuir*,there is still no “cogent and predictable analysis of when courts should adopt a deferential approach to an administrative decision”: “What this demonstrates is that the common law standard of review analysis continues to provide little certainty about which standard will apply in a particular case. How a court will weigh and balance the four standard of review factors remains difficult to predict and therefore more costly to litigate.” With this in mind, Rothstein J’s assertion that, in the absence of a privative clause, the appropriate standard is always correctness appears to be a welcome simplification of the standard of review analysis. Under this approach, in the absence of a privative clause, it would be unnecessary to haggle in court over legal points such as whether a particular question of law qualifies as “a question of central importance to the legal system” under the *Dunsmuir* standard of review analysis. This might enhance predictability and lower costs for litigants. If a legislature wanted courts to defer to certain specialized decision-makers on questions of law, it could express this desire by amending the decision-maker’s home statute, or enacting judicial review legislation such as BC’s *Administrative Tribunals Act,* or s. 18.1(4)(d) of the *Federal Courts Act.*  Section 58 of the ATA provides that the standard of review if a listed tribunal contains a privative clause is patent unreasonableness; if there is no privative clause, the standard is correctness for all questions except those dealing with findings of fact, the exercise of discretion, or the application of procedural fairness or natural justice, as per s. 59 of the ATA.
* However, Rothstein J’s approach to expertise may achieve predictability at the expense of justice, i.e. the most competent, context-specific exercise of public decision-making powers, be that decision-making by the administrative state or the courts. As L’Heureux-Dube pointed out in *Mossop* (1993), “there is a great variety and diversity among administrative bodies, and not all administrative bodies are specialized or have equal expertise”. The focus of standard of review analysis should be on who – the administrative body, or the courts – is better placed to make the decision being challenged.This focus need not be at odd w/ the other tension underlying admin law: between the rule of law and legislative supremacy.
* Possibility: the tension between efficiency and suitability might best be resolved with Binnie J’s approach to the correctness standard in *Dunsmuir* (2008): even in the absence of a privative, deference applies to questions of law related to an administrative decision-maker’s home statute or other closely related statutes that require the decision-maker’s expertise. This would sufficiently capture situations like the Human Rights Tribunal’s interpretation of “family status” in s. 3 of its enabling statute, as was the case in *Mossop.* This might also avoid unnecessary debate and distraction about whether a particular question is “of central importance to the legal system as a whole”. In the alternative, or in addition, the SCC might consider expanding or shifting its evaluation of expertise to actual, as well as general expertise.

## Should there by three standards, or two? …or just one?

### The two original standards: correctness and patent unreasonableness

* Thanks to the SCC’s unanimous judgment in ***CUPE* (1979)**, there were originally two standards of review in Canada: **correctness** and **patent unreasonableness**. Dickson J held that the Board’s interpretation of s. 102(3)(a) of the *Public Service Labour Relations Act* would only be patently unreasonable if “its construction” could “not be supported by the relevant legislation”, i.e. *no reasonable person* could interpret the provision in the way that the Board did, and so required court intervention.
* Patent unreasonableness is a highly deferential standard. Correctness, in contrast, involves zero deference. As Iacobucci J explained in ***Ryan* (2003)**, in applying the correctness standard, “the court must undertake its own reasoning process to arrive at the result if judges correct”. Likewise, in ***Dunsmuir* (2008)**, the majority held: “When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer.”

### And then there were three: correctness, patent unreasonableness, and reasonableness *simpliciter*

* In ***Southam* (1997)**, the SCC introduced an intermediate standard between correctness and patent unreasonableness: **reasonableness *simpliciter****.* Under this standard, a decision is unreasonable if it cannot stand up to somewhat probing examination. Thus the focus with reasonableness *simpliciter* is on the reasoning of the administrative decision-maker. This is different from the focus of patent unreasonableness articulated in *CUPE* (1979): “could the legislator have intended that the administrative decision-maker have jurisdiction over this matter?”. The main difference between these two reasonableness standards relates to the immediacy of the defect: for the patent unreasonableness standard, the decision must be unreasonable on its face, whereas for the reasonableness *simpliciter* standard, the defect takes some probing to uncover.
* The reasonableness *simpliciter* standard was applied in ***Baker* (1999)***.* L’Heureux-Dube, writing for a majority of the SCC, applied the pragmatic and functional approach, weighing the following factors to find that some deference was required, but not so much deference that patent unreasonableness was called for: there was no privative clause but decisions could be judicially reviewed with leave of the Federal Court; the formal decision-maker was the Minister who had relative expertise on immigration matters generally, and the exemption in particular; the purpose of the provision was to afford the Minister substantial discretion; and, the nature of the question was factual. Applying the reasonableness *simpliciter* standard, L’H-D found that the decision to deny Baker a humanitarian and compassionate exemption was unreasonable, principally because the decision failed to give serious consideration to children’s interests, given that the welfare of children is a fundamental Canadian value that underlies the *Immigration Act.*

### And then there were two again: correctness and reasonableness

* In ***Dunsmuir* (2008)**, Binnie J (concurring) suggested that substantive review had become “unduly subtle” and “burdened with law office metaphysics”. The majority agreed, and sought to simplify things by merging the two existing reasonableness standards into a single one: “reasonableness”.
* Importantly, the majority in ***Dunsmuir* (2008)** clarified that the single reasonableness standard is not equivalent to reasonableness *simpliciter,* i.e. that the adoption of a single reasonableness standard did “not pave the way for a more intrusive review by courts”. The majority also noted that the new reasonableness standard did “not represent a return to pre-*Southam* formalism”.
* Rather, the majority explained that the new, single reasonableness standard was “a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result”. The focus of this single reasonableness standard was both **the decision-maker’s reasoning process** (“justification, transparency and intelligibility”), and **the decision itself** (“whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”). Also, the majority explained that deference requires “respectful attention to the reasons offered or which could have been offered in support of a decisions”, suggesting that even if a decision maker’s reasoning process was lacking, a decision would be upheld as reasonable if its rationale fell within the margin of appreciation.

#### Arguments against having two reasonableness standards

* + In ***Dunsmuir* (2008)**, Bastarache and Lebel JJ (majority) concluded that focusing on the magnitude or immediacy of a defect to distinguish between patent unreasonableness and reasonableness *simpliciter* did not make sense. Quoting Mullan, the majority reasoned: “To maintain a position that it is only the “clearly irrational” that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective “clearly” to irrational is surely a tautology. Like “uniqueness”, irrationality either exists or it does not. There cannot be shades of irrationality.”
  + The majority in ***Dunsmuir* (2008)** also suggested that, even if one could conceive of different degrees of irrationality, “it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough.*”

#### Critique of the single reasonableness standard

* + **Spectrum of deference:** In ***Dunsmuir* (2008)**, Binnie J (concurring) suggested that the majority’s single standard of reasonableness will “shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference.” Thus, while the bulk of the debate when there were two reasonableness standards centered on which of two to apply, with a single standard an equal amount of debate will focus on the degree of deference, i.e. how big or small the “range of possible, acceptable outcomes” should be. Binnie J drew this analogy: “In practice, the result of today’s decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another w/o any overall saving to motorists in time or expense.”
  + **Unpredictability:** Given that the majority in ***Dunsmuir* (2008)** notes that deference requires “respectful attention to the reasons offered *or which could have been offered in support of a decisions*”, it may be that the margin appreciation afforded to a particular decision-maker depends on the imagination of counsel and the court, leading to unpredictable outcomes.
  + **Precedents decided on different standards:** A further critique of the collapse of the two reasonableness standards into one is the challenge posed by the use of precedents decided on different reasonableness standards. A decision that attracted the correctness standard under the old analytic framework may not attract the correctness standard under the new framework. This has the potential to create anomalous results.
  + **Incoherence:** As Rothstein J (concurring) pointed out in ***Khosa* (2009)**, *Dunsmuir* failed to make substantive review more clear. In fact, as he noted, the nine judge panel could not agree on how this simplified approach should actually play out: “… six judges of this Court said that the standard of review applicable to the adjudicator’s legal determination was reasonableness. Three judges found that the standard was correctness. Each group focused on different aspects of the adjudicator’s decision-making process.”

### Why correctness is not obsolete: there are still two standards, i.e. correctness is not obsolete

#### The pluralist model and normative interpretation are not necessarily at odds with correctness

* + Though there has been a shift towards the pluralist model of constitutional ordering and the normative approach to statutory interpretation, in reality, the best medium is probably somewhere in between the two extremes. Rather than abdicating one in favour of the other, the rule of law and legislative supremacy should, and can, be balanced. Under the pluralist model of constitutional ordering and the normative approach to statutory interpretation are not necessarily at odds with review on a correctness standard. The correctness standard may be applicable, for example, where fundamental Charter or human rights values are at stake.

#### Reasonableness may now be the norm, but exceptions to deference still exist

* + Though ***Dunsmuir* (2008)** makes deference and the reasonableness standard the default, the majority also articulated several exceptions to deference.
  + Post-*Dunsmuir*, the following issues are likely to attract a correctness standard:
    - Questions of general importance to the legal system;
    - Questions of law that are outside an ADM’s home statute or expertise;
    - Constitutional issues;
    - True questions of jurisdiction;
    - Human rights questions (if the majority’s view in *Mossop* (1993) is still applicable).

#### Courts’ right to judicial review is constitutionally-guaranteed

* + Section 96 of the *Constitution Act, 1867* has been held to give the superior courts in each province the *inherent, constitutionally-recognized jurisdiction* to review administrative decision-making, at least with respect to questions of jurisdiction (which attract a correctness standard). This means that a superior court, even in the face of the most strongly worded privative clause, is constitutionally entitled to judicially review the jurisdiction of an administrative decision-maker. This inherent jurisdiction was articulated by Laskin CJ for a unanimous SCC in ***Crevier* (1981)**. This expansive interpretation of s. 96 of the *Constitution Act, 1867* tips the balance in the tension between the rule of law and legislative supremacy towards the rule of law and judicial intervention. In ***MacMillan Bloedel* (1995)**, Lamer CJ (SCC) reiterated this: “The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction, which forms this core, cannot be removed from the superior courts by either level of government, without amending the Constitution.”

#### Correctness as a statutory standard of review

* + **Section 58** of BC’s *Administrative Tribunals Act* provides that the applicable standard of review for tribunals with a privative clause is correctness for all matters excluding findings “of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction” (in which case that applicable standard of review is patent unreasonableness).
  + Similarly, s. 59 of the ATA provides that, for tribunals whose enabling statute does not contain a privative clause, the standard of review “to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness”.

# Discretion

## Whether courts should interfere where administrative decision-makers are granted discretion: yes

### Introduction to discretion

* Discretion exists an administrative decision-maker has the power to choose between a number of options – e.g. a variety of results, or action or inaction – within a set of boundaries imposed by statute. With discretionary decisions, there is no one, legally-proscribed answer. As L’Heureux Dube J explained in ***Baker* (1999)**: “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.”
* A classic sign of discretionary power is legislators’ use of the permissive word “may”, rather than the mandatory word “shall”. Whenever an administrative decision-maker *may* do something, that decision-maker may also *not* do that thing. Either option is legitimate, and the decision-maker has the power to choose.
* Examples of discretionary administrative decisions include the decision to terminate at pleasure public office holders, as the dissent in *Nicholson* (1978)discussed, and the decision to grant humanitarian and compassionate exemptions under the *Immigration Act,* as was the case in *Baker* (1999) and *Khosa* (2009).
* The rationale for discretionary power is twofold. First, discretion exists because it is generally impossible to legislate or prescribe an outcome for every circumstance. This is because human circumstances vary so broadly. Second, discretion exists because, in some cases, it may be undesirable for legislators to prescribe outcomes. As Cartier explains, discretion is “essential to contemporary government” because “bringing the various legislative schemes that are put in place by Parliament down to the individual requires some measure of flexibility on the executive’s part, either because Parliament cannot foresee every individual case that is likely to arise… or because it does not have the necessary expertise or knowledge to craft the norms that should apply in any given area of activity”.

### The space between the legislative will and executive action

* According to the traditional view of the separation of powers, the executive simply “executes” the will of the legislature. However, as Cartier explains, in practice “the margin of manoeuvre that is involved in making choices suggests that there is a space or distance between the expression of the will of Parliament on the one hand, and acts of the executive on the other”. The exercise of discretion creates this space between the legislative will and executive action. Awareness of this space raises the following Q: *is this space in which administrative decision-makers exercise discretion subject to legal principles and judicial oversight, or not?*

### The law-discretion dichotomy

* The application of legal principles and judicial oversight to discretionary power is controversial. Within the academic sphere, there are two schools of thought: (a) the “discretion as arbitrariness” school; and (b) the “discretion as a tool to support the development of the welfare state” school.

#### Discretion as arbitrariness

* Dicey, a proponent of legal formalism and judicial intervention in administrative decision-making, contrasted law with discretion. Dicey associated discretion with arbitrary power, suggesting that the rule of law “excludes the existence of arbitrariness, or prerogative, or even of wide discretionary authority on the part of the government”. Arbitrariness, in turn, Dicey associated with “insecurity for legal freedom”. As Cartier explains, Dicey agreed discretionary power was permissible in exceptional circumstances like war, but “fiercely condemned the kind of legislative delegations of discretion that became commonplace in the welfare state”. This delegation of discretion, exercised in a “lawless void”, was problematic because it deprived courts of their supervisory power. Free from judicial supervision, the executive could exercise its power in an arbitrary manner and administrative decision-makers became a law unto themselves.

#### Discretion as a tool to support the development of the welfare state

* Robson, in contrast to Dicey, perceived discretion as an instrument to support the development of the welfare state. According to Robson, discretion was not intrinsically arbitrary; rather, discretion, properly exercised, involved administrative decision-makers “exhibiting a… judicial frame of mind” and a “spirit of justice”. However, Robson did not think that administrative decision-makers should be completely free from judicial oversight; rather, he proposed setting up a specialized court that could deal exclusively with administrative decision-making.
* Similarly, Jennings argued that discretion and the rule of law were not antithetical. Discretionary power required some form of judicial supervision, preferably performed by a specialized administrative court.

### Tension between legitimate and illegitimate policing of discretion

* Two different approaches in the judicial sphere mirror the opposite academic camps: (a) the interventionist approach to discretionary decision-making; and (b) the non-interventionist approach. These approaches are reflected in ***Roncarelli* (1959)**: on the one hand, the judgment of Rand J represents intervention; on the other hand, the judgment of Cartwright J represents non-intervention. In *Roncarelli*, the impugned decision was the forever cancellation of a Montreal restaurant-owner’s liquor licence by the Quebec Liquor Commissioner, on orders from the premier, Duplessis. The evidence indicated that Duplessis made this order because of Roncarelli’s connection to the Jehovah’s Witnesses.

#### Interventionist approach to discretionary decision-making

* Rand J’s approach in ***Roncarelli* (1959)**exemplifies the interventionist approach to discretionary decision-making, i.e. the idea that discretion is constrained by legal principles. Linked to this interventionist approach is the need to respect individual freedom.
* Rand J acknowledges that the decision to grant or deny a liquor licence was within the Liquor Commission’s discretion. However, he argues that, in the public sphere, “there is no such thing as absolute and untrammelled “discretion””. In other words: “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”. Rand J says that discretionary power must be exercised within the “lines or objects” of the legislation. Posing the question, “Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair?”, Rand J answers in the negative: “The ordinary language of the legislature cannot be so distorted.” Revoking Roncarelli’s licence was “beyond the scope of the discretion conferred” on the Liquor Commissioner by the *Liquor Act.*
* Rand J concludes that the expanding administrative demands that discretionary power be exercised in good faith, i.e. not according to the “arbitrary likes, dislikes or irrelevant purposes of public officers acting beyond their duty”. Discretionary power exercised in bad faith, or maliciously, Rand J suggests, “would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure”.
* In ***Baker* (1999)***,* L’Heureux-Dube J (majority) adopted a similar view of discretionary decision-making. The *Immigration Act* gave the Minister broad discretion to choose whether or not to grant an exemption on humanitarian or compassionate grounds. L’H-D J held that, when a legislature uses statutory language to confer “broad choices on administrative agencies… courts should not lightly interfere with such decisions and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised”. However, L’H-D J, like Rand J, held that discretion is not absolute: “discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law”. In ***Baker* (1999),** the majority concluded that, in part given the highly discretionary nature of the Minister’s decision weighed against the absence of a privative clause, the possibility of appeal to the Federal Court with leave, and the individual (rather than polycentric) nature of the decision, the appropriate standard of review was reasonableness *simpliciter.* Applying this standard, the majority found that the decision to deny Baker an exemption was unreasonable: “because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker’s children… it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned”.

#### Non-interventionist approach to discretionary decision-making

* In contrast, Cartwright J’s approach in ***Roncarelli* (1959)** exemplifies that non-interventionist approach to discretionary decision-making. Linked to the non-interventionist approach is the need to protect an administrative decision-maker’s margin of manoeuvre.
* Considering the relevant provisions in the *Liquor Act,* Cartwright J states: “I am unable to find that the Legislation 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.” Because of this *lack* of explicit direction from the legislature or statutory limits on the manner in which the Commissioner’s discretion was to be exercised, Cartwright J concludes that the Commissioner had “unfettered discretion” to decide whether to grant, refuse, or cancel a liquor licence. Given the lack of standards or conditions, Cartwright J says, “I am forced to conclude that the Legislature intended the administrative decision-maker “to be a law unto itself”.

### In favour of intervention

#### A middle ground between administrative discretion and judicial control: intervention *“light”*

* At first whiff, Rand J’s judgment in *Roncarelli* (1959) smells of Dicey’s “discretion as arbitrariness”. However, a closer reading suggests that Rand J is advocating for a middle ground between administrative discretion and judicial control. While Dicey suggested that the rule of law generally excludes the exercise of discretionary power by administrative decision-makers, Rand J acknowledges that it was within the Liquor Commissioner’s discretion to grant or revoke liquor licences. This is not at odds with Robson or Jennings’ views of discretion; rather, Rand J’s view is very similar to Robson’s idea that discretion can be exercised arbitrarily with a “spirit of justice”, and Jennings’ idea that discretion and the rule of law are not necessarily antithetical. This is intervention “light”, so to speak: courts will only intervene in discretionary decision-making to ensure that this discretion is exercised within the bounds of legislative intent and purpose, “not with an improper intent and for an alien purpose”.

#### Different approaches to statutory interpretation

* Though Rand J seems happy not to intervene in discretion exercised within the bounds of legislative intent and purpose, a proponent of the Cartwright J perspective might argue that this intervention “light” approach is simply a cloak for more aggressive judicial control of administrative decision-making. If discretionary power is to be policed by courts in light of legislative intent and purpose, the various approaches to statutory interpretation can grow or shrink an administrative decision-maker’s margin of manoeuvre. For example, a literal and textual interpretation of statutory language might lead a judge to conclude that a particular exercise of discretion is *within* a decision-maker’s capacities. This appears to be Cartwright J’s approach in *Roncarelli* (1959). In contrast, a purposive approach to statutory interpretation might lead a judge to conclude that the same exercise of discretion falls outside the purpose and intent of the legislation conferring that discretion. This appears to be Rand J’s approach in *Roncarelli* (1959). Importantly, while the plain meaning rule to statutory interpretation still lurks in the shadows of some judgments, the modern approach to statutory interpretation as endorsed by the SCC in *Re Rizzo* is Driedger’s “modern principle”, or the purposive approach to statutory interpretation. For example, in *Baker* (1999), L’H-D J (majority) adopted a contextual approach to statutory interpretation, taking into account the objectives of the *Immigration Act,* ministerial guidelines, and Canada’s international commitments. This approach to statutory interpretation bodes well for striking a workable balance between judicial control and administrative discretion, rather than abdicating supervision in favour of non-intervention.

#### Discretion exercised in a “space controlled by law”

* In *Baker* (1999), L’H-D J (majority) cautioned that there is no easy distinction between discretionary and non-discretionary decisions: “Most administrative decisions involve the exercise implicit discretion in relation to many aspects of decision making.” Also, she noted that there is no easy distinction between judicial interpretation and the exercise of discretion: “interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options”. This raises the question: *where courts intervene in discretionary decision-making, is one form of discretion (administrative) simply be replaced with another form (judicial)?* While this may be the case, the manner in which courts intervene in discretionary decision-making was guided by the pragmatic and functional approach in *Baker* (1999), and is now guided by the contextual approach to reasonableness under the (similar) standard of review analysis set out in *Dunsmuir* (2008). The review of discretionary administrative decisions by courts in the same framework and using the same tools as the review of non-discretionary decisions breaks down the law-discretion dichotomy even further. While Dicey saw discretion exercised in a “lawless void”, the application of standard of review analysis to discretionary decisions, as in *Baker*, suggests the opposite. As Cartier explains, “*Baker…*moves closer to a conception of discretion as exercised in a “space controlled by law,” as opposed to a conception of discretion as inherently political or giving the executive “free reign within legal limits”.
* That said, it is not clear whether the *Baker* conception of discretion exercised in a “space controlled by law” has been fully embraced by the Supreme Court of Canada. With the exception of Fish J’s judgment, *Khosa* (2009) seems to represent a step back towards the idea that, when exercising discretion, administrative decision-makers have “free reign within legal limits”, i.e. it is not the function of a reviewing court to reweigh the factors that went into an administrative decision-maker’s exercise of discretion. In *Khosa*, Binnie J (majority) concluded that the Appeal Division’s exercise of discretion was reasonable. Unlike L’Heureux-Dube J who in *Baker* was willing to reweigh the factors that should have gone into the Minister’s reasonable exercise of discretion*,* the majority in *Khosa* was unwilling to reweigh the *Ribic* factors that informed the Appeal Division’s decision to deny Khosa a humanitarian and compassionate exemption. The majority’s decision in *Khosa* suggests that administrative decision-makers do have “free reign within legal limits”, and that the review of discretionary decisions by courts will not involve a reweighing of factors. I disagree with the majority’s approach, and prefer Fish J’s willingness to find that the Appeal Division’s focus on a single *Ribic* factor – Khosa’s likelihood of rehabilitation – was unreasonable. There is no part of a discretionary decision that should be untouchable by courts; if any aspect of a discretionary decision is arbitrary, fettered, biased, malicious or otherwise an abuse of discretionary power, courts should intervene to protect the rights of the individual affected by that decision.

#### Discretion as “dialogue”

* Cartier suggests that, since *Roncarelli,* courts have oscillated between two conceptions of discretion: discretion as dialogue, and discretion as power. Cartier explains: “When conceived as the former, administrative discretion must be approached from a bottom-up perspective and thought of as a dialogue between the individual affected by the decision and the public authority making that decision. […] The effect of the dialogue is essentially to narrow the range of outcomes that a decision-maker is legally entitled to reach, because the decision must be responsive to the dialogue that preceded it”. In *Roncarelli,* Rand J’s approach was one of discretion as dialogue. In contrast, Cartwright J’s was one of discretion as power. According to Cartier, under this conception, discretion is viewed as “an exercise of power, unchallengeable by courts, except when the statute explicitly indicates that such a challenge is authorized”.
* Like Cartier, I agree that discretion should be conceived as a dialogue because, from this perspective, discretion is compatible with the rule of law. Administrative decision-makers can exercise discretion within, as Cartier suggest, “the realm of the rule of law through participation and accountability” to the individuals affected by their decisions, as well as to the courts. More broadly, the idea of discretion as dialogue reflects a pluralist model of constitutional ordering. The pluralist model involves upholding the rule of law through a dialogue between the three branches of government, as well as individual Canadians. As Cartier explains: “Legislatures and administrative tribunals have a role in the determination of the values considered fundamental to the Canadian social, political and legal order, as do the parties who challenge the state to show that its exercises of public power are accountable to those underlying values.”