Administrative Law – Summary

Concepts and Debates 5
Introduction (3-29) 5
The Administrative State and the Rule of Law 5
The Administrative State: Delivering Public Programs 5
The Subject Matter of Public Administration 5
Institutions of the Administrative State 7
Independent Agencies over Government Departments: 8
Independent Agencies over Courts: 8
Political & Administrative Redress of Individual Grievances (pg.18) 8
Administrative Remedies 8
The Administrator as Judge, J Willis 9

The Role of Judicial Review 10
PART I: OVERVIEW OF ADMINISTRATIVE DECISION MAKERS 10
Baker v Canada (Minister of Citizenship and Immigration) 10
Judgments – Procedural History 10
Analysis 11
Application 11
The Approach to Review of Discretionary Decision-Making 11
Application of the Pragmatic and Functional Approach 12
PART II: PROCEDURES 12

Substantive Review: Framework for Standard of Review Analysis 13
Substantive Review (629-632) 13
The Standard of Review – Chapter 9 (633-649) 13
Dunsmuir v New Brunswick 2008 SCC 9 14

Substantive Review: Privative Clauses and Statutory Rights of Appeal 17
Introduction 17
Privative (or preclusive) Clauses and Rights of Appeal 17
Examples: 18
Privative Clauses in the Standard of Review Analysis 18
Hibernia Management and Development Company v Canada-Newfoundland and Labrador Offshore Petroleum Board, 2008 NLCA 18
Rights of Appeal in the Standard of Review Analysis 19
Constitutional Limits of Privative Clauses 19
Crevier v AG (Quebec) et al 19

Substantive Review: Expertise and Statutory Purpose 19
Introduction 19
Expertise as a Factor in the Standard of Review Analysis 20
The Role of Statutory Purpose 20
Bell Canada v Bell Aliant Regional Communications, 2009 SCC 40 20

Substantive Review: Nature of the Question and Discretionary Decision-Making 21
Introduction 21
Factual Questions 22
Dr Q v College of Physicians and Surgeons of BC 2003 SCC 19 22
Questions of Law 24
Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982 24

Discretionary and Policy Questions in the Standard of Review Analysis 25
Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12 25

The Use and Misuse of Discretion **26**
Introduction 26
Laws, Rules and Discretion 26
Traditional Common Law Doctrines for Review of the Exercise of Discretion 27

Jurisdictional Questions and the Origins of the Standard of Review Analysis **27**
Introduction 27
Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61 .... *28*
The "Preliminary Question" Doctrine 28
The Origins of the Standard of Review Analysis: CUPE (1979) 29
CUPE v NB Liquor Corporation [1979] 2 SCR 227 (NB) *29*
Remember Dunsmuir (Jurisdiction): *30*
Correctness on Jurisdictional Questions 30

Applying the Standard of Review **30**
Correctness Review – 30
CASE: Pushpanathan v Canada (Minister of Citizenship and Immigration) (SCC, 1998) *30*
Reasonableness Review – 32
CASE: Canada (Citizenship and Immigration) v Khosa (SCC, 2009) *32*
Requirement to Give Reasons in Substantive Review 33
CASE: Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board) (SCC, 2011) .. *33*
CASE: Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association (SCC, 2011) *34*
Coffey v. College of Licensed Practical Nurses of Manitoba (Man. CA) [2008] 34
CASE: Cabral De Medeiros v. Canada (Citizenship and Immigration) (FC, 2008) 36
CASE: Kawartha Pine Ridge District School Board v. Grant (Ont. Div. Ct.) [2010] 37
CASE: Registrar, Motor Vehicles Dealers Act v. Unity-A-Automotive Inc. et al. (Ont. Div. Ct.) [2010] 38

Duty of Administrative DMs to Consult with and Accommodate Aboriginal Peoples **39**
Introduction 39
The Source 39
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 .... *40*
The Threshold 41
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 .... *41*
Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, 2010 SCC 43 .... *41*
The Content 42
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 .... *43*

Procedural Fairness: Overview of Sources **43**
Two Arms of Procedural Fairness 44
Procedures – Introduction 44
Fairness: Sources and Thresholds 45
The Enabling Statute *45*
Subordinate Legislation: Administrative Policy and Practice *45*
Policies and Guidelines *45*
General Procedural Statutes *46*
Common Law Procedural Fairness *46*
The Traditional Common Law Doctrine *46*
Cooper v Board of Works for Wandsworth District (1863), 143 ER 414 (Eng CP) 46
The Modern Common Law Doctrine: Dimensions and Limitations of Procedural Fairness *47*
Nicholson v Haldimand-Norfolk Regional Police Commissioners, [1979] 1 SCR 311 (Ont) 47
Constitutional and Quasi-Constitutional Sources of Procedures *47*
The CDN Bill of Rights 48
The CDN Charter 48
QB Charter 48

Procedural Fairness: Common Law Threshold **48**

Thresholds 48
The Common Law Threshold 49
Historical Overview *49*
Martineau v Matsqui Inmate Disciplinary Board, [1980] 1 SCR 602 49
Minister of National Revenue v Coopers & Lybrand, [1979] 1 SCR 495 50
Cardinal v Director of Kent Institution, [1985] 2 SCR 643 (BC) 50
Decisions of a Legislative and a General Nature 50
Wells v Newfoundland, [1999] 3 DCR 199 .... *51*
Legislative Decision: *51*
Canada (Attorney General) v Inuit Tapirisat of Canada, [1980] 2 SCR 735 – Cabinet and Cabinet Appeals 51
Canadian Doctors for Refugee Care v Canada (AG), 2014 FC 651 52
General Policy Decisions/Policy Making *52*
Vanderkloet v Leeds & Grenville (County Board of Education), (1985), 20 DLR (4th) 738 (Ont CA) 52
Bezaire v Windsor Roman Catholic Separate School Board (1992), 9 OR (3d) 737 (Div Ct) 52
CDN Assn of Regulated Importers v Canada (AG) [1993] (FCTD; FCA) 53
Inspections and Recommendations 53
In re Pergamon Press, [1971] Ch 388 (CA) (England) *53*
Re Abel and Advisory Review Board, (1979), 97 DLR (3d) 304 (Ont Div Ct), aff'd (1981), 119 DLR (3d) 101 (Ont CA) *54*
Re Munro (1993, Sask CA) *54*

Procedural Fairness: General Content and Legitimate Expectations 54
The Level of Procedures 54
The Baker Factors 55
1. *The nature of the Decision and the Process Followed in making it* *55*
2. *The nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates* *55*
3. *The importance of the Decision to the affected individual(s)* *55*
4. *The legitimate expectations of the person challenging the decision* *55*
5. *The choices of procedure made by the agency itself* *56*

Application of the 5 Factors in Baker *56*
Legitimate Expectations 56
Mount Siniai Hospital Center v Quebec (Minister of Health and Social Services) 2001 SCC 41 (Que) *56*
Congregation des temoins de Jehovah de St-Jerome-Lafontaine v Lafontaine (Village) (SCC) 2004 .... *57*
Legitimate expectations and reasons for decisions *57*

Procedural Fairness: Specific Content (Notice & Reply; Hearings) 58
The Choice of Procedures 58
Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1 .... *58*
Procedural Protections under S. 7 of the Charter *58*
Specific Content Issues 59
Pre-Hearing Issues 59
Notice *59*
The Actual Hearing 60
Oral Hearings *60*
Khan v University of Ottawa (1997), 34 OR (3d) 535 (CA) 61
Pleasures Gentlemen's Club [2008] (Ont CA) (Rouleau JA for court) 62

Procedural Fairness: Specific Content (Case Study on Public Inquiries) 63
Public Inquiries & the Criminal Process 63
Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy) 1995 .... *63*
Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System) (1997) SCC *64*
Ontario (Human rights Commission) v Ontario (Board of Inquiry into Northwestern General Hospital) 1993 Ont Div Ct *65*
CIBA-Geigy Ltd v Canada (Patented Medicine Prices Review Board) 1994 FCA *66*

Truth Before Punishment: A Defence of Public Inquiries: Gus Van Harten 66

Procedural Fairness: Charter/Bill of Rights Threshold 68
Introduction 68
Singh v Canada 1985 (SCC) 68
Charkaoui No. 1 [2007] 1 SCR 350 (Can) (McLachlin CJC for court) 70
Charkaoui II [2008] 2 SCR 326 (Can) (LeBel and Fish JJ for court) 72

Procedural Fairness: Procedural Statutes 73
General Procedural Statutes 73
Ontario's Statutory Powers Procedure Act 73

Procedural Fairness: Specific Content (Disclosure; role of in-house counsel) 74
Charkaoui II (2008) (359) (SCC) 74
Pritchard v Ontario (2004) (SCC) 75
London Limos (2012) (MBCA) 75

Bias & Lack of Impartiality (focus on bias at the individual level) 76
Introduction 76
Bias The General Test 76
United Enterprise Ltd v Saskatchewan (Liquor and Gaming Licensing Commission) 1997 (Sask QB) 77
DeMaria v Law Society of Sask (2013) 77
Attitudinal Bias 78
Paine v University of Toronto (1980) Ont Div Ct 78
Pelletier v Canada 2008 FC 78
Newfoundland Telephone Co v Newfoundland (board of Commissioners of Public Utilities) (SCC) 79
Apprehension of bias standard using Baker factors 79
Sternberg v Ontario Racing Commission (2008) Ont. Div. Ct. 79

Bias & Lack of Impartiality (focus on bias at the institutional level) 80
2747-3174 Quebec Inc v Quebec (Liquor Licensing) 1996 80
Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch) 2001 81

Bias & Lack of Impartiality (case study from International Law) 82
A CASE FOR AN INTERNATIONAL INVESTMENT COURT: Van Harten 82

Remedies 84
Remedies for Unlawful Administrative Action 84
Government in the Conduct of Business 85
CASE: Volker Stevin NWT ('92) Ltd v Northwest Territories (Commissioner) (NWTCA, 1994) 85
Availability of court injunction beyond statutory framework 86
CASE: Guelph (City) v Soltys (Ont Sup Ct, 2009) 86
Requirement to use alternative remedies 87
CASE: Volochay v College of Massage Therapists of Ontario (ONCA, 2012) 87
Misconduct of Applicant – 88
CASE: Homex Realty v Wyoming (SCC, 1980) 88

Standing 88
Overview of standing 88
Government Accountability (Beyond Courts) 89
Why allow broader participatory rights in judicial review? Why limit such rights? 89
In favour of broad standing rules: judicial review is a unique means of accountability 89
Against broad standing rules: commentators express these concerns 89
Statutory Rights to Standing 90
Public Interest Standing 90
Finlay v Canada (Minister of Finance) [1986] 2 SCR 607 (Can) (Le Dain J for court) 90
Canadian Council of Churches v. Canada, [1992] 1 SCR 236 (Can) (Cory J for court) 91

Canada v. Downtown Eastside Sex Workers, 2012 SCC 45 (Cromwell J for court) 92
Should cases that are "transcendental" be going to the court like this at all? 93
How is public interest standing related to JR? 94
Evolution of the Public Interest Standing Test 94
Shift from "only way to do it" to "this is a reasonable way of doing it" 94

Concepts and Debates

Introduction (3-29)

The Administrative State and the Rule of Law

- Admin law is a branch of public law
- Has the closest affinity with constitutional law in that it concerns the legal structuring and regulation of sovereign authority, both in the state's relations with individuals and in the allocation of authority among various institutions
- Admin law is pervasive b/c of the extensive and integral role of gov in modern society
- Concerns of admin law are general and can arise in connection with the administration of any statute or public program

The Administrative State: Delivering Public Programs

- Much of the subject matter of admin law is the law governing the implementation of public programs, particularly at the point of delivery
- Programs originate in the identification by government of a problem created by or not adequately addressed by the operation of the market or private law, often stemming from inequalities of power
- Problem identified by political lobbying, public pressure etc. gov can respond in many ways: do nothing; deal with it through existing legal tools; or, create a new legal framework administered by some agency other than the courts of law designed specifically for this purpose
- Third option is primarily the realm of admin law: the procedural fairness; the adequacy of both the factual basis and the legal authority for administrative action; the rational exercise of discretion; and the availability of legal remedies to challenge the abuse of power by public bodies and officials

The Subject Matter of Public Administration

Admin law plays a role in a wide range of specialized areas of regulation and dispute resolution. Most of these areas have given rise to litigation.

<u>Employment</u>

- The employment relationship is extensively regulated by statutory programs
- The individual contract of employment and its attendant private law rights and remedies are only one component, and in many contexts they are relatively insignificant (i.e. in labour law, employees have a statutory right to be represented by a trade union of choice, if the application for this is granted, the board polices the relations b/w the union and the employer
- Statutes also typically prescribe basic employee entitlements that are of particular importance to those who are not covered by a collective agreement (i.e. min wage, max hours of work, compensation for injuries etc.)

<u>Regulated Industries</u>

- Due to industrialization, the market proved to be incapable of ensuring certain public goods, as a result, certain industries are subject to extensive statutory regulation
- Examples: utility companies require consent of a regulator before increasing tariffs; broadcasters require a license to ensure their air time has a certain allotment to "Canadianess"
- All forms of commercial transportation (flights, trains etc) are regulated for public safety

Economic Activities

- State regulates economic activities, regardless of the industry or business in which it occurs (i.e. mergers and takeovers are scrutinized for their possibility of adverse impact on competition)
- Canadian manufacturers are protected from unfair competition caused by the importation of goods for sale at less than the cost of production
- All economic activity is subject to taxation in order to raise revenue to provide public services and to redistribute wealth

Professions and Trades

- The members of most professions enjoy a statutory monopoly to render the services associated with that profession (i.e. law, health care)
- Applicants must satisfy prescribed educational standards, and in some instances a good character requirement
- Rationale for this type of market interventions is consumers' lack of knowledge and their inability to make an informed selection of an appropriate service provider or to assess the quality of the work performed
- Regulatory schemes also apply to trades and vocations: persons selling cars, real estate, securities etc.
- The extension of a licensing system to those selling or providing a variety of goods and services is explained by similar rational of consumer protection as apply to the professions

Social Control

- Some public programs restrict individual's freedom of movement (i.e. imprisonment)
- Incarceration of the mentally ill
- Immigration and Refugee Protection Act, 2001 regulates the admission and removal of non-citizens

Human Rights

- Public awareness and debate about social dimensions of discrimination led to the enactment of statutory schemes for the protection of human rights
- Unlike s. 15 of the constitution, Human rights applies to both private parties and gov

Income Support

- Provision of income support remains important to CDN state, though the amounts have been reduced dramatically
- Supports provided provincially and federally

Public Services

- Gov also delivers/pays for a range of services
- Most familiar are health care, education, child welfare, road construction and maintenance, public parks, fire services, police forces, garbage collection, public transit etc. nearly all these the services are delivered under statutory authority
- Distinctions to be drawn for the services above: some achieve their aim by regulating a relationship b/w private persons: the statutory regulation of employment and the prohibition of discrimination fall into this category, although, as the gov is also a major employer, it also is subject to these programs
- Public programs may also be distinguished on the basis of whether they achieve their aims by conferring benefits on individuals or by imposing restrictions on otherwise lawful activities
- Public education, universal health care, and income support are examples of the former; business licensing and land-use controls, the latter
- All regulatory programs are intended to confer benefits on members of the public BUT programs that regulate relationships b/w private individuals both create benefits and impose obligations that are legally enforceable
- The distinction b/w statutory restrictions on common law rights (i.e. physical liberty, freedom of contract and property rights) and statutory benefits has often surfaced when administrative action has been challenged in the courts

- Over the past 2 centuries, the law has more often tended to uphold the status quo than advance the redistributive and welfare objectives of legislation

Institutions of the Administrative State

Legislatures

- Is in principle the leading public forum where the most important political decisions taken in the name of the electorate are explained, debated, and potentially approved—although the role of legislatures appears to have declined as senior executive bodies—especially the PM and premier's office—have centralized and consolidated their power by various means
- Nearly all public programs must originate with a statute enacted by the provincial/territorial or federal legislatures in order to create new legal rights and duties

Cabinet and Ministers

- Typically made up of various ministers and is chaired by the PM or premier, who assigns ministerial responsibilities
- Cabinet is also known federally as the governor in council and provincially as the lieutenant in council
- A minister generally has responsibility for a (federal) department or a provincial ministry that is normally established through statute
- Cabinet or individual ministers may be empowered to supplement a statute with delegated legislation

Municipalities

- Municipalities exercise powers that are delegated by the provincial legislature, including tax powers
- Many of the programs that frequently affect people are administered at the local level of gov: police and fire services, schools, parks etc.
- Members of municipal councils are elected but subject to provincial guidance and control in these areas
- Standards are set by enabling legislation, ministerial policy directives, or by the terms on which the provincial funding is provided
- Some municipal decisions may be set aside on appeal by a provincial agency or to a provincial tribunal

Crown Corporations

- Some public services provided through Crown Corps which enjoy substantial independence in their day-to-day operations (this is to enable them to make commercial decisions without gov interference)
- Examples: CBC; Canada Post etc
- Many have been privatized (i.e. Air Canada, Petro Can, 407, juvenile correction facilities)

Private Bodies and Public Functions

- An array of nominally private bodies are found in the borderland b/w government and the private sector
- Some derive legal authority purely from contract, but by virtue of their control over particular activities, private bodies may resemble the administrative agencies that otherwise discharge governmental functions
- Example of this are professional sports clubs

Independent Administrative Agencies

Congruent Features:

- Enjoy a measure of independence from government department with overall responsibility for the policy area in which they operate --> minister CANT direct what decision they must reach in a matter
- Those liable to be affected by a decision have an opportunity to participate in decision making process by producing evidence and making submissions
- Operate at "sharp end" of process; when the program is applied to the individual i.e. denying a license, determination of person's refugee status
- All admin. Programs are specialized --> deliver a program or part of one

Varying Features:

- Certain agencies determine individual rights based on past events or facts, have a relatively precise statutory standard, and a limited degree of discretion --> i.e. human rights tribunals, professional discipline committees
- Other agencies have a bigger policy-making mandate and are guided more by the impact of the decision on an individual or group of them
- Some agencies resemble courts in their structure i.e. professional discipline committees & social assistance appeal tribunals
- Some agencies have massive caseloads --> I.e. Immigration and Refugee Board
- Varying effects the decisions made by independent agencies have on individuals

**Admin agencies are part of the government in that they are responsible for advancing the public interest by implementing the program they administer. They are like courts in that they may conduct hearing and must justify their decisions, which invariably affect individuals' rights

Independent Agencies over Government Departments:

- Ind. Agencies are insulated from pressures of day to pay partisan politics
- Easier for them to maintain open process & develop longer-term consistent policies

Independent Agencies over Courts:

- Nature of decisions made by many agencies are much more governmental in nature than judicial
- More desirable for decisions to be made by persons other than judges
- Disputes with which agencies are concerned involve relatively small sums so processing them through the courts is a misallocation of public resources
- A more informal process than the one of courts may allow for more expeditious decisions and reduce need for legal representation

Political & Administrative Redress of Individual Grievances (pg.18)

- ***Legislative Oversight of Admin Process -*** legislative oversight inadequate for investigation complaint from ppl about decisions made during course of implementing the public programs of the administrative state
- SO: every Canadian province has an officer of legislature called the ombudsman
  - Can investigate action taken in the administration of a government organization that affects individuals
  - Has the power to obtain info in connection with the investigation conducted in private
  - The complainant just has to file a complaint to begin the investigative process
  - Ombudsman can consider a wide range of possible errors that may have been committed in delivery of public program
  - If ombudsman decides something went wrong in the process of implementation then organization will be asked to provide a remedy
    - If recommendation NOT acted upon, then ombud may report matter to the relevant committee of the legislature

Administrative Remedies

- Admin agencies have internal mechanisms for dealing with citizens' grievance
  - Asking person who made decision to revisit it; speak with more senior person in agency; formal level of appeal; unlike courts these agencies also have an express statutory power to reconsider their decisions

The Administrator as Judge, J Willis

Judicial review: the review of decisions made by administrator judges (by ordinary courts)

Degrees of reviewability in "lawyer's law":

1. Reviewing court is entitled to substitute its judgment in toto for the judgment of the inferior court (i.e. on an appeal to a COA from the decision of a trial judge on a question of law
2. Limited to enquiring whether the inferior Court applied the correct principle to the facts of the particular case and can't set aside the decision merely b/c it would have come to a different conclusion if it had been initially deciding (i.e. on an appeal to a COA from a sentence of imprisonment imposed by the trial Court)
3. Can't enquire into merits of decision, only can look at whether the persons deciding was fair and honest (i.e. where a Judge is asked to review the exercise by a trustee of a discretionary power entrusted to him by the will)

Each of these degrees of review is capable of being applied to review by the Courts of the decision of an Administrator-Judge. BUT, it is the last and narrowest type which the Courts are entitled on common law principle to apply to it; it is only when they are expressly empowered to do so by legislation that they exercise any wider power.

The Income Tax Appeal Board

- Travelling court, 3 lawyers who sometimes sit together, sometimes don't
- Sole purpose is to decide disputes between the revenue department and the individual citizen
- Differs from Court only in being specialized, fairly informal, cheap and easy access
- Decides the same type of tax questions the Exchequer Court and SCC decided before the Board was created
  - Is essentially a trial court for income tax cases without the disadvantages to the citizen in law Court
- Under s. 96 of BNA only federal Parliament can give specialized tribunals the power of deciding cases, provinces cannot
- Because of this, existing judicial machinery has become stereotyped and unchangeable
- Rationale: more access, informal, cheap, tax payer can come and be a self-rep (worry that in the court system, only the rich could afford court litigation)
- Tax Appeals today: now a Tax Court of Canada, over the years, the rationale of access and informality has perhaps been slightly diluted by pressure of having more institutional independence and consistency (this has existed since approx. 1971)

Workmen's Compensation Boards

- Very different from the Income Tax Board
- Is a state-run Industrial Accident Insurance Office
- Its powers of adjudication, determining in effect whether a given claim is within the terms of the statutory accident policy-the most important term being that the accident to be compensable must be one "arising out of and in the course of the employment"-is purely incidental to its main business of setting and collecting premiums, or levying assessments as they call it, and paying claims.
- Its decision is final and immune from review by the Courts
- Point of the Board's creation was to "get rid of the nuisance of litigation" b/w employers and workmen
- The Board is a judge in its own case
- In the Unemployment Insurance Act there is a possible solution to this: the use of a Court of Referees for review
- Court of Referees: bi-partisan Board consisting of an equal number of persons representing employers and those representing employees, headed by an independent chairman chosen for impartiality and knowledge of labour relations
- Review of administrative adjudication doesn't have to be *judicial* review, i.e., review by the ordinary Courts

Public Utilities Board

- Different from the above two, but similar to Transport Board of Canada and the Securities Commission of Ontario; is a "government in miniature"
- Job is to translate into action a regulatory policy sketched out for it in the governing Act, is directed to apply to the facts of each case
- Board is necessary in this case b/c it is doing things a formal Court can't
- This is b/c the board is reviewing decisions from its own policy that it created itself, ordinary Court doesn't have the necessary expertise in these areas for review

Judicial Review on Administrative Decisions
- Author believes this is only a good idea in cases where the court is more competent than the tribunal is
- In cases where the hope is to have the Court pour its own interpretation of the statute (of the tribunal) then it's a bad idea
- Today: courts will not review the substance of the deciding authority's decision, they will review the *process* whereby the decision is arrived at
  - They do not want "excess of jurisdiction" i.e. can only answer the question its empowered to decide and no other question

The Role of Judicial Review

PART I: OVERVIEW OF ADMINISTRATIVE DECISION MAKERS

Judicial Review: one of the principle means of ensuring that the administrative process operates within the constraints of the principles of legality.

Chapter 2 covers an overview of judicial review and they various grounds, both substantive and procedural on which JR is available.

In **Baker v Canada**: court applied existing principles of JR in a substantive domain that had been rife with conceptual difficulty and settled controversies

Baker v Canada (Minister of Citizenship and Immigration)

L'Heureux-Dube
- s. 114(2) of the Immigration Act, 1985 confers powers onto the minister to facilitate admission into CAN
- At heart of appeal is the approach that should be taken by a court to judicial review of such decisions (on procedural and substantive grounds)
  - Other concerns raised: reasonable apprehension of bias, provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2)
- **Facts:** Baker from Jamaica, working illegally as live-in domestic worker, has 4 CDN born children, suffers mental health barriers, denied H&C, no reasons provided

Judgments – Procedural History

Federal Court – Trial Division (1995) 101 FTR 110
- Dismissed JR application stating that in absence of evidence to the contrary assumption was that officer was acting in good faith
- Held that the notes didn't show bias
- Raised question as to whether the Convention on the Rights of the Child applied to the Immigration Act (i.e. is the best interest of the child something that needs to be considered in assessing applicants)

Federal Court of Appeal [1997] 2 FC 127
- Held that the appeal was limited to the question raised above (i.e. does the convention apply domestically)
- For international law to be applicable it must be implemented through domestic legislation (this hadn't been done yet)
- To go ahead and act as though it had been would be to "offend" the separation of powers

- Held that the deportation of a parent was not a decision "concerning" children within the meaning of article 3

Analysis

- Ultimately holds that while a "serious question of general importance" is the trigger by which an appeal is justified, once this is acknowledged, the COA may address any other question or issue raised
- 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 (Cardinal v Director of Kent Institution, 1985 SCC)
- The existence of a duty of fairness doesn't determine what requirements will be applicable in a given set of circumstances → all of the circumstances must be considered in order to determine the content of the duty of procedural fairness
- While it is flexible, still need to review the criteria:
  - Purpose of participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker
- Factors to consider:
  - The nature of the decision being made and the process followed in making it
  - The nature of the statutory scheme and the "terms of the statute pursuant to which the body operates"
  - The importance of the decision to the individual(s) affected
  - The legitimate expectations of the person challenging the decision
    - This is part of the doctrine of fairness or natural justice but doesn't create substantive rights (Old St. Boniface)
    - i.e. if an applicant has a legitimate expectation that a certain procedural will be followed, that procedure is required by the duty of procedural fairness
  - Must take into account and respect the choices of procedure made by the agency, especially when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in the circumstances

Application

- Holds that the convention did not create a legitimate expectation about how H&C apps will be decided (is not a domestic gov doc)
- Disagrees with FCOA that held she only needed "minimal" participatory duty of fairness
  - Holds that they must have a meaningful opportunity to present evidence and have it fully and fairly considered
  - BUT meaningful participation can happen in different ways, doesn't need to be an oral hearing
- Traditional position at common law has been that the DOF doesn't require, as a general rule, that reasons be provided for administrative decisions (Northwestern Utilities Ltd v City of Edmonton)
  - BUT courts have emphasized the usefulness in providing reasons in ensuring fairness
- Holds that reasons are required in H&C apps but that in this case this requirement has been fulfilled as Baker had access to officer's notes
- Reasonable apprehension of bias test: whether a well informed person, viewing the matter realistically and practically would see the decision as fair→ Lorenz's notes fail this

The Approach to Review of Discretionary Decision-Making

- Concept of discretion refers to decisions where the law doesn't dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries
- "Pragmatic and functional approach" recognizes that standards of review for errors of law are appropriately seen as a spectrum with certain decisions
- Admin law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving interpretation or rules of law

- Rule has been that "discretionary" decisions may only be reviewed on limited grounds such as the bad faith of decision makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations
- Discretionary decisions: must be made within the bounds of the jurisdiction conferred by the statute, but, considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-makers jurisdiction
- 3 standards of review: patent unreasonableness, reasonableness simpliciter, and correctness
- Pragmatic and functional approach takes into account that the more discretion left to a decision maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options

Application of the Pragmatic and Functional Approach

- No privative clause in the Immigration Act, though you must have leave from Federal Court and a serious question of general importance to appeal
  - Existence of this provision, based on *Pushpanathan*, means there should be lower level of deference on issues related to the certified question itself
- Fact it is the Minister making the decision militates in favour of deference
- Concludes that the appropriate standard of review is reasonableness simpliciter
- The failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, not withstanding the important deference that should be given to the decision of the immigration officer
- Holds that the interests of the child should be interpreted into the purpose of the legislation behind H&C apps (large and liberal interpretation of s.3(c) the facilitation of reuniting citizens and PR's with close relatives)
- While the Convention is not directly applicable (as not implemented domestically), the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review

Decision: appeal allowed based on the violation of procedural fairness owing to a reasonable apprehension of bias and b/c the exercise of the H&C discretion was unreasonable

PART II: PROCEDURES

Judicial Review: From a tradition JR perspective, admin law has dual concerns: the process by which a decision is reached and the merits of that decision. Provided that the decision-maker has kept within the limits of its "jurisdiction" the courts have limited interest in the substantive merits of decisions. They stick to reviewing issues of procedure

The study of procedures: is the study of procedural rights that individuals and groups have to participate in making decisions. The study can be broken into two major themes:

- 1) The entitlement to procedural rights, or the "threshold"
- 2) The choice of the procedures to be required, assuming the threshold will be crossed
- These two themes are interdependent
- There is a need to use different kinds of procedures for different kinds of decisions
- The consideration of appropriateness requires a thorough knowledge and understanding of the structures and functions of agencies
- The Charter has had an impact and constitutionalized certain procedural entitlements BUT the precise extent to which it has marked a change or advance from the existing principles of the common law remains uncertain
  - There are questions about whether "fundamental justice" involves a claim to procedures more enhanced than those afforded by traditional "procedural fairness"
  - Also question the extent s. 1 can be advanced in the administrative setting
- Charter: in past 35 years we see 3 significant aspects of the evolution of the common law that have become ingrained and represent significant alterations in the traditional pattern of procedural litigation:
  - 1) Language of the discourse has changed

- 2) The threshold below which no procedural claims will be recognized has been lowered
- 3) The courts are more willing to make choices among the procedures and to require different procedures for different kinds of decisions
  - This means that claims to court-like procedures will not be recognized automatically

- There has been acceptance of the view that judges should respect the carefully crafted administrative processes and procedural rulings and not be so willing to intervene on a "correctness" basis (**Baker**)

Substantive Review: Framework for Standard of Review Analysis

Substantive Review (629-632)

For over 75 years, there have been serious issues about the scope of JR on substantive grounds.

- These issues emerged during the beginning of the era of a more active government (i.e. social programs, new regulatory agencies, increased use of Tribunals in place of courts etc.)
- These features are now integral to modern government
- Historically, JR of the substance of statutory decision making was very confined
- **Privative Clauses:** provisions intended to limit the scope of judicial review of tribunals
  - Review of a tribunal's findings of fact was confined to instances where there was absolutely no evidence to support the tribunal's conclusion
- Courts developed a less tolerant attitude in response to increasing government intervention and new social programs
  - Privative clauses were interpreted in a restrictive fashion to limit their effect on judicial power
  - Concept of jurisdictional error was distorted to the extent as to subject any determination of law that a statutory decision-maker might make to full correctness review
- Created major conflict b/w judiciary and legislature, causalities were the supposed beneficiaries of these new programs
- New era is one where judiciary affords more respect to the administrative process
- Gained speed in 60s and 70s when Tribunals were needed for discrimination cases etc.
- Era persists today, with Baker SCC told courts that their engagement with the administrative process must be from a "pragmatic and functional" perspective→ to do this, they had to respect the legislature's choice of decision-maker
  - Required them to acknowledge their lack of familiarity with the workings of administrative regimes and to take a purposive and contextual approach to statutory interpretation
- **The outcome of this pragmatic and functional approach is that the courts arrive at a "standard of review" to determine the intensity with which they review an administrative decision**
- This approach was reaffirmed and renovated in *Dunsmuir*
  - The pragmatic and functional approach to determine the appropriate level of deference to an administrative actor was renamed the "**standard of review analysis**"
  - All of the factors in the analysis remain (but have been recalibrated)
  - The possible standards of review have been blended into 2: 1) an intrusive correctness standard and 2) a deferential reasonableness standard
- While Dunsmuir clarified some things, it left further challenges in how to best reconcile the principles of legislative supremacy, judicial independence and administrative expertise
  - While it simplified the process in deciding the appropriate standard of review, it's created perplexing questions about how a court should apply the newly unified deferential standard f reasonableness

The Standard of Review – Chapter 9 (633-649)

Focus of Chapter is on the standard of review to be used by the courts when exercising its review powers over a statutory authority. Dunsmuir outlines this and provides for the framework (the standard of review analysis). This uses the functional and pragmatic approach and incorporates the same factors:

1. The presence and terms of a privative clause or right of appeal in the statute
2. The nature of the question that is under review
3. The expertise of the decision-maker, and

4. The statutory purpose and context in which the decision-making took place

The Standard of Review Analysis

- Dunsmuir didn't radically change the court's commitment to judicial deference for administrative decision-making (in Baker) yet it did change how it was implemented

Stages of Review

1. Determine the appropriate standard of review
    - **a.** Must an administrative decision be unreasonable or simply incorrect, in the courts view for the court to set it aside?
    - **b.** Dunsmuir sets out 4 factors to determine this
2. Apply the standard in the circumstances of the case at hand to decide the outcome of judicial review

Dunsmuir v New Brunswick 2008 SCC 9

Bastarache and LeBel (McLachlin, Fish and Abella concurring)

- JR is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority
- The Function of JR is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes
- JR upholds the ROL and maintains legislative supremacy
- ROL is maintained b/c the courts have the last word on jurisdiction, and legislative supremacy is assured b/c determining the applicable standard of review is accomplished by establishing legislative intent
- The legislature cannot remove the judiciary's power to review actions and decisions of admin bodies (even a privative clause, which provides a strong indication of legislative intent, can't be determinative)
- JR is constitutionally protected in CAN under ss. 96 to 101 of the Constitution Act
- Two standards of review:
    - Correctness
    - Reasonableness

<u>Determining the Appropriate Standard of Review</u>

- JR is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction
- **Where the question is one of fact, discretion or policy, deference will usually apply automatically →** Court holds that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated
- Reasonableness (guidance from case law)
    - Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which I t will have particular familiarity
    - Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context
- A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
    - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
    - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
    - The nature of the question of law. A question of law that is of "central importance to the legal system … and outside the … specialized area of expertise" of the administrative decision maker will always attract a correctness standard (Toronto (City) v. CUPE , at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
- IF these factors considered together, point to a standard of reasonableness, the decision-maker's decision must be approached with deference
- The correctness review has been found to apply to constitutional questions regarding the division of powers b/w Parliament and the provinces in the Constitution Act

- Such questions, as well as other constitutional issues, are necessarily subject to correctness review b/c of the unique role of s. 96 courts as interpreters of the Constitution

CASE: *Dunsmuir v. Brunswick* (2008) - CB pg. 634

Facts	• Dunsmuir = court official with NB Department of Justice so was a provincial public servant and a statutory office holder at leisure • Dismissed on the basis of s. 20 of *Civil Service Act,* SNB 1984 which provided for termination as "governed by ordinary rules of contract" • Section 100.1 of the *Public Service Labor Relations Act,* RSND 1973 incorporated s. 97(2.1) which gives an adjudicator the right to substitute penalty as they see best fit for the discharge or the discipline of an employee determined to have been discharged or otherwise disciplined for **cause** • Government argued their official reason for dismissal was his unsuitability for the position and not a cause as per the PSLRA whereas D argued the gov't dismissed him for cause and if proven so he is entitled to seek reinstatement based on common law of dismissal of public officers
Proc. Hist.	***Adjudication -** mutually agreed PSLRA adjudicator held that Dunsmuir should've been told of the reasons for the government's dissatisfaction with his performance & suitability for the position & thus termination was void; ordered the appellant be reinstated ***Judicial Review by NB Court of Queen's Bench -** Pragmatic & Functional approach was applied and appropriate SofR was held to be CORRECTNESS; no deference needs to be paid to the adjudicator's interpretation of both Acts despite the presence of a privative clause in the PSLRA & expertise of the adjudicator ***NB Court of Appeal -** appropriate SofR was held to be of REASONABLENESS SIMPLICITER, but that it was unreasonable for adjudicator not the accept the employer's portrayal for dismissal as being NOT for cause
SCC Analysis	• <u>**Process of Judicial Review:**</u> **A.** Courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a particular category of question **B.** If above not successful, courts proceed to an analysis of the factors that will determine the appropriate SofR <u>**SofR FACTORS:**</u> • The presence or absence of a privative clause • The purpose of the tribunal as determined by interpreting the enabling legislation • The nature of the question at issue • The expertise of the tribunal • <u>**Two possible standards of review -**</u> **A.** Reasonableness --> Usually questions of fact, discretion and policy, questions where the legal issues can't be easily separated from the factual issues **B.** Correctness --> Usually legal issues • *The following factors will lead to conclusion that decision maker should be given deference & a reasonableness standard applied:* **A.** Privative Clause - statutory direction from Parliament or a legislature indicating need for

	deference
	B. A discrete and special administrative regime in which the decision maker has special expertise
	C. The nature of the question of law - a question that is of "central important to the legal system … and outside the … specialized area of expertise" of the administrative decision maker will always attract the correctness standard (Toronto v. CUPE). Whereas a question of law that doesn't rise to that level may be compatible with reasonableness where the above two factors indicate
	• *An exhaustive review is NOT required in every case to determine the proper SofR* --> existing jurisprudence may help identify some of the questions that generally fall under correctness standard for example
	  • i.e. Correctness tends to apply to constitutional questions regarding division of powers;
	  • i.e. in administrative bodies' determinations of true questions of jurisdiction or *vires* --> true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of powers gives it the authority to decide a particular matter; if not interpreted correctly, its action will be found to be ultra vires
	  • i.e. questions regarding jurisdictional lines between 2 or more competing specialized tribunals

Application	**Majority - Bastarache & Lebel JJ (Mclachlin, Fish & Abella)** • Inclusion of a full privative clause in s. 101 (1) of the PSLRA, through which the adjudicator was appointed & empowered, gives rise to a a strong indication that reasonableness should apply • The nature of the regime suggests a reasonableness standard --> adjudicators acting under the PSLRA can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate • The remedial nature of s.100.1 of the PSLRA and its provision for timely and binding settlements of disputes also implies a reasonableness standard **HELD:** the appropriate standard is that of reasonableness **Side note:** Ironic that despite the SCC affirming its commitment to judicial deference in this case, it still overturned unanimously the adjudicator's decision
Other	**Deschamps J in *Dunsmuir* & Rothstein J in *Canada v. Khosa* outline an alternative approach -** • Absent a statutory direction to the contrary, courts should defer to administrative tribunals on questions of fact, and usually on questions of mixed fact and law or of discretion but not on questions of law where deference is warranted only where there is a privative clause and not where there is a statutory right of appeal • This approach mimics how appellate courts scrutinize lower court decisions; administrative decision makers regarded as a lower tier in a hierarchical structure with courts at the top maybe? • Deschamps in Dunsmuir adopted a correctness standard and overturned the decision despite the presence of the privative clause and the expertise of the labour adjudicators • **<u>REASON:</u>** This was the grievance of a non-unionized employee and so the adjudicator had to identify the rules governing his contract; this makes it a question of law. The common law rules differ greatly from the ones provided for in the PSLRA for the dismissal of an employee. The correct starting point is the common law and not the adjudicator's enabling statute & so the adjudicator's expertise is not applicable to interpreting the common law. So, the reviewing court does NOT have to defer to his decision on the basis of expertise.

Substantive Review: Privative Clauses and Statutory Rights of Appeal

Introduction

- Chapter concerns the specific provisions in the statute under which a DM acts and with statutory provisions that address the relationship b/w the courts and the relevant DM or decision
- An examination of privative clauses and rights of appeal involves statutory interpretation as the court must formulate an understanding of legislative intent on the issue of judicial deference
- **Note**: in the absence of an express right of appeal in a statute, a person may still be able to seek judicial review before the superior courts of the relevant province based on the common law
- Statute rarely indicates what standard of review a court should apply
  - Even when they do, the meaning of the words used to describe the relevant standard may evolve over time
  - i.e. in BC the Administrative Tribunals Act was passed in 2004 stating that courts should apply a patent unreasonableness standard to the review of certain tribunal decisions
    - BUT the SCC in Canada v Khosa 2009 said that "patent unreasonableness" will continue to evolve over time
- Legislatures have included provisions in statutes that direct the courts not to review the decisions taken under the statute, these are called **privative clauses**
  - Meaning and impact of these vary, but the inclusion is always taken to signal deference by the courts
  - Alternatively, when the statute indicates a role for judges by including a statutory right of appeal to a particular court, this will weigh against deference for the issues subject to the right of appeal
- Note: where these clauses are included in statute, they will influence, but not determine outright the standard of review

Privative (or preclusive) Clauses and Rights of Appeal

Privative clauses are statutory provisions by which a legislature purports to limit the scope or intensity of judicial review of a statutory DM.

Language varies; courts distinguish b/w "full" or "strong" privative clauses and "weak" privative clauses.

Full privative Clause: one that declares that the decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded, although, where the legislation employs words that purport to limit review but fall short of the traditional wording of a full privative clause, it is necessary to determine whether the words were intended to have full privative effect or a lesser standard of deference (*Pasiechnyk v Saskatchewan (Workers Comp Board))*

Thus, it is possible for a clause to be full in its effect even where it doesn't satisfy the above clear definition.

Weak clauses (or finality clauses): fall short of the broad language, they state simply that the decisions of a DM are "final and conclusive" or that a DM has the "sole" or "exclusive" jurisdiction in certain matters without expressly precluding the role of the courts from any "review" of the DM.

Interpretation of Privative Clauses

- May also depend on whether other provisions of the statute provide fro an appeal to a court from the DM
- Statutory right of appeal may be available on questions of law, fact, a mix of both or some other category
- Where the legislature has included both a privative clause and a statutory right of appeal, it is said to have *authorized and to have circumscribed the court's role, leaving the disputing parties and the court to resolve any tensions arising from the statute*
- A privative clause can't oust the authority of the superior courts to carry out JR on constitutional issues or to ensure that an admin actor has the statutory authority that it claims and that it is acting within the bounds of this authority

Examples:

Strong Privative Clause

No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings. **Labour Relations Act, 1995 , SO 1995, c 1, Schedule A, s 116**

A Finality Clause

The decision and finding of the board under this Act upon all questions of fact and law are final and conclusive. **Workers' Compensation Act, 1979 , SS 1979, c W-17.1, s 22(2)**

Note: In light of the variation in privative clauses and rights of appeal, it is important to examine the statute under which a decision has been taken to determine the appropriate route for any statutory appeal and to assess the likelihood that a court will show deference to the decision-maker. On the basis of *Dunsmuir*, one must also review past cases in which comparable decisions have been reviewed by a court in order to locate existing jurisprudence on the standard of review.

Privative Clauses in the Standard of Review Analysis

- When determining whether judicial deference should be shown, generally, a court will accept that the presence of a privative clause calls for the court to show deference
- BUT unfortunate history of judicial resistance to privative clauses
- In Dunsmuir, the majority described a privative clause modestly as "a statutory direction from Parliament or legislature indicating the need for deference"
- Despite presence of full privative clause, the Superior Courts retain constitutional authority to review to ensure a DM has not exceeded its authority
- More than just the technical issues at hand, debates arise over the appropriate role of the courts i.e. privative clauses for labour relations board, reasons for this;
    - 1) Protracted delays that accompany applications for JR of an arbitrator's interpretation of a collective agreement (time is of essence)
    - 2) Cost of litigation (unfair advantage to employers)
    - 3) Created for the purpose of keeping labour disputes out of the courts
    - 4) Most tribunals in the labour area are tripartite (have reps of labour and management with a chair appointed by agreement)→ historically courts have been unsympathetic the aspirations of labour
- Where are we today?
    - Privative clauses remain important as a signal of deference BUT the Dunsmuir framework suggests a turn away from them
    - Dunsmuir may dilute the impact of full privative clauses in spite of the majority's admonition against an expansive approach to Jurisdictional review
    - BUT Dunsmuir leaves room to maintain the effect of a privative clause in areas like labour relations (based on role of existing jurisprudence)

Hibernia Management and Development Company v Canada-Newfoundland and Labrador Offshore Petroleum Board, 2008 NLCA

- Ambiguity of s. 30 in the relevant legislation
- Court applies Dunsmuir approach and holds that s. 30 constitutes a partial privity clause and the reasonableness standard should apply
- This case is an example of the direction in Dunsmuir that the courts exercise caution in characterizing questions as jurisdictional

Rights of Appeal in the Standard of Review Analysis

- Many statutes provide a right of appeal to a specific court on questions of law or fact or both
- In ON, this is typically the Divisional Court; at the federal level it's the Federal Court of the FCOA
- A right of appeal is broadest when it encompasses all of the possible questions that a DM might make
    - Inclusion of such a clause weighs against deference by a court
- Purpose of a right of a appeal is to clarify the route that the legislature intends a JR application to follow
- Where no right of appeal is included in a statute, then, by default, the common law reserves judicial review for the superior courts of the respective province (which may carry other common law requirements of standing and the exhaustion of internal remedies, for example)
- In Dunsmuir, majority didn't mention rights of appeal and their impact on the standard of review analysis
- One may assume Dunsmuir didn't seek to alter the then-existing position on statutory rights of appeal
- Before Dunsmuir, the general position was that, where **questions of fact** fell within the scope of the right of appeal, there was a tendency to defer to the findings of the trier of fact. Where the issue was **one of law**, the assumption was that the right of appeal indicated a legislative intent for the court to feel free to intervene on the basis of its own conclusions on the relevant legal issues. In contrast to the red or amber lights of privative-clause-protected decisions, a right of appeal on questions of law was taken as a green light for judicial intervention
- The fact this wasn't a safe assumption was revealed as early as **Bell Canada v Canada [1989]**
- SCC:
    - The nature of the question and the degree of the tribunal's expected expertise were beginning to emerge as relevant concerns even when there was a statutory right of appeal
- Dunsmuir:
    - The majority says that the decisions of a tribunal or agency on the interpretation of its own statute, or closely related statutes, are "usually" entitled to deference and that questions of law—where not of central importance to the legal system and outside the decision-maker's expertise—"may" be compatible with the standard of reasonableness

Constitutional Limits of Privative Clauses

Crevier v AG (Quebec) et al

- Doctrine: the Constitution implicitly guarantees the authority of the courts to review decisions of administrative agencies for errors of law or jurisdiction and for procedural unfairness
    - This is significant to privative clauses b/c it restrains the ability of Parliament or a provincial legislature to limit the scope of judicial review
- When speaking of the constitutional basis for judicial review, the focus is on review of administrative action where a tribunal or agency allegedly made an error of jurisdiction (although this may be defined in a variety of ways) or of constitutional interpretation or where it denied procedural fairness to an individual
- Statutory interpretation is informed by the judiciary's ideas about the appropriate distribution of power b/w courts and administrative agencies
- It is now generally agreed by the courts that a legislature doesn't have the constitutional authority to oust the courts' power to review an administrative agency's decision or their enabling statute
- In constitutional law, legislation that confers power on public authorities is always subject to challenge where the legislation disregards the division of powers
- Outside of JR in constitutional law, it is less clear
- In Canada, in the absence of any express separation of powers provision, it was claimed historically that a right to the judicial review of administrative action should be implied in the constitution based on the judicature provisions of the Constitution Act, 1867, ss 96-101

Substantive Review: Expertise and Statutory Purpose

Introduction

- Chapter examines the expertise and statutory purpose factors in the standard of review analysis

- **Expertise:** of the admin DM, as measured by the court in light of relevant statutory provisions and relative to the court's understanding of its own expertise
    - Expertise can arise from: "whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act," an administrative body called upon to answer a question that falls within its area of relative expertise will generally be entitled to greater curial deference. (*Dr Q v College of Physicians and Surgeons of BC,* 2003, McLachlin)
- Statutory Purpose: as determined by the enabling legislation (has long history from the pragmatic and functional approach)
    - An assessment of stat purpose doesn't itself determine the standard of review without resort to other factors
    - This factor has been integral to the court's approach since the *CUPE* decision of 1979, expertise arose more recently in the mid-90s in *Pezim* and *Southam*

Expertise as a Factor in the Standard of Review Analysis

- Expertise can be shown in many different ways
- i.e. can be traced to the background of an individual member, recognized as part of the history and institutional memory of a DM and its membership; "field sensitivity"→ non-exhaustive
- A consideration of expertise requires a court to put itself into the mind of the legislature at the time that the legislature created or subsequently endorsed a statutory regime
- The court must look for explicit markers in the statute, such as a provision that states the type of expertise that tribunal members must or should possess as a condition of their appointments
- Court may also find indirect indicators of the legislature's intentions
- ***Dunsmuir*** majority concluded (at para 54) that deference will usually extend to the resolution of questions of law "where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" or "where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context." The role of labour adjudicators was highlighted as an example.

The Role of Statutory Purpose

- There is always a legislative perspective within which a statute is intended to operate
- A component of the functionalist approach to substantive review and deference was a call for courts to inquire into the purposes of a regulatory regime in order to avoid legal interpretations that contradicted or frustrated that purpose
- Courts may refer to the factor of a statute's purpose when characterizing the context for a decision that is under review
- Respect for statutory purpose is another way of saying that the courts respect the substantive choices of the legislature and those to whom the legislature has delegated public powers.
- Framing of statutory purpose interacts with all other factors in the standard of review analysis
    - It informs, and is informed by, the terms of the statute, the nature of the question, and the decision maker's relative expertise
- The interpretation of a statute, where it carries a range of possible meanings, should not be at the expense of the statute as a whole and its regulatory aims; such other factors in the analysis should support, and not contradict, that framing of purpose
- Perhaps the most important role of statutory purpose is to steer courts away from judicial decisions that run counter to the overall rationale for a specialized administrative regime
- Bell Canada (post Dunsmuir) linked statutory purpose more closely to the nature of the question in the standard of review analysis

Bell Canada v Bell Aliant Regional Communications, 2009 SCC 40

Abella

- **Background**: Telecommunications Act, 1993, sets out broad telecommunications policy objectives and tells the Canadian Radio-television and Telecommunications Commission to implement them in the exercise of its statutory authority→ issue on appeal is whether this authority was properly exercised

- **Issue**: Common problem is whether the CRTC, in the exercise of its rate-setting authority, appropriately directed the allocation of funds to various purposes
- **Holds:** the CRTC's allocations were reasonable based on the Canadian telecommunications policy objectives that it is obliged to consider in the exercise of all of its powers, including its authority to approve just and reasonable rates
- **Details:**
    - CRTC issued "Price Caps Decision" in May 2002→ this effectively barred carriers from increasing their prices at a rate greater than inflation while the productivity offset put downward pressure on the rates to be charged
    - Market was failing to regulate and keep prices low, why CRTC felt this was necessary
    - **The intent** of the Price Caps Decision was, therefore, that prices for these services would remain at a level sufficient to encourage market entry, while at the same time maintaining the pressure on the incumbent carriers to reduce their costs
    - While some participants objected to the creation of the deferral accounts, no one appealed the Price Caps Decision
    - The decision was only supposed to be applicable from June 1, 2002-May 31, 2006, but in 2005 the CRTC extended it until May 31, 2007
    - Bell wanted to use balance in deferral accounts to increase accessibility in rural areas, CRTC determined that: As a priority, at least 5 percent of the accounts was to be used for improving accessibility to telecommunications services for individuals with disabilities. T he other 95 per cent was to be used for broadband expansion in rural and remote communities
- At FCOA court unanimously dismissed the appeals concluding that the Price Caps Decision regime always contemplated the future disposition of the deferral account funds as the CRTC would direct, and that the CRTC acted within its broad mandate to pursue it regulatory objectives—SCC agrees with this
- Bell and Telus argued that the credits were "rebates" which constituted an unjust confiscation of property
- For Bell Canada and TELUS appeal, the dispute is over the CRTC's authority and discretion under the Telecommunications Act in connection with ordering credits to customers from the deferral accounts. In the Consumers' appeal, it is over its authority and discretion in ordering that funds from the deferral accounts be used for the expansion of broadband services
- CRTC's authority to establish the deferral accounts is found in a combined reading of ss. 27 and 37(1) of the Act
    - The authority to establish these accounts necessarily includes the disposition of the funds they contain
- Court sees the issues raised in the appeals goes to the very heart of the CRTC's specialized expertise
- The expertise leans towards a more deferential approach
- **Decision:** I would therefore conclude that the CRTC did exactly what it was mandated to do under the Telecommunications Act . It had the statutory authority to set just and reasonable rates, to establish the deferral accounts, and to direct the disposition of the funds in those accounts. It was obliged to do so in accordance with the telecommunications policy objectives set out in the legislation and, as a result, to balance and consider a wide variety of objectives and interests. It did so in these appeals in a reasonable way, both in ordering subscriber credits and in approving the use of the funds for broadband expansion

Substantive Review: Nature of the Question and Discretionary Decision-Making

Introduction

- Before Dunsmuir, the most important factor in the pragmatic and functional approach appeared to be expertise
- Dunsmuir has shifted the focus to the nature of the question by emphasizing that a determination of the nature of the question may create a strong presumption in favour of deference
- Conventionally, courts distinguished the decisions of admin actors based on whether they engaged questions of law, fact, or mixed law and fact
- Iacobucci in ***Canada v Southam Inc [1997] 1 SCR 748***:

- Questions of Law: Q's about what the correct legal test is;
    - Questions of Fact: Q's about what actually took place b/w the parties;
    - Questions of mixed: Q's about whether the facts satisfy the legal tests
- BUT it is not always this straightforward in determining this
    - Also may be challenging to distinguish these categories from the further category of "discretionary" Q's (b/c the resolution of issues of law and fact will always involve some element of discretion)
- Dunsmuir instructed that in some cases an assessment of the nature of the Q will presumptively determine the standard of review
- Generally, the analytical process of issue selection in litigation turns on subtle choices made by the disputing parties about how to frame the case before the court
- Disaggregation: when taken to an extreme, could be used to divide an admin decision into numerous components
    - Is more typically used to isolate a question of law that formed part of the decision under review in order to subject the question of law to correctness review

Factual Questions

- Dunsmuir: where the question is one of fact, discretion or policy, deference will usually apply automatically→ the same standard must apply to the review of questions where the legal and factual issues are intertwined with and can't be readily separated
- Rationale for this: it is the primary DM that has had first-hand access to the information on which a factual assessment was based and to the regulatory context in which the decision was made
    - They are better positioned to evaluate and weigh the evidence in relation to the factual issues in dispute
    - Also, factual findings in specific cases are unlikely to affect future cases or the legal system in general→ as long as the DM arrived at its factual conclusions reasonably, the courts will not interfere
- Issue: might arguable present opportunities for a DM to insulate a decision from review by structuring the decision so that it turned on determinations of fact
- The same justifications apply to situations where factual issues can't be readily separated from questions of law
- Courts normally treat a decision as a single act, subject to a single standard of review
- In Dr Q v College of Physicians, the SCC emphasized the factual aspects of the decision of the committee to justify a reasonableness standard, even in the face of a broad statutory right of appeal and relatively limited expertise of the DM

Dr Q v College of Physicians and Surgeons of BC 2003 SCC 19

McLachlin

- Decision: allow the appeal and reinstate the order of the College of Physicians
    - BC SC exceeded the limits of JR by reconsidering the Committee's findings of fact and the COA erred in failing to set aside the order of the reviewing judge
- Ms. T seeing Dr. Q for depression, relationship became sexual and lasted 16 months
- Case turned on an assessment of credibility
- Committee believed Ms. T over Dr. Q
- BCSC phrased the question as: whether the evidence before the Committee objectively assessed meets the standard of clear and cogent evidence to support the finding that Dr. Q was guilty
    - BCSC held that the evidence wasn't sufficiently cogent
    - College appealed to the BCCA
    - Held that they couldn't reach a conclusion that BCSC was "clearly wrong" and dismissed the appeal
- The Role of the Committee
    - BC has ultimate authority and responsibility for the governance of the medical profession in that province
    - It has delegated part of this responsibility to the College of Physicians
    - Committee consists of 2 physicians, a public rep, and a lawyer

    - For case at hand, committee had to: 1) make findings of fact (including assessments of credibility) 2) select the appropriate standard of proof and 3) apply the standard of proof to the facts
    - Committee applied the standard of "clear and cogent evidence" (standard is not challenged)
    - Key question in this case is whether the reviewing judge should have interfered with the findings of credibility made by the Committee
- The Role of the Reviewing Judge
    - The Act permits an appeal to the BCSC→ reviewing judge's task isn't to substitute their views of the evidence for those of the tribunal, but to review the decision with the appropriate degree of curial deference
    - BUT in effect, this is what the judge at BCSC did
        - She did this based on two assumptions:
        - 1) belief that she was required to review the evidence and make her own evaluation of it
        - 2) that because there was a right of appeal in the Act, that review wasn't to be treated like it normally is: where the reviewing judge first determines the appropriate standard of review and then applies the standard to the decision
- Review of the Pragmatic and Functional Factors
    - 4 Factors: (1) the presence or absence of a privative clause or statutory right of appeal (2) the expertise of the tribunal relative to that of the reviewing court on the issue in the question (3) the purposes of the legislation and the provision in particular, and (4) the nature of the question: law, fact, or mixed
    - Overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the ROL
    - Consideration of the factors should enable the judge to address the core issues in determining the degree of deference (shouldn't be applied mechanically)
- Factor 1 Privative/Statutory:
    - Focus is on the statutory mechanism of review
    - Statute may afford a broad right of appeal, may be silent, neutral etc.
    - It may also include a privative clause suggesting a more deferential approach
- Factor 2 Relevant Expertise:
    - Recognizes that legislatures will sometimes remit an issue to a DM body that has particular topical expertise
    - But, expertise is a relative concept, not an absolute one
    - Greater deference will be called for only where the DM body is more than the courts and the question under consideration is one that falls within the scope of this greater expertise
    - Thus the analysis for this factor has 3 dimensions:
        - 1) Court must characterize the expertise of the tribunal in Q
        - 2) Must consider its own expertise relative to that of the tribunal
        - 3) Must identify the nature of the specific issue before the admin DM relative to this expertise (Pushpanathan)
- Factor 3: Statutory Purpose
    - As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies
    - A statutory purpose that requires a tribunal to select from a range of remedial choices or admin responses, is concerned with the protection of the public, engages policy issues, or involved balancing multiple sets of interests will demand greater deference
    - Express language used can help: i.e. provisions that require the DM to have regard to all such circumstances as it considers relevant confers a broad discretionary power and will generally suggest policy laden purposes
    - A piece of legislation that essentially seeks to resolve disputes or determine rights b/w two parties will demand less deference
- Factor 4: Nature of the problem
    - In appellate review of judicial decisions, the nature of the Q is almost entirely determinative of the standard of review

- Judicial decisions of first instance on factual issues will only be interfered with where the appellate court can identify a "palpable and overriding error" or where it was "clearly wrong"
    - BT in admin action this is different, nature of Q is just one of 4 factors to consider when determining standard of review
    - When finding is on of pure fact, the factor will militate in favour of showing more deference → issue of pure law is in favour of a more searching review (particularly so where the decision will be one of general importance or great precedential value)
- Application: Reasonableness simpliciter
- Role of COA was to determine whether the reviewing judge had chosen and applied the correct standard of review, if she had not, then to assess the administrative body's decision in light of the correct standard of review, reasonableness

Questions of Law

- In Dunsmiur, the majority stated that a court should adopt a correctness standard for some but not all questions of law
- **Correctness is required for questions of "general law" that are both "of central importance to the legal system as a whole" and "outside the adjudicator's specialized area of expertise" and that "impact on the administration of justice as a whole"**
- Reason for this is to ensure "uniform and consistent answers" from the courts
- This suggests that questions of law can be readily separated from questions of fact (not always the case)

Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982

Bastarache

- In 1985 claimed refugee status, never saw it through b/c he was granted PR
- Later arrested and charged with drug trafficking
- Sentenced to 8 years in prison
- Renewed refugee claim in 1991 (was released from prison and served a deportation order)
- Convention Refugee Determination Division determined he wasn't a refugee on basis that Convention had an exception for those who had been guilty of acts contrary to the purposes and principles of the UN
- Lower level courts never considered the appropriate standard of review to be used
- Under s. 83(1) there is a right of appeal, the certification of a "question of general importance" is the trigger by which an appeal is justified
- The object of the appeal is still the judgment itself, not merely the certified question
- The purpose and expertise often overlap
- Central inquiry in determining the SOR is the legislative intent of the statute creating the tribunal
- Court must ask "was the question which the provision raises one that was intended by the legislators to be left of the exclusive decision of the board?"
- Approach of the "jurisdictional question" has been replaced by the pragmatic and functional approach
    - But, only some provisions within the Act may require greater curial deference than others
    - As such, still appropriate and helpful to speak of "jurisdiction questions"
- "Jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional approach, the tribunal must make a correct interpretation to which no deference will be shown
- Factors to be taken into Account (4)
    - 1) Privative Clauses and (2) Expertise
    - 3) Purpose of the Act/Provision
        - Purpose and expertise often overlap: purpose often indicated by the specialized nature of the legislative structure and the need for expertise is often manifested by the requirements of the statute and qualifications of the members
        - Where the purpose is not establishing rights b/w private parties, but balancing multiple constituencies, then greater deference should be shown
        - A "polycentric issue" is one which involves a large number of interlocking and interacting interests and considerations

- 4) The Nature of the Problem: Question of law or fact?
    - Even pure questions of law may be granted a wide degree of deference where other factors suggest that deference is the legislative intention
    - Where the other factors leave the intention vague, the opposite is true
    - In general deference is given on questions of fact because of the "signal advantage" enjoyed by the primary finder of fact→ less deference on questions of law b/c finder of fact may not have developed any particular familiarity with issues of law (L'Heureux-Dube – Mossop)
- Standard: despite factors that indicate a patent unreasonableness standard, taking all factors together, court holds that the SOR is correctness
- Reasons: s. 83(1) has a right of appeal if a question is certified as a serious question of general importance → this means that the questions certified for review by their nature will have an applicability to numerous future cases and warrants the review by a court of justice

Notes

- Critical aspect of Pushpanathan: the court's conception of the question as one of general international law, thus putting it beyond the expertise of the board
- It appears—especially after Dunsmuir —that an expert decision-maker is entitled to deference when resolving a question of central importance to the legal system that falls within its expertise, and that non-expert decision makers may be shown deference when resolving legal issues of more discrete significance
- The question in Pushpanathan was reviewed on a correctness standard not only because of the generality of the issue at stake but also because of the limited expertise of the decision-maker in the interpretation of treaties
- the Supreme c ourt has narrowly interpreted the Dunsmuir category of general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized expertise

Discretionary and Policy Questions in the Standard of Review Analysis

- Category of discretionary decisions brought within the pragmatic and functional approach in ***Baker***
- Prior to ***Baker,*** such decisions were subject to review on a complex series of discrete grounds of review (i.e. whether the DM used its power for an improper purpose, took into account an irrelevant consideration, acted in bad faith etc.)
- Post-***Dunsmuir***, it is clear that questions of discretion (and policy) are to be identified as such and dealt with using the SOR analysis
- **Discretionary questions:** it is not only present in certain kinds of decisions, it is inherent to all forms of decision-making (i.e. inquiries into questions of law, fact or mixed all involve a degree of discretion)
    - Thus, better to look at this as an inquiry into the foremost or pre-eminent nature of the question, based on the terms of the statute that bestow authority on the DM
    - To identify DQ: look to the relevant statute in order to determine whether the statute frames the DM's authority in very general terms, such that it requires choices to be made from a wide range of options, usually involving broadly framed policy considerations
    - Where such language is present, the Q may be framed as discretionary based on ***Dunsmuir***
    - Common language: "in the public interest," "in the circumstances," "in the opinion of"
        - Each conveys that the legislature intends the decision maker to use its judgment, perhaps guided by a list of purposes or guidelines in the statute.
    - It is always the case that a DM must use its powers in good faith and for the purposes of the legislature
- SCC in ***Khosa*** is an example of how the SOR analysis may apply to a discretionary decision → also reiterates the importance of the nature of the question post-***Dunsmuir***

Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12

Binnie

- Khosa landed immigrant in CAN, took part in "street racing"

- Was ready to plead guilty to dangerous driving but not to criminal negligence causing death (which he was eventually convicted of)
- Khosa applied to Immigration Appeal Division to remain in CAN despite the conviction, was denied
- At trial judge used patent unreasonableness standard and dismissed the appeal
- At FCOA used reasonableness simpliciter and set aside the IAD decision
- Decision: believes the trial judge was right to afford the IAD a higher degree of deference (as they were dealing with a decision that Parliament had granted them authority to decide i.e. whether there were enough H&C reasons to let him stay) → the outcome the IAD came to was reasonable, FCOA erred in over-turning this decision
- When examining the four factors of Dunsmuir, they need to be considered as a whole, bearing in mind that not all factors will necessarily be relevant for every single case
- Reasonableness standard
    - Privative clause is present (no statutory right of appeal)
    - Purpose is to determine a wide range of appeals under the IRPA, including appeal from PRs, protected persons, deportation orders etc.
    - In recognition of the hardship of removal Parliament has included s. 67(1)(c) H&C exception→ the IAD must be satisfied that there were sufficient H&C considerations to warrant special relief
        - It is left to the IAD to determine what constitute sufficient H&C factors
- Appeal allowed and decision if IAD restored

Notes

- In Baker, decision was ground-breaking b/c SCC established that even discretionary choices of admin agencies were not entitled automatically to the highest level of deference
- In Khosa, the question was classified as discretionary b/c of the breadth of the statutory language
    - By rejecting Khosa's application for JR, the court clearly signaled a reluctance to interfere with the discretionary choices of an admin tribunal
- How do we reconcile these differences given that in both cases the court was applying a deferential standard?
- Closely connected to discretionary questions are policy questions, in Dunsmuir SCC refers to both as "questions of discretion or policy"→ are they the same?

The Use and Misuse of Discretion

Introduction

- No aspect of admin law has attracted worse press from opponents of an activist state
- AV Dicey was primarily concerned with discretionary powers exercisable over freedom of speech, public meetings and personal liberty
- He was also critical of "collectivist social policies" (i.e. social assistance programs) as he believed they required extensive discretion and that officials were always likely to abuse powers that were not strictly confined by law
- Discretion in the modern state should be restricted to what is necessary and unavoidable in order to achieve the social objective or policy of the statute (JC McRuer)
- Judicial reticence about administrative discretion sometimes appears to reflect the policy preferences of the judge.
- Chapter focuses on the courts' doctrinal approaches to reviewing the legality of exercises of discretion by admin actors

Laws, Rules and Discretion

- In admin law, discretion has a particular meaning, hinging on the statutory language used to empower the admin actor
- In this context, discretion means: an express legal power to choose a course of action from a range of permissible options, including the option of inaction

- What ever the action is, it must always track back to language in a statute
- For Four reasons it is misleading to attempt to draw a sharp distinction b/w rules and discretion as administrative tools (Baker)
    - 1) Terms of an agency's enabling statute frequently don't yield a clear meaning that identifies the "correct" answer to a problem
        - The process of filling the silences and resolving the ambiguities in statutory language can be described as the exercise of an *implicit* discretion to elaborate unclear or incomplete legislative instructions
    - 2) Even the most detailed and precise regulatory codes are not self-enforcing
    - 3) All express grants of discretion to public officials are subject to some legal limits, at least when their exercise affects the rights and interests of individuals
    - 4) Discretionary decisions must be made by reference to the statutory purposes and other legal limits of the power → they should also be informed by any public policy objectives formulated by the agency, past practice etc.
- Even when legislation contains a purposes clause, the purposes are typically stated at a high level of generality and are of limited assistance in deciding whether a given exercise of discretion was within the scope of the power conferred by the statute
- Thus, issues of relevancy and purpose normally boil down to questions of statutory interpretation

Traditional Common Law Doctrines for Review of the Exercise of Discretion

- Under common law there were traditionally a number of discrete grounds of JR for abuse of discretion
- DM could have: acted in bad faith, wrongfully delegated is powers, fettered its exercise of discretion by laying down a general rule and not responding to individual situations, or acted under the dictation of another
- These are relatively uncommon, most common ground for JR of discretion arises when an agency exercises its discretionary power to achieve a purpose not contemplated by its grant
- Related ground: in exercising its discretion, the agency considered a factor that was irrelevant to achieving the ends for which the power was granted or, conversely, that the agency neglected to consider a factor that was relevant.
- Since Baker, review of discretionary decisions by admin actors has been incorporated into substantive review and the standard of review analysis
    - Yet, traditional grounds for review of discretion may still appear (especially in court's approach to applying a reasonableness or correctness standard)
- Points of reference the courts use when sizing up the breadth of discretionary power and degree of latitude they should allow to the admin DM:
    - 1) The statutory language in which discretion is granted (i.e. is it couched in objective or subjective terms?)
    - 2) The nature of the interest affected by the discretionary power (i.e. is it one our legal system normally affords a high degree of protection?)
    - 3) The Character of the decision
    - 4) The character of the decision maker
- In principle, administrative action that is not authorized by law is of no legal force or effect

Jurisdictional Questions and the Origins of the Standard of Review Analysis

Introduction

- Subcategory of the question of law is the jurisdictional question
- Jurisdiction: a statutory authority to enter into an inquiry
- Concept is central to both JR (provides the foundation for the constitutional role of the courts to ensure that admin DM's don't exceed the scope of their delegated powers) and is central to controversies in admin law
    - Controversies: At one extreme is the restrictive view that an administrative actor cannot act unless a court has determined that it has the jurisdiction to act, or at least that its actions are always

subject to the court's review of its ability to decide its own authority to act. At the other extreme is the permissive view that a court has no greater right to interpret the terms of a statutory grant of power than does the grant-holder, and so the courts should not question the conclusions reached by administrative decision-makers.

- In Dunsmuir, majority reiterated position that courts (through JR) play a constitutional role in ensuring that admin tribunals exercise only authority that they have been granted by statute
  - At the same time, however, the court made clear that the concept of "jurisdictional error" must not be stretched beyond the narrow domain of a decision-maker's authority to enter into an inquiry
  - "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.
- A reviewing court must determine whether the statute implies that the legislature intended the DM to decide for itself whether to answer a Q or engage in an activity connected to its statutory authority
- So long as the statute implies that the DM has this authority to decide the scope of its own authority, a court should be satisfied that the decision-maker's interpretation of its parent statute has not engaged a question of jurisdiction but rather (at most) a question of law
- Pre-Dunsmuir, the theory and practice of substantive review was dominated by the concept of jurisdiction
  - Primary task of courts was to ensure that the tribunal or agency stayed within their legislative boundaries

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61

Rothstein

- A question of timelines is not a true question of jurisdiction
- Since Dunsmuir, SCC has not identified a single true question of jurisdiction
- True questions of jurisdiction are narrow and will be exceptional
- When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness
  - As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness

Cromwell (dissent)

- Rothstein's position that questions of jurisdiction are exceptional and fact he doesn't provide examples, leaves no indication of how, if at all, this presumption could be rebutted (the presumption that they don't exist)
- Believes jurisdiction questions exist

The "Preliminary Question" Doctrine

- Dunsmuir warned against the return to this doctrine that preceded the CUPE 1979 decision
- Courts used to allocate decision making power b/w courts and admin agencies (that were protected by a privative clause) by attempting to distinguish b/w those questions of law that were within the area of DM authority, or jurisdiction, of the agency, and those that were "preliminary" to the exercise of the agency's jurisdiction (i.e. collateral to the merits of the decision)
- Agency's determination of prelim q's were subject to review by the courts on the basis of their correctness
  - In contrast, any Q of law within the agency's jurisdiction was entirely immune from judicial review (b/c of privative clause)
- Issues with this doctrine:
  - 1) No test was ever devised to identify which questions of law that an admin tribunal might decide in the course of resolving a dispute were preliminary and which ones were part of merits
  - 2) The search for preliminary questions distracted from the substantive issue at stake
  - 3) The doctrine lacked coherence, courts could set aside admin decisions almost at will
    - Only a modest level of judicial craft was needed to present an issue of statutory interpretation as preliminary to the merits of the decision and therefore subject to judicial review for correctness.

The Origins of the Standard of Review Analysis: CUPE (1979)

- Dunsmuir called for caution on the concept of jurisdiction by referring to Dickson's decision in CUPE (1979)
- Case was a turning point in admin law
- Past approached to substantive review permitted virtually any Q of law to be approached as a question of jurisdiction and thus reviewed on a correctness standard
- On other hand, if it was not found to be a Q of jurisdiction, it was completely immune from JR

CUPE v NB Liquor Corporation [1979] 2 SCR 227 (NB)

<table>
<tr><td>FACTS</td><td>Labour dispute during strike re: replacement workers and picketing of stores. Cannot have replacement workers prohibited by the statute. Corp replacing striking workers with management personal. ER arguing that hiring certain kinds of replacement workers is NOT a violation of the Act.</td></tr>
<tr><td>ISSUE</td><td>Is this contrary to s. 102(3) of the act? The issue turns on whether the legislature intended to prohibit this particular practice of hiring workers.</td></tr>
<tr><td>HELD</td><td>The board decided a matter that was plainly confided to it, for it alone to decide within its jurisdiction → on reasonableness standard, Dixon upholds the decision of the board. Found in favour of ER.</td></tr>
<tr><td>RATIO</td><td>Courts exercise heavy restraint and allot a significant amount of deference to specialized tribunals for resolving these types of (allegedly jurisdictional) ambiguity. Shifted the focus of jurisdictional review by directing attention to the <u>rationality of the agency's interpretation of its enabling statute</u> rather than to an priori classification of the statutory provision in dispute.</td></tr>
<tr><td>ANALYSIS</td><td>NB Labour Relations Act: '102(3) ... employers may strike and during the continuance of the strike
▪ The employer shall not <u>replace the striking employees</u> or <u>fill their position with any other employee</u>, and no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.'
DIXON'S APPROACH TO AMBIGUITY:
The labour board resolves the decision in the employee's favour. The legislature intended to avoid violence. <u>Prohibiting picketing as a prid pro quo from replacing the striking employees includes management as well.</u> Any other meaning would frustrate the purpose of the statute. Justice Dickson says there are many different readings, acknowledges some statutes are subject to multiple interpretations that are all reasonable. I am not going to decide myself, but defer to the labour board if it looks reasonable.
▪ Whether the legal question was '<u>preliminary</u>' or '<u>collateral</u>' is not determinative (does away with this doctrine) – '<u>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'</u> (para 10).
▪ Statutory language may have more than one meaning – here it 'bristles with ambiguities' (para 4).
<u>Courts should show deference to Board's interpretation of its parent statute (PRAGMATIC/FUNCTIONAL APPROACH):</u>
▪ Strong privative clause (para 14)
    ○ Important to have in mind privative clause found in s. 101 of the Act, which protects the decisions of the board made within jurisdiction
▪ Role and special expertise of the Board (para 15)
▪ Purpose of the statutory scheme (para 24-7)
Unless this rises to a level of seriousness/obviousness, the court should not interfere with the tribunal's determination:
▪ Labor board said that its purpose was to achieve a compromise: prohibit</td></tr>
</table>

	picketing, and prohibit replacement of workers. This relies on unique expertise of the board members ▪ The board's decision is at least reasonable: cannot be said to have so misinterpreted the provision in question as to embark on inquiry **DETERMINING WHETHER TRIBUNAL HAS AUTHORITY TO MAKE INQUIRY**: ▪ "The general subject matter of the dispute between the parties unquestionably fell within the confines of the act" o STRIKE! This subject matter falls within the general role of this decision maker

Remember Dunsmuir (Jurisdiction):

- Administrative bodies must also be correct in their determinations of <u>true questions of jurisdiction or *vires*</u>. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before CUPE [1979]….
  - "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, <u>true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.</u> The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction….'

Correctness on Jurisdictional Questions

- No administrative agency may act beyond the bounds of its powers as identified by legislature
- But, (1) the legislature may want the agency itself, not the courts, to determine the boundaries of the agency's jurisdiction, and (2) courts could contort policy choices that they dislike into "jurisdictional" questions so as to justify a correctness standard

In doing jurisdictional analysis, ask yourself whether this is really a question beyond the intended scope of the agency's power → jurisdictional questions lead to **correctness** standard

Applying the Standard of Review

Correctness Review –

- ***Dunsmuir:*** **[50]** *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. From the outset, the court must ask whether the tribunal's decision was correct.*
- When reviewing a legal question on a correctness standard, a court will carry out its own analysis of the statute or other legal instrument to arrive at an autonomous understanding of how silence or ambiguity should be resolved and the legal standard applied.

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

Bastarache J

- **Principles of Treaty Interpretation: Article 1F(C)**
  - It was decided that each contracting state would decide for itself when a refugee claimant is within the scope of the exclusion clause under Article 1F(C) of the Convention by the UN High Commissioner for Refugees
  - Canadian court must adopt an interpretation that is consistent with Canada's obligations under the Convention; must look to the wording of the Convention and rules of treaty interpretation to determine its meaning within domestic law
  - Rules outlined in the *Vienna Convention on the Law of Treaties*

- Federal CofA erred in dismissing the objects and purposes of the treaty; legislative history of Article 1F shows that the signatories to the Convention wished to give special meaning to the words "purposes and principles of the UN"
- First step in interpretation is to define the purpose of the convention as a whole and then the purpose and place of Article 1F(c) within the scheme
- **La Forest J** defines the purpose of the convention as having an underlying commitment by the international community to the assurance of basic human rights without discrimination → this overarching and clear human rights object & purpose is the background against which interpretation of individual provisions must take place
- **The general purpose of Article 1F is NOT the protection of the society of refuge from dangerous refugees, whether b/c of acts committed before or after the presentation of a refugee claim → that is the purpose of Article 33**
- Second point to be taken from the declarations of the French delegate referred to earlier: In the light of the general purposes of the Convention, as described in Ward, and elsewhere, and the indications in the travaux préparatoires as to the relative ambit of Article 1F(a) and F(c), the purpose of Article 1F(c) can be characterized in the following terms: to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting.

- **Acts that are "Contrary to the Purposes & Principles of the UN"**
  - Attempting to enumerate a precise or exhaustive list stands in opposition to the purpose of the section and the intentions of the parties to the Convention
  - BUT there are several types of acts which clearly fall within this section

- ***GUIDING PRINCIPLE*** → *where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the UN, then Article 1F(c) will apply*

Categories that fall within this principle:

1. Where a widely accepted intnl agreement or UN resolution EXPLICTLY declare that the commission of certain acts is contrary to the purposes and principles of the UN, then there is strong indication that those acts will fall within *Article 1F(c)*

   → Where such declarations or resolutions represent a reasonable consensus of the intnl community, then the designation should be considered determinative
2. Other sources of law may be relevant in a court's determination of whether an act falls within *Article 1F(c)*

   → i.e. determinations by the International Court of Justice

   In the case *United States Diplomatic and Consular Staff in Tehran* , the court found: *Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights*
3. Important aspect of the exclusion under *Article 1F(c)* is the inference that violators of the principle and purposes of the UN must be persons in positions of power, as drawn in the UNHCR Handbook.

   NOTE- Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the state thereby implicitly adopting those acts, the possibility should not be excluded a priori

Application to this Case:

- No indication in international law that drug trafficking, as in this case, is to be considered contrary to the purposes and principles of the UN
- While respondent has given evidence that intnl community has made efforts to stop trafficking through several UN treaties, institutions and declarations, it has not been able to point to any explicit declaration that drug trafficking is contrary to the purposes and principles of the UN or that such acts should be taken into consideration in deciding whether to grant a refugee claimant asylum

4. Second category of acts falling within scope of *Article 1F(c)* are ones for which the court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution
    - This analysis involves a factual and a legal component →The court must assess the status of the rule which has been violated. Where the rule which has been violated is very near the core of the most valued principles of human rights and is recognized as immediately subject to international condemnation and punishment, then even an isolated violation could lead to an exclusion under Article 1F(c).

Applications to this Case:

- In this case there is simply no indication that the drug trafficking comes close to the core, or even forms a part of the corpus of fundamental human rights
- In the absence of clear indications that the international community recognizes drug trafficking as a sufficiently serious and sustained violation of fundamental human rights as to amount to persecution, either through a specific designation as an act contrary to the purposes and principles of the United Nations (the first category), or through international instruments which otherwise indicate that trafficking is a serious violation of fundamental human rights (the second category), individuals should not be deprived of the essential protections contained in the Convention for having committed those acts.
- Article 33 and its counterparts in the Act are designed to deal with the expulsion of individuals who present a threat to Canadian society, and the grounds for such a determination are wider and more clearly articulated.

Held:

- Allow the appeal and return the matter to the Convention Refugee Determination Division for consideration under Article 33 of the Convention, and ss. 19 and 53 of the Act, if the respondent chooses to proceed.

Reasonableness Review –

- Deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.
- As a general observation, it appears that the Supreme court is usually inclined to accept broad leeway for decision-makers involved in discretionary, policy, and fact-laden determinations. Nonetheless, the court is frequently not in agreement on whether and how to defer when reviewing questions of law and statutory interpretation.
- The SCC confirmed in ***Khosa*** that reasonableness was not a spectrum and referred to reasonableness as a "single standard that takes it color from the context"

CASE: Canada (Citizenship and Immigration) v Khosa (SCC, 2009)

- **Applying the Reasonableness Standard – Binnie J**
    - One of the objectives of Dunsmuir was to liberate judicial review courts from what came to be seen as undue complexity and formalism
    - Under the reasonableness standard, reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law"
    - Considerable deference is owed to the IAD (Immigration Appeal Divison of the Immigration & Refugee Board) and the broad scope of discretion conferred by the IRPA weigh against an interference with the IAD's decision to refuse special relief in this case as did the Federal Court of Appeal
    - Fish J agreed that the standard of review is that of reasonableness but differed in allowing the appeal on issues "of remorse, rehabilitation and likelihood of reoffence"
    - Binnie J disagreed with the approach of having the reviewing courts reweigh the evidence; **[62]** ***"Whether we agree with a particular IAD decision or not is beside the point. The decision was entrusted by Parliament to the IAD, not to the judges.***

- [66] *The weight to be given to the respondent's evidence of remorse and his prospects for rehabilitation depended on an assessment of his evidence in light of all the circumstances of the case. The IAD has a mandate different from that of the criminal courts. Khosa did not testify at his criminal trial, but he did before the IAD. The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusion based on its own appreciation of the evidence. It did so.*
- **Binnie J:** I cannot, with respect, agree with my colleague Fish J that the decision reached by the majority in this case to deny special discretionary relief against a valid removal order fell outside the range of reasonable outcomes.
- **HELD:** The appeal is allowed and the decision of the IAD is restored.

Requirement to Give Reasons in Substantive Review

- *Dunsmuir*
  - The majority stated that an examination of "the qualities that make a decision reasonable" entails reference "both to the process of articulating the reasons and to outcomes."
  - Main concern of reasonableness review is said to be "with the existence of justification, transparency and intelligibility within the decision-making process."
  - The above statements indicate that the giving of reasons ***may be an important prerequisite for a court to conclude that a substantive decision of an administrative actor was reasonable***
  - Majority also suggest that there is room for a court to supplement or even substitute the reasons of the decision-maker and that this is consistent with the principles of justification, transparency, and intelligibility.
    - However, where a tribunal has offered elaborate reasons for a decision, the court should presumably look first—or even exclusively—to those reasons in order to understand the decision

CASE: Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board) (SCC, 2011)

SCC clarified the *Dunsmuir* requirement for justification, transparency, and intelligibility in administrative decision-making. It did so with regard to the adequacy of reasons in substantive review.

- **Abella J**
- **[13]** *This, I think, is the context for understanding what the Court meant in Dunsmuir when it called for "justification, transparency and intelligibility." To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist.*
- Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses—one for the reasons and a separate one for the result
  - The reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.
- Courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
- A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion
  → it is sufficient if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
- Unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review

- **[22]** *It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.*

HELD: the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes. I would dismiss the appeal with costs.

CASE: Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association (SCC, 2011)

- **Rothstein J**

SCC Majority outlined how the courts should conduct the reasonableness review of an adjudicator's "implicit" decision—that is, a decision for which the adjudicator has supplied no reasons.

- **Alberta CofA** held that since the adjudicator provided no reasons for the decision, it was NOT necessary to determine the appropriate standard of review in the administrative law sense, instead could simply apply standard of appellate review for questions of law, ie. Correctness
- **SCC** disagreed with that:
  - **Where the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear because the issue was not raised before the tribunal.**
- It may well be that the administrative decision maker did not provide reasons because the issue was not raised and it was not viewed as contentious. If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.
  - This should NOT be taken to mean that courts should not give due regard to the reasons provided by a tribunal when such reasons are available OR "as diluting the importance of giving proper reasons for an administrative decision" (*Khosa)*
- When there is no duty to give reasons or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review
- In some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision
  - the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons. However, remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making
- When a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal. Instead, the decision should simply be upheld as reasonable.
- On the other hand, a reviewing court should show restraint before finding that an implied decision on an issue **not raised** before the tribunal was unreasonable, especially without first giving the tribunal an opportunity to provide one
  - Doing so would imply that the Court thought it appropriate in the particular circumstances to allow the issue to be raised for the first time on judicial review.
  - Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised.

Coffey v. College of Licensed Practical Nurses of Manitoba (Man. CA) [2008]

Reasonableness Standard

FACTS	• Appellant = licensed practical nurse (LPN) & member of the College of Licensed Practical Nurses of Manitoba pursuant to the ***Licensed Practical Nurses Act*** • A found guilty of professional misconduct unbecoming of an LPN by panel of the College's discipline committee which imposed reprimand & costs

	◦ His complaint was that, as a consequence of the College changing the registration year for members, all members had been charged twice for the month of December 2002. After his suit against the College failed in small claims court & Court of Queen's Bench, he solicited support from other members of the College. ◦ College found the solicitation problematic b/c (i) it contained false, inaccurate, erroneous and misleading information in respect of staff salaries, and (ii) that it was circulated outside the LPN membership. ◦ These factors, taken together, brought the profession into disrepute and constituted unprofessional conduct • A argued that any errors he made in the solicitation were no more than errors in judgment, not in any way rising to the level warranting professional discipline • A appealed panel's findings as per **right of appeal** in s.47 of Act and counsel argued that appropriate standard of review was correctness by appellate court
STANDARD OF REVIEW ANALYSIS	• In *Filipchuk*, a panel of this court concluded that the standard applicable to the decision of a discipline panel of the College, involving findings of professional misconduct, was reasonableness. **Standard of Review Analysis:** 1. No **privative clause** in the Act & a broad **right of appeal** 2. **Purpose of Panel:** Act states that, *"The college must carry out its activities and govern its members in a manner that serves and protects the public interest." The discipline process plays a central role in the fulfillment of that aim. The decisions of panels facilitate the achievement of the goals of the Act."* • **Points to a high degree of deference to panel's decision** 3. **Nature of the Question (crucial):** Mixed Law & Fact; heavily fact-laden question, with some legal aspects to it SO this question is one of mixed fact and law • Whether the appellant's conduct, in circulating information it found to have been false, to persons beyond the LPN membership, for motives it found to have been calculated to discredit the administration, constituted professional misconduct or conduct unbecoming, as charged. • ***Dunsmuir,*** "legal issues that cannot be easily separated from the factual issues" generally attract a standard of reasonableness 4. **Expertise:** Of panel in relation to the courts (***Dunsmuir***) • Even thought the conduct of the appellant involved activities outside of his workplace, and did not raise questions about his personal competence or practices, a panel of the discipline committee would be better placed than a court to assess whether particular conduct brought the LPN into disrepute • This court's dicta in ***Law Society of Manitoba v. Savino*** → "no one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules • Suggests that a high degree of deference, suggesting a reasonableness standard, is owed on the basis of this factor. **OVERALL: Weighing all factors in, degree of deference intended to be given to Panel by the Act = fairly high. Right standard = Reasonableness**
APPLICATION OF STANDARD OF REVIEW	• ***Ryan*, Iacobucci J** **[46]** *A court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did ….* • **Appellant has burden of persuading that there is no line of analysis that could have lead to the tribunal coming to that decision** • ***Dunmsuir*** **[47]** *A court conducting a review for reasonableness inquires into the qualities that make a*

	decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Court satisfied that Panel considered evidence before it b/c the following findings were all linked to evidence: 1) Appellant knew that the Union mailing list included non-LPNs; apparent from the statement at the outset of the solicitation 2) The solicitation contained false information relating to staff salaries 3) The false information impugned the integrity of the College's officers and staff. • It is the role of the Panel and not the court to weigh and evaluate all the evidence; different finding on some points could have been made on the evidence but it was open to the panel to make the findings it did based on the evidence SO → findings = reasonable • He had the right to challenge the College on the fees, to pursue the matter in court, to request information, to solicit LPNs. His careless and reckless behaviour, which unjustifiably damaged the college, was a **permissible basis for imposition of a professional sanction**
HELD	Appeal Dismissed. The decision of the Panel falls clearly within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law"
VH NOTES	

CASE: Cabral De Medeiros v. Canada (Citizenship and Immigration) (FC, 2008)

Past jurisprudence states that decisions of the Immigration/Refugee Protection Board are afforded a REASONABLENESS standard→ Courts cautious to re-weigh evidence

FACTS	• Family from Portugal arrive in Canada & file Convention Refugee Claims – rejected on basis that they're economic migrants Pre-removal Risk Assessment filed 2005 to ensure that even though they've been denied, there not a risk to their removal denied – denied. • After this decision, the conduct of the spouse & father changes; he resorts to abuse. Another "pre-removal risk assessment"; Immigration officer had to decide whether or not there is sufficient risk to preclude mother & daughters' return to Portugal – rejected; **no sufficient risk and she can return to Portugal** • Decision based on availability of general State protection against violence in Portugal – decided this notwithstanding the fact that he had knowledge of another person who did not receive this type of protection in Portugal. ○ The officer chose to rely on country conditions documentation in preference to much more specific documentation regarding the experience of a similarly situated individual and an affidavit of a technical advisor for the Board of a Portuguese Victim Support organization.
ISSUE	a) Officer's weighing of the evidence before home b) Misapplication of rule from Canada v. Ward that a claimant may overcome the presumption of state protection, especially in context of a democratic state, by advancing the testimony of similarly situated individuals that were let down by state protection in that country c) Issue of Standard of Review
STANDARD OF REVIEW ANALYSIS	**REASONABLENESS STANDARD:** • ***Dunsmuir*** → a question of fact, discretion, and policy, as well as questions where the legal issues cannot be easily separated from factual issues generally attract a standard of reasonableness. Exclusive review is not required in every case to determine the proper standard of review. **Jurisprudence might be**

	helpful. • Based on earlier jurisprudence, the court concludes that the analysis generally required has already been performed; it is not necessary to repeat it → **Immigration/Refugee Protection = reasonableness standard**
APPLICATION OF REASONABLENESS STANDARD	• Satisfied that Pre-Removal Risk Assessment Officers are specialized admin tribunals with significant deference owed to their decisions, especially those regarding the weight to be given to evidence they're presented with • Officer preferred general country conditions documentation on state protection against family violence in Portugal to more specific and case-oriented documentation. Burden was on applicants to overcome a presumption in factor of the existence of state protection. • While this court and applicant's lawyer may have reached a different conclusion, that is not relevant; court is satisfied that the Officer's analysis was thorough and his conclusion was open to him
HELD	Application for judicial review dismissed.
VH NOTES	

CASE: Kawartha Pine Ridge District School Board v. Grant (Ont. Div. Ct.) [2010]

Reasonableness Standard

FACTS	• Q suspended pursuant to s.310(1) of the *Education Act (1990)* for using marijuana off school property b/c his use would "have an impact on the school climate" by the school board's expulsion committee • Respondent, Q's mother, appealed to the *Child and Family Services Review Board* → tribunal proceeded by way of a hearing de novo (heard testimony from parties & considered evidence) • Tribunal held that school board had to show a direct and causal link b/w a student's behavior and a definitive impact on the school climate; no evidence of a nexus was found • Expulsion quashed and ordered that any record of the expulsion be expunged; Q reinstated; school board applied for judicial review of that decision • **Note:** application still heard despite the fact that Q had already graduated by time case came to court
ISSUE	(i) Whether court should refuse to determine the application on the grounds of mootness**; (ii) the appropriate standard of review**; (iii) did the tribunal err in conducting a hearing de novo; (iv) whether the Board's expulsion decision should be set aside
STANDARD OF REVIEW ANALYSIS	• The standard of review of a decision of the Tribunal reviewing a school board's expulsion decision has never been determined **<u>SofR Analysis –</u>** **(1) Private Clause:** S. 311.7(5) of Act states that a decision of the Tribunal on appeal from a decision of a school board to expel a student is final → suggests deference o Second privative clause at s.311.4(4) stating that if a school board does not decide to expel a student after an expulsion hearing the decision is final → Court held this doesn't weaken the first privative clause that applies to the Tribunal's decision on an expulsion appeal **(2) Purpose of Tribunal:** In 2000, the enactment of the *Safe Schools Act,* the legislature provided for a mechanism to appeal an expulsion decision of a school board, and the Tribunal was designated to hear expulsion appeals pursuant s.4(1) **(3) Nature of the Question:** <u>Mixed Law & Fact</u> o Tribunal required to determine whether expulsion was an

	appropriate disciplinary response in the circumstances. - To decide the question, T had to interpret provisions of the *Education Act*, s. 310(1), and apply the legislative provisions to the facts before it - T also had to consider mitigating and other factors prescribed by regulation in deciding to uphold expulsion or not **(4) Expertise:** There is expertise in Tribunal relating to issues affecting children's interests - Members of the T required by the CFSA to possess certain prescribed qualifications → either a degree, diploma or certificate granted by a post-secondary institution and at least one year's experience working in or volunteering in children's services or social services, or at least five years' experience working in or volunteering in children's services or social services **OVERALL:** Given the privative clause, the designation of the Tribunal to hear expulsion appeals, its experience with matters affecting children's best interests and the nature of the question before it, namely, one of mixed fact and law →Proper Standard of Review of the Tribunal's decision = **Reasonableness**
APPLICATION OF STADNARD	• The Act does not require the Tribunal to defer to the principal's beliefs. • Via right of appeal, it is the legislature's intention to confer the decision to expel on the School Board and to make that decision reviewable by the Tribunal. Therefore, T must decide, on the evidence before it (including the evidence of the principal), whether the student is engaging in a prohibited activity that has an impact on the school climate and is deserving of expulsion. • The school board could not show a direct link or nexus between the student's conduct and school atmosphere → Tribunal considered the evidence of the principal, the head of guidance, Q and Q's drama teacher • The decision of the Tribunal falls within a range of reasonable outcomes. It correctly interpreted the legislation, weighed the evidence and reasonably concluded that the School Board had failed to prove that Q's activity would negatively impact the school climate.
HELD	Application for judicial review dismissed.
VH NOTES	

CASE: Registrar, Motor Vehicles Dealers Act v. Unity-A-Automotive Inc. et al. (Ont. Div. Ct.) [2010]

Reasonableness Standard

FACTS	• Decision of Ontario Motor Vehicle Council appealing from licensing tribunal. Thangarajah is a mechanic, but also owns business selling cars on the side. • On 3 occasions, the business was convicted for being an unregistered dealer under the MVDA. 2005: The company informed OMVIC in writing that it had sold cars that year without a license. • Thangarajah took a course, and eventually became certified in December 2006. In 2007, his company was convicted of 2 counts of not filing required documentation. In 2008, company applied to become registered as a dealer, and Thangarajah applied to become registered salesperson. His wife filled out his application. On the application, checked off "no" for the question of ever the company was charged with offence. • The Registrar issued notice to refuse registration bc the applicants' past conduct was inconsistent with intention of MVDA. • **Tribunal decision**: registrar should not be allowed to make use of supplementary disclosure sent to respondent's counsel. **Tribunal overturns**

	the denial of the license.
STANDARD OF REVIEW ANALYSIS & APPLICATION	**REASONABLENESS STANDARD**: • Court considers "justification, transparency, intelligibility within the decision-making process" to see if its decision falls within a *range of possible outcomes* which are defensible in law **(Dunsmuir)** • Tribunal appears to have excused his omission to reveal the prior convictions on basis of unfamiliarity with the law and his literacy problems – in some cases, past misconduct may be excused, where the evidence show that there are reasonable grounds to believe that the business will be conducted in accordance to law: **no such evidence shows this here** • Relying on the principle that ignorance of the law is no excuse • **While the reasonableness standard is a deferential one, the decision of the Tribunal here is not a reasonable one, given the failure of the Tribunal to consider implications on the respondent's past conduct for the future conduct of his business:** o Whether the lack of knowledge of legal responsibilities, coupled with past convictions, the lack of disclosure of those convictions, the selling of three cars after a conviction for curb-siding in 2005, as well as the respondent's continuing problems with understanding and reading English give reasonable grounds to believe that the respondent will not carry on his business in accordance with law, integrity and honesty in the future?
HELD	• Appeal allowed; the decision of the Tribunal is set aside. The matter is referred to the Tribunal for a new hearing before another member. • Tribunal failed to ask if the past conduct provided reasonable grounds to believe that the respondent would act in accordance with the law & with honesty and integrity in the future
VH NOTES	

Duty of Administrative DMs to Consult with and Accommodate Aboriginal Peoples

Introduction

- Duty to consult has been recognized as a constitutional obligation since at least 1990
- ***R v Sparrow*** [1990] set out that consultation and accommodation of affected Ab peoples was required if the gov wished to justify an infringement of Ab rights under s. 35 of the Constitution Act, 1982
- In 2004 ***Haida Nation v BC*** extended the obligation to claimed Ab rights as well as established ones
- In 2005, ***Mikisew Cree First Nation v Canada*** confirmed that the duty also applied to rights under historic Crown-Aboriginal treaties
- The duty is also an important expression of the "honour of the Crown", an unwritten constitutional principle that, like judicial independence and parliamentary supremacy, supports the ROL

The Source

- ***Haida Nation*** arose from long-standing title claims by the HN, which claimed that BC was required to consult with them about the use of their Ab Title Lands
    - They specifically objected to logging operations on their lands
- SCC found in favour of HN and expanded the scope of procedural obligations owed to Ab peoples in relation to their constitutional rights beyond those previously recognized in ***Sparrow***
- The role of the duty is to preserve Ab interests in lands and resources pending a more final settlement of claimed Ab rights through treaty negotiation, litigation, or other processes
- In its highest aspirations, the duty seeks to support and improve relationships b/w Ab peoples and the Crown based on principles of compromise, cooperation and mutual interest

- SCC held that the honour of the Crown gives rise to a duty to consult and accommodate Ab peoples before their rights have been established formally by CDN law
- Honour of the Crown was later confirmed as an unwritten constitutional principle in ***Beckman v Little Salmon/Carmacks First Nation*** (2010)
- In treaty contexts, the honour of the Crown has long been recognized as requiring an interpretation of these agreements that avoided any appearance of "sharp dealing" by the Crown (***Badger***; ***Marshall***)
- In ***Haida Nation***, McLachlin describes the honour of the Crown as an umbrella concept that encompasses fiduciary obligations, the duty to consult, and potentially other obligations

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73

- **Facts:** For more than 100 years Haida people claimed title to all the lands of the Haida Gwaii and the waters surrounding it. All the islands are heavily forested, must important to the Haida people is the cedar which has played a central role in their economy and culture
- Area has been logged since before WWI
- BC continues to issue licenses to cut trees here to forestry companies (known as Tree Farm Licenses)
- TFL 39 had been issued to MacMillan Bloedel Ltd in 1961, in 1995 and 200 it was transferred to Weyerhaeuser Company, HP opposed this
- In Jan 2000, the HP launched a lawsuit objecting to the 3 replacement decisions and the transfer of TFL 39 to Weyerhaeuser
  - Argued a number of things including breach of fiduciary duty, grounded in their assertion of Ab title
- **Issue:** what duty, if any, does the gov owe to the HP? Is the gov required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Ab rights?
- HP argue that their claim to title is strong but it is complex and will take years to prove, if gov pursues in the meantime, old growth forests will be destroyed
- Gov argues that its their right and responsibility to manage the forest resource for the good of all British Columbians
- Chambers judge found that the gov has a moral but not a legal duty to negotiate with the HP
- COA reversed this stating the gov and the company have a duty to accommodate and consult with HP
- **Decision:** gov has a legal duty to consult with the HP about the harvest of timber. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns
  - Consultation must be meaningful, though there is no duty to reach an agreement
  - Companies don't owe independent duty to consult
  - Crown's appeal dismissed
- **Analysis**:
  - Gov's duty to consult with Ab peoples and accommodate their interests is grounded in the honour of the Crown
  - Honour of the Crown is always at stake in its dealings with ab peoples (***Badger; Marshall***)
  - The honour of the crown gives rise to different duties in different circumstances
  - Where the Crown has assumed discretionary control over specific Ab interests, the honour of the crown gives rise to a fiduciary duty (***Wewaykum Indian Band***)
  - In case at hand, ab rights and title have been asserted but have not been defined or proven
    - The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.
  - Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Ab claims (***Sparrow***)
  - Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982

Notes

- Since HN, the honour of the Crown has also been recognized as the source for consultation obligations in relation to gov decisions to take up treaty lands for settlement and development under historical treaties with Ab peoples (***Mikisew Cree First Nation***)

- Reliance on the honour of the Crown as the source of the duty to consult and accommodate is open to criticism
    - One is that it resurrects a principle that may be characterized as a relic of English legal history
        - The phrase "honour of the crown" is even less precise than "the public interest," the latter phrase having been found in Sparrow at pg. 1113, to be "so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."

The Threshold

- The threshold question asks whether a duty to consult and accommodate exists in a given context
- It exists where the Crown has knowledge of an existing or potential Ab or treaty right and contemplates conduct that potentially affects that right adversely
- Crown knowledge can be constructive, and the potential Ab or treaty right is assessed under a "credible claim" standard
- Similar to the common law duty of fairness, the threshold isn't difficult to cross

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73

McLachlin

- **Issue**: Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?
- Answer lies in the honour of the Crown → when acting honourable, Crown can't run roughshod over Ab interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof
    - The Crown may continue to manage the resource in question pending claims resolution BUT, depending on the circumstances, the honour of the Crown may require it to consult with and reasonably accommodate Ab interests pending resolution of the claim
- Gov argues that it is under no duty to consult and accommodate prior to final determination→ up until then there is only a broad common law "duty of fairness" based on the general rule that an admin decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness
- SCC: The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution
- To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title
    - Wouldn't truly be reconciliation if proof is finally reached and then Ab peoples find their land and resources changed and denuded
- **Test**: The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it (***Halfway River First Nation v BC***)
- Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate
- **Decision**: I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands

Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, 2010 SCC 43

McLachlin

Court holds that the duty is triggered only be new impacts on Ab rights

- **Background:** case concerned with the sale of electricity from a power plant that supplied an aluminum smelter
- Haisla Nation was consulted when the power plant was built in the 1960s, but the Carrier Sekani Tribal Council (CSTC) wasn't

- HydroBC entered into an Energy Purchase Agreement (EPA) with the smelter (owned by Rio Tinto Alcan), this required approval from the BC Utilities Commission (had to ensure everything was done in the public interest)
- CSTC asked the Commission to include the adequacy of consolation within its deliberations → commission found no adverse impacts on CSTS's interests and thus no need to expand the scope of its deliberations to address CSTC's concerns
- Issue: 1) whether the Commission had jurisdiction to consider consultation and 2) whether the Commission's refusal to rescope the inquiry to consider consultation should be set aside
    - To do this, SCC had to consider when a duty to consul would arise and the role of tribunals in relation to the duty
- HN held that the answer to this is that the duty arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it"
- This test can be broken down into 3 elements:
    - 1) The Crown's knowledge (actual or constructive) of a potential Ab claim or right
    - 2) Contemplated Crown conduct; and
    - 3) The potential that the contemplated conduct may adversely affect an ab claim or right
- The duty to consult derives from the need to protect Ab interests while land and resource claims are ongoing or when the proposed action may impinge on an ab right
    - Grounded in the honour of the Crown, the duty has both a legal and a constitutional character
    - The richness of the required consultation increases with the strength of the prima facie Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right
- 3 elements that give rise to the duty:
    - 1) Knowledge by the Crown of potential claim or right
        - Threshold is not high→ actual knowledge arises when a treaty may be impacted; constructive arises when lands are known or reasonably suspected to have been traditionally occupied by an Ab community
        - Existence of a potential claim is essential, proof that it will succeed is not (just need a credible claim)
        - Tenuous claims may attract a mere duty of notice
    - 2) Crown Conduct or Decision
        - Must be Crown conduct or decision that engages a potential Ab right
        - Conduct needs to potentially adversely impact on the claim or right in question
        - Government action that gives rise to the duty isn't limited to exercise of statutory powers, not is it confined to decisions/conduct which have an immediate impact on lands and resources
    - 3) Adverse Effect
        - The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights→ Past wrongs, including previous breaches of the duty to consult, don't' suffice
        - Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right
        - An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult→ Duty to consult is designed to prevent damage to Ab claims and rights while claim negotiations are underway
        - Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right
- **Decision:** Commission was correct in concluding that an underlying infringement in and of itself wouldn't constitute an adverse impact giving rise to a duty to consult

The Content

- The content of the common law duty of fairness in a given circumstance is measured against a concept of fairness that is well entrenched in our legal system

- In contrast, the content of the duty to consult is measured against what the honour of the Crown requires in a given context
- This standard demands that consultation be meaningful and contribute to the process of reconciliation, and may mean that the crown must make changes to its proposed action in light of information obtained through consultations
    - Crown's efforts don't have to result in perfect process, just reasonableness
- Under both standards, a highly contextual, case-specific analysis giving rise to a spectrum of procedural obligations is used to determine the required content
- Under the duty to consult and accommodate standard, weaker claims and lower levels of impact are owed duties at the lower end of the scale, which have been described as including:
    - (a) notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
    - (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
    - (c) full and fair consideration by the party obliged to consult of any views presented
- This content is very similar to that at the lower end of they duty of fairness spectrum

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73

This excerpt sets out the spectrum analysis

- Content varies with the circumstances
- Generally, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effect upon the right or title claimed
- In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances
    - At all stages, good faith is required by both sides
    - Common thread on Crown's part must be "the intention of substantially addressing Ab concerns" as they are raised through a meaningful process of consultation
- As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached
- In weak cases: the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.
- At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision
- Every case is to be approached individually
- When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation
    - Thus, the effect of good faith consultation may be to reveal a duty to accommodate
- **Application**: proof that it is a strong case and that the impact would be substantial, thus the Province has a duty to consult and perhaps to accommodate on the TFL decisions

Procedural Fairness: Overview of Sources

Key Cases: *Cooper*; *Nicholson*
Key instruments: *Canadian Bill of Rights* (esp. s. 1(a) and 2(e)); *Charter of Rights* (esp. s. 7); statutory codes on procedure (esp. *Ontario's Statutory Powers Procedure Act*)

Two Arms of Procedural Fairness

- *Audi alterem partem*
  - "The other side must be heard"
  - Captures the idea of notice and reply
  - Is the main part of procedural fairness
    - i.e. a right to call witnesses at a hearing and to cross-exam witnesses (this is a high level procedural right part of the right of reply→ it extends to this point, to call witnesses, cross-examine etc. BUT right of reply doesn't always extend this far, sometimes it only goes so far as a right to respond by letter)
- *Nemo iudex sua causa*
  - "No one shall be judge in his or her own case"
  - Independence/rule against bias
  - If it's a biased decision, the process is not fair

Procedures – Introduction

- From traditional JR perspective, admin law has dual concerns: the process by which a decision is reached and the merits of that decision
- Court have claimed authority to resolve by reference to judicially developed standards and procedural issues that arise or have arisen in the course of admin DMing
  - BUT, when the DM has kept within its "jurisdiction", the courts profess limited interest in the substantive merits of decisions
- Some question if there can be a clear demarcation b/w issues of procedure and those of substance→ despite this, issues of procedure have played a major role in the evolution of modern judicial review law
- **Study of procedures is the study of procedural rights that individuals and groups have to participate in making decisions**
  - **These are rights to present information, analysis, and opinions to an agency that has power to make a decision (or to investigation or make a rec) and to test info, analysis and opinions from other sources**
  - i.e. Professional discipline
- The study of procedural rights can be divided into two major themes:
  - (1) The entitlement to procedural rights, or the "threshold"
    - What are the kinds of decisions that some procedural rights should be given?
  - (2) The choice of the procedures to be required, assuming the threshold will be crossed
- These two themes are interdependent
- Law about procedures is composed of common law, legislation and regulations, the Bill of Rights, the Charter and the practices of the agencies themselves
- With the enactment of the Bill of Rights in 1960 and its self-proclaimed special or superior legislative status, the movement toward the constitutionalization of procedural entitlements seemingly made a more concrete advance
  - BUT for 2 and a half decades, courts' restrictive interpretation of its terms made it ineffective
- Bill of Rights was rediscovered in ***Singh v Canada*** in 1985
  - From this, it is assumed that the Bill of Rights is an alternative source of constitutionally protected procedural rights in the federal domain to those provided by the Charter (BUT there are again judicial indicators that this influence has once again waned)
- Far more dramatic in terms of immediate impact was the Charter (particularly s. 7)
  - S. 7: in Singh, SCC used s. 7 to invalidate important features of the then ***Immigration Act's*** procedures for dealing with convention refugee claims
- Procedural rights have been constitutionalized by the Charter, but to precisely what effect is still a significant challenge for the courts
- In 35 years since enactment of Charter, we have seen 3 changes in the traditional pattern of procedural litigation:
  - (1) The language of discourse (the words used to express the doctrine has changed)
  - (2) The threshold below which no procedural claims will be recognized has been lowered

- (3) The courts are more willing to make choices among the procedures and to require different procedures for different kinds of decisions
- Procedural obligations may vary even within the context of the different exercises of the same statutory power (manifested by the emergence of the doctrine of legitimate expectation)

Fairness: Sources and Thresholds

- ***Baker*** is the leading CDN authority on the factors and principles considered by courts in determining the scope and content of the common law duty of procedural fairness
    - It addresses both the circumstances in which judges will require public authorities to observe fair procedures, affording those affected by their decisions the right to be heard by an independent and impartial decision-maker, and the specific procedures necessary to achieve this end
- Legislature also important source

The Enabling Statute

- To ascertain whether someone has procedural rights, must first look to the terms of the enabling statute of the public authority
    - The statute may set out a detailed list of procedural requirements that DMs must follow in making specific decisions
- In some circumstances, statutory procedures may constitute the clear legislative direction required by courts to limit or oust common law procedural protection
    - i.e. in ***Singh***, the provisions of the ***Immigration Act, 1976,*** prescribed a complete procedural code governing refugee status determinations and thus, superseded and displaced the common law duty of procedural fairness

Subordinate Legislation: Administrative Policy and Practice

- Rather than prescribing specific procedures in an administrative board's enabling statute, legislatures may choose to statutorily delegate to the executive the power to enact regulations or rules that establish procedural requirements
- Regulations and rules made pursuant to statutory authority, "subordinate legislation," are binding on those parties subject to them
- Main reasons for this delegation is expertise and efficiency (i.e. Tribunals are more intimately familiar with the DM context and are best placed to craft procedures appropriate to this context)
- To address the concern that those making the rules aren't following the wishes of those who delegated the power, various mechanisms of accountability and scrutiny have been set in place
    - i.e. legislature remains power to repeal the power, public consultation and judicial review of subordinate legislation
- The validity of regulations or rules may be challenged where statutorily prescribed mandatory steps for their effective enactment weren't followed
- Subordinate legislation may also be challenged on substantive grounds and like any other statute must comply with the Charter and other constitutional and quasi-constitutional instruments
- Also subject to JR if they are ultra vires
- There is a strong presumption that those statutory powers that authorized the making of rules establishing the procedures of adjudicative bodies require the subordinate legislator to comply with the principles of procedural fairness

Policies and Guidelines

- Public authorities will frequently issue guidelines and policies, sometimes regarding the procedural aspects of DMing, which don't set down legally binding requirements
- The power to make these soft law instruments may, but need not, be provided for in the enabling statute
- Only rules that are legally binding, are subject to governor in council approval and tabling in Parliament
- Soft law instruments like guidelines often play a dominant role in public authorities' DMing (i.e. only referring to statute when the guidelines aren't clear)

General Procedural Statutes

- Some CDN jurisdictions have enacted general procedural statutes, which constitute an additional source of procedural requirements
- These are the Alberta Administrative Procedures and Jurisdiction Act, British Columbia's Administrative Tribunals Act, Ontario's Statutory Powers Procedure Act, and Quebec's An Act Respecting Administrative Justice
- The thresholds for application of these procedural codes, varies across jurisdictions
  - Once triggered, these codes prescribe common procedural standards for the DMs falling within their ambit
- These general procedural statutes, when they apply, provide for procedural standards of varying specificity, including rights to reasons for decision and the right to make representations.

Common Law Procedural Fairness

- If a particular procedure is not required by a public authority's enabling statute, valid delegated legislation, or a general procedural statute, or if the procedure is required only to a limited extent, the authority may nevertheless be obliged to provide an affected party with fuller procedural protection under the principles of common law procedural fairness
  - Under these principles, a party affected by a public authority's decision is entitled to be heard by the authority in an impartial and independent hearing
- The concept of procedural fairness comes from the rules of "natural justice"
  - Historically this only applied to judicial or quasi-judicial functions
  - Now it applies to a much broader spectrum of decisions, including the ministerial decision involved in ***Baker***

The Traditional Common Law Doctrine

Cooper v Board of Works for Wandsworth District (1863), 143 ER 414 (Eng CP)

Erle CJ:

- **Background**: The *Metropolis Local Management Act* 1855, s. 76 required anyone intending to build a new house to give notice to the Board of Works, 7 days before construction → gave the board the power "in default of such notice to cause such house or building to be demolished or altered and to recover the expenses thereof from the owner"
  - Point was to allow them time to give directions about drains
- Cooper was a builder, Board claims they never received notice, he says he sent it but started construction 5 days after sending→ Board tore down house with no notice, Cooper brought an action for damages and succeeded at trial
- Cooper argues: though the statute in its literal sense gave the board the power to do what they did, argues that there is a long standing principle that no man is to be derived of his property without having an opportunity to be heard
- Court: can't conceive of any harm that could happen to the Board from hearing the party before they subjected him to a loss so serious as the demolition of his house
- Court: law has been applied to many exercises of power that aren't strictly judicial proceedings (i.e. ***Dr. Bentley's*** case)
- **Decision**: I think this board was not justified under the statute, because they have not qualified themselves for the exercise of their power by hearing the party to be affected by their decision

Byles J

- "…although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature"

Notes

- The above quote could be interpreted 3 ways:
  - (1) Where there is such a legislative lacuna, the role of the court is to consider what the leg would have done had it thought about it

  - (2) An assertion that the leg has in fact spoken indirectly (to the extent that the common law requires hearings in the face of the legislative silence)
  - (3) The assertion of a limited common law Bill of Rights; an autonomous power of the judges, through their control of the common law, to require a hearing unless the legislature speaks explicitly on the subject

The Modern Common Law Doctrine: Dimensions and Limitations of Procedural Fairness

- Following ***Cooper,*** courts' willingness to impose hearing requirements on DMs became contingent on how they categorized the nature of their DMing power
- Decision-makers exercising judicial or quasi-judicial functions were required to comply with natural justice; ministers, public servants, or tribunals exercising so-called administrative functions were not
- The judicial character of the decision-maker's power could be inferred from the nature of that power and, in particular, could be implied from the mere fact that rights were being affected.

Nicholson v Haldimand-Norfolk Regional Police Commissioners, [1979] 1 SCR 311 (Ont)

Laskin CJC (5-4 majority)

- **Background**: under s. 27 of the Police Act (1970), no chief of police, or police officer is subject to any penalty except after a hearing and final disposition of a charge
- N served as a constable for 15 months and was discharged by the board without being given an opportunity to make submissions. He sought review and succeeded in Divisional Court, appeal by board to COA, appeal by N to SCC
- **Facts:** COA held that b/c N was short of his 18 month employment period, the Board didn't have to give him a hearing → also argued that by explicitly legislating for a hearing in certain instances, they are by implication excluding them for other purposes
- SCC: COA gave no recognition that there may be a common law duty to act fairly
  - COA's decision effectively says that a police officer who has served 18 months or more is afforded protection against arbitrary discipline/discharge through the requirement of notice and hearing and appellate review, but leaves no protection for those who are less than 18 months
- **Decision**: while he can't be afforded the same rights as an officer who has worked 18 + months, he can't be left unprotected → should be treated "fairly" not arbitrarily
  - In the "sphere of the so-called quasi-judicial the rules of natural justice run, and in the administrative or executive field there is a general duty of fairness"
- Emergence of the notion of fairness involving something less than procedural protection of traditional natural justice
  - In general this means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative
- Appellant should have been told why his services were no longer required and given the opportunity (orally or in writing) to respond

Martland J (dissenting)

- The purpose of having someone on a probationary period is to enable the Board to decide whether it wishes to continue with their services or not
- Decision of the board was purely administrative, and thus the Board was under no duty to explain to the appellant why he was fired

Constitutional and Quasi-Constitutional Sources of Procedures

- Procedural rights also receive constitutional protection under the Charter and quasi-constitutional instruments like the Bill of Rights and the QB Charter
- Resorting to these sources of procedures becomes necessary in 3 main circumstances:
  - (1) Legislation may expressly deny or provide a lower level of certain procedural safeguards, leaving no room for common law supplementation
    - i.e. this happened in *Singh*
    - In these cases, only constitutional/quasi-const. norms may override the statute and mandate more significant procedural protections

  - (2) Const./quasi-const. provisions may establish procedural claims in circumstances where none existed previously at common law
  - (3) These provisions may mandate a higher level of procedural protections than would the application of common law procedural fairness to the challenges admin DMing.
- Thus, const./quasi-const. interests serves to "boost" procedural protections beyond those recognized at common law

The CDN Bill of Rights

- Is a federal statute
- Area of application is confined to the federal domain (ss. 5(2) and (3))
- Has no relevance to provincial statutes or DMing under provincial jurisdiction
- Purports to be applicable to both prior and subsequent legislation in that it declares its primacy over all other legislation unless that leg expressly provides that it overrides the Bill
- The principle procedural protections in the Bill are found at ss. 1(a) and 2(e):
  - 1(a) no discrimination, namely the right of the *individual* to life, liberty, security of the person and *enjoyment of property….*
  - 2(e) can't deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the *determination of his rights and obligations*

The CDN Charter

- The main source for procedural protections under the Charter is s. 7:
  - s.7: everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
- Unlike s. 2(e) of the Bill of rights, s. 7 is not conditioned by any reference to a hearing
  - S. 7 held to have a Substantive and a procedural component in ***Reference re BC Motor Vehicle Act***, 1985)
- The procedural fairness rights of the party affected by a government decision are triggered only where the decision engages that party's life, liberty, or security of the person.
  - This is a limitation as many decisions surrounding economic regulation, licensing, regulating business etc. do not deal with the security of person
- Initial thought was that similar protections could be found under s. 15 (this was struck in ***Andrews v Law Society of BC (***1989) when the SCC held that s. 15 was essentially an anti-discrimination clause)
- S. 11 has been confined to criminal proceedings and those with "true penal consequences"
  - Debate around if a Tribunal levied high enough fine if this would fit "true penal consequences" requirement

QB Charter

- Section 23 of the Quebec charter provides that "[e]very person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him." It is a quasi-constitutional guarantee insofar as s 52 of the Quebec charter specifies that no law may derogate from s 23 unless such derogation is expressly allowed by statute.

Procedural Fairness: Common Law Threshold

Key Cases: *Inuit Tapirisat*; *Canadian Association of Regulated Importers*; *Abel*

Thresholds

- Procedural fairness to be seen as sources of procedural protections
- Procedures conferred by the DM's enabling legislation and related delegated legislation will protect affected parties as a matter of course

- BUT whether general procedural codes, common law procedural fairness, and constitutional/quasi sources are available to supplement these procedures depends on whether the threshold for their application has been met
- The judge-made thresholds for the application of the duty of fairness have been to a varying extent incorporated into the thresholds for some general procedural codes, like Ontario's SPPA and for the quasi-constitutional Canadian Bill of Rights

The Common Law Threshold

Emphasis is now on exceptional categories where the duty will <u>not apply:</u>

(1) Where the decision is <u>legislative/general in nature</u>
(2) Where the decision is <u>non-dispositive</u> (i.e. a recommendation)
(3) In case of emergency
(4) Where the duty is removed or restricted by statute

Note: as one expands the meaning of "rights, privileges or interests," the more difficult it becomes to distinguish <u>general</u> policy decisions (where the duty doesn't apply) from <u>individualized</u> decisions (where the duty applies)

Historical Overview

- For large part of 20th C, common law courts wouldn't resort to the common law rules of natural justice to read in hearing requirements to silent statutes unless the DM was exercising a "judicial" of "quasi-judicial" function
  - In ***R v Legislative Committee of the Church Assembly [1928***], Lord Hewart decided that for the rules of natural justice to be imposed and for certiorari and prohibition to be available, a DM had to have "legal authority to determine the rights of subjects" as well as the "superadded" characteristic of a "duty to act judicially"
- Thus, decisions that could be characterized as preliminary and not final, bearing on "mere privileges" rather than rights, or issued from the exercise of an "administrative" or "ministerial" rather than a judicial power fell below the threshold for the application of the rules of natural justice
- Situation made difficult by fact that the courts were unable to provide a clear and consistent definition of a "judicial" function
- DM Gordon defined this as: the determination of "pre-existing" rights and liabilities through the application of a "fixed objective standard," and administrative functions as the creation of rights and liabilities through "policy and expediency.
- Following ***Ridge v Baldwin*** and ***Nicholson***, which recognized that in some circumstances, admin DM's owed affected parties a duty of procedural fairness the formalistic judicial/administrative classification lost much of its importance in admin law
  - BUT this divide is still relevant in determining whether the procedural protections of Ontario's Statutory Powers Procedure Act (SPPA) and QB's Charter are triggered
- After Nicholson, still unclear whether there were two distinct levels of procedural protection (natural justice for DMs exercising judicial/quasi functions and procedural fairness for those exercising admin functions and whether there were any decisions to which procedural protections didn't extend
- Was there still a threshold, and how was it defined?

Martineau v Matsqui Inmate Disciplinary Board, [1980] 1 SCR 602

- Question of threshold explored in this case
- Two important features:
  - 1) Involved prison discipline (not previously shown sympathy for procedural claims)
  - 2) Primary preliminary issue: allocation of original judicial review jurisdiction b/w the Trial and Appeal Divisions of the Federal Court of Canada (Now FC and FCOA)
- **FACTS:** 2 inmates were disciplined and alleged they weren't given a hearing (make an application for review in the FCOA which was dismissed b/c the court didn't have jurisdiction)
  - Also made an application for certiorari in the Trial Division which has jurisdiction to grant usual remedies
  - Application based on the fairness requirement

- **ISSUE:** Can certiorari only be used to review judicial/quasi functions?
    - NO, SCC appeared to expand the limits of certiorari to include enforcement of procedural requirements generally
- **ANALYSIS:**
    - Pigeon (majority): "the Order issued by Mahoney J deals only with the jurisdiction of the Trial Division, not with the actual availability of the relief in the circumstances of the case. This is subject to the exercise of judicial discretion and in this respect it will be essential that the requirements of prison discipline be borne in mind." → goes on to state that the remedy should only be granted in cases of serious injustice
    - Dickson (minority): In general, courts ought not to seek to distinguish b/w judicial/admin DMing, drawing this distinction b/w a duty to act fairly and a duty to act in accordance with the rules of natural justice yields an unwieldy conceptual framework→ not every breach of prison rules of procedure which will bring intervention by the courts, question should be whether there has been a breach of the duty to act fairly in all the circumstances
    - Thinks its wrong to regard natural justice and fairness as distinct and separate standards: in Nicholson CJ stated: "… notion of fairness involving something less than the procedural protection of the traditional natural justice." Fairness involves compliance with only some of the principles of natural justice. … The content of the principles of natural justice and fairness in application to the individual cases will vary according to the circumstances of each case. …"

Notes:

- With the 1992 proclamation of the amendments to the Federal Court Act, that particular need to make distinctions between judicial and administrative functions disappeared.
- The relevance of the divide only remained to the Q as to whether the SPPA applied (i.e. the right to a determination by an independent and impartial tribunal (s.23) and the other procedural rights contained din Ch 3 of the QB Charter; and whether the application of res judicata applied to a statutory DM

Minister of National Revenue v Coopers & Lybrand, [1979] 1 SCR 495

- Dickson clarifies a non-exhaustive list to determine whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis:
    - 1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
    - 2) Does the decision/order directly or indirectly affect the rights and obligations of persons?
    - 3) Is the adversary process involved?
    - 4) Is there an obligation to apply substantive rules to many individual cases rather than, i.e., the obligation to implement social and economic policy in a broad sense

Cardinal v Director of Kent Institution, [1985] 2 SCR 643 (BC)

- Le Dain (for the court): decided that a hearing was required for a decision by prison officials to keep a prisoner "dissociated" for security reasons
- "The court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying in 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."
- "[T]he denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for the court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing."

Decisions of a Legislative and a General Nature

- Notion in ***Knight*** that legislative functions were excluded from the ambit of any implied procedural requirements, in general, and the new, more flexible duty to act fairly, in particular, finds its genesis in the judgment of Megarry J in ***Bates v Lord Hailsham of Marylebone***, [1972] (outlined in ***Inuit Tapirisat***)

- Dickson in ***Martineau***: "purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision."
- The decision of a gov to introduce a bill into a legislature or the legislature to enact such legislation is one class of "legislative decisions" to which a common law duty of procedural fairness clearly doesn't apply. Such truly legislative decisions must fall below the procedural fairness threshold to ensure respect for the principle of the constitutional separation of powers b/w the legislative and judicial branches

Wells v Newfoundland, [1999] 3 DCR 199

- **FACTS:** Wells was a commissioner appointed to the Public Utilities Board under the Public Utilities Act, he ceased to hold office as a "consumer representative" when the NF legislature enacted an Act that restructured the board, removing his position. He argued that he had a right to fairness in the making of the decision leading to the loss of his positions.
- **DECISION**: SCC dismisses his argument
- **ANALYSIS**: decisions to restructure board and not re-appoint him were bona fide decisions → leg decision making isn't subject to any known duty of fairness. Legislatures are subject to constitutional requirements for valid law-making, but within those boundaries can do what they like → legislature is only subject to review by the electorate.
- The rules governing procedural fairness do not apply to a body exercising purely legislative functions (***Reference re Canada Assistance Plan***)→ in this case the respondent's loss resulted from a legitimately enacted "legislative and general" decision, not an "administrative and specific" one, impact on him may have been singularly severe, but it didn't constitute a direct and intentional attack on his interests, was broad and policy oriented

Notes:

- The only procedure due any citizen of CAN is that proposed legislation receive 3 readings in the Senate and the House of Commons and that it receive Royal assent. Once that process is completed, legislation within Parliament's competence is unassailable (***Authorson v Canada*** (AG), 2003 SCC 39)
- FC recently held that where legislative amendments to the Navigation Protection Act, RSC 1985, c N-22 and to the Fisheries Act, carried the risk of harm to the treaty rights of Ab peoples, the Crown was subject to a duty to consult under s. 35 of the Constitution Act, and held that the affected Abs had a right of notice and reply (***Courtoreille v Canada, 2014 FC 1244***).

Legislative Decision:

Canada (Attorney General) v Inuit Tapirisat of Canada, [1980] 2 SCR 735 – Cabinet and Cabinet Appeals

Estey J

- **FACTS:** Canadian Radio-television and Telecommunications Commission (CRTC) had power to regulate the rates of utilities, including Bell (given under the National Transportation Act, 1970)
- In 1976 Bell made an application for approval of a rate increase. The Inuit Tapirisat intervened to oppose parts of the application → specifically, they wanted the CRTC to condition Bell's rate increase on an obligation to provide better service for remote Northern communities
- After unfavourable decision, IT appealed to the governor in council (Cabinet)
- CRTC and Bell made submissions to Cabinet, IT given none of this info except the submission by Bell, appeal was dismissed. IT made a motion in FC for a declaration that a hearing should have been given, and even if it had been given, it didn't comply with the principles of natural justice
- **ISSUE:** is there a duty to observe natural justice in, or at least a lesser duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents?
- **ANALYSIS**: the mere fact that a statutory power is vested in the GIC doesn't mean it is beyond review. Essence of the principle of law is simply that in the exercise of a statutory power, the GIC, like any other person, must keep within the law as laid down by Parliament. However, in this case the duty is not owed b/c: Cabinet could decide 'of its own motion,' indicating no need of it to involve others in the process; the

impracticality today of imposing a notice and hearing requirement on Cabinet, and that Cabinet retains discretion on whether/how it hears submissions from the public

- **RATIO:** 'Where... the executive branch has been assigned a function performable in the past by the Legislature itself and where the *res* or subject-matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise. The fact that the function has been assigned as here to a tier of agencies (the CRTC in the first instance and the Governor in Council in the second) does not, in my view, alter the political science pathology of the case.'
- **NOTE:** exception to the exception: there could be a duty of fairness owed by cabinet if they are making a decision that is specific to an individual (or is unique) and if it isn't a policy decision that impacts many

Canadian Doctors for Refugee Care v Canada (AG), 2014 FC 651

- **FACTS:** The Interim Federal Health Program (IFHP), a program first authorized by cabinet in the 50s, provided health insurance for refugee claimants. In 2012 the GIC passed 2 orders that essentially eliminated coverage for refugees. Many challenged this on several grounds, including that the radical changes had been made without advance notice/consultation and thus violated procedural fairness. FC dismissed this claim but held the changes violated s. 12 of Charter ("cruel and unusual treatment")
- **ISSUE:** whether as a result of legitimate expectation on part of stakeholders, or the nature of the rights affected by the OIC, did the GIC owe a duty of procedural fairness?
- **ANALYSIS**: no duty of fairness is owed by the gov in the exercise of its legislative functions (though certain decisions can attract a duty of fairness). Whether a duty to observe natural justice or procedural fairness exists depends on a number of factors: 1) subject matter of the decision in question; 2) the consequences of the decision for those affected by it, 3) the number of people involved (***Baker***).
- **REASONING**: procedural rights don't arise where the executive decision at issue is "legislative and general" rather than one that is "administrative and specific" (i.e. in ***Oberlander*** the OIC was to revoke specifically his citizenship; in Inuit Tapirisat it was a broad policy)
- **DECISION**: the 2012 OICs implementing modifications to the IFHP were "legislative and general" and did not give rise to participatory rights on part of what is an amorphous and potentially infinite group of stakeholders

General Policy Decisions/Policy Making

- General decisions: seems that this will have the effect of denying claims to procedural protections in relation to certain species of broadly based policy decisions
- Where the impact of the decision being made is diffuse and affects a broad spectrum of the public generally, claims to participatory rights will be hard to justify
- The dilemmas of identifying which decisions are so general as not to pass the threshold as well as the variations in status among those claiming participatory rights in relation to kinds of "policy" decisions are well illustrated by several decision in the context of school board decisions:

Vanderkloet v Leeds & Grenville (County Board of Education), (1985), 20 DLR (4th) 738 (Ont CA)

- **FACTS:** school board's decision (in face of declining enrollment), to reorganize 3 elementary schools. Acting under Stat Authority, ON's minister of education issued guidelines governing the closing of schools that required public consultation and participation; board also prepared policies for school closings→ groups of ratepayers argued that the board didn't comply with the guidelines or its own policies
- **DECISION**: COA held that the reallocation didn't amount to a school closing and that the guidelines and policies didn't apply → procedural fairness not applicable to a board of education (an elected public body, who, in good faith and within its jurisdiction, reallocated the student body)

Bezaire v Windsor Roman Catholic Separate School Board (1992), 9 OR (3d) 737 (Div Ct)

- **FACTS:** Board closed 9 schools, contrary to guidelines, no opportunity for input given to stakeholders. DC distinguished above case on basis that that was a reallocation where in this case it was an actual closing and thus the guidelines apply.
- **DECISION:** The guidelines, although ambiguous and lack the force of subordinate legislation, result in the applicability of the doctrine of fairness→ they are premised on community consultation

Note: subsequently in ***Elliott v Burin Peninsula School District No 7*** (1998) COA held that the closing of a school was an administrative function that attracted the rules of procedural fairness

Note, following case is very close to the line and becoming a specific policy decision

CDN Assn of Regulated Importers v Canada (AG) [1993] (FCTD; FCA)

- **FACTS**: ministerial decision changing the quota distribution system for the importation of hatching eggs and chicks→ change significantly affected historical importers. Historical importer challenged the change claiming that they had not been consulted
- **REED J (federal Court):**
  - It is not necessary for the applicants to prove they had a "right" to import to access judicial review, they merely had to demonstrate they have an "interest" which justifies bringing the application for JR (they have done this, as they have been importing in an unregulated environment for many years)
  - Rejects argument that it was impractical to give those affected an opportunity to comment as it was a small and known number. As part of this, they should have been given some sort of general notice (i.e. by advertisement in the news paper)
  - Classifying a decision as either "policy" or "legislative" Is not helpful; what is important is an assessment of the effects which actually follow from the decision
  - **DECISION:** importers not given procedural protections before changes made, gives order continuing their entitlements under the old scheme
- **LINDEN JA (FCOA):**
  - Generally, rules of natural justice are not applicable to legislative or policy decisions → more particularly, not applicable to the setting of quota policy; although they may be to individual decisions respecting grants of quotas
  - DECISION: finds no right to procedural protections as it is a Minister establishing a general quota→ some may be affected while others may benefit → is essentially a legislative or policy matter within which the Courts do not normally interfere
  - REASONS: to interfere would be a political, not a legal decision, the respondents want to impose a public consultation process on the Minister which was not contemplated by the legislation (i.e. other similar statutes have included such a process, thus, if legislator wanted that in this circumstance they could have included it)

135-140

Inspections and Recommendations

- Under traditional doctrine, there were two distinct functions: investigating and recommending
- Until the late 1970s, the doctrine was clear: no hearings were required, and this proposition was a product of the general doctrine about the threshold—the functions were not judicial
- ***Guay v Lafleur,*** [1965] 2 SCR 12 (Que): Lafleur authorized under the Income Tax Act to investigate into the financial affairs of a number of tax payers (including Guay). Guay requested to be present and represented by counsel during
- Lingering effects of this jurisprudence seen in ***Knight*** where L'Heureux-Dube stated: "a decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have that effect"
- This changed in England during the 70s;

In re Pergamon Press, [1971] Ch 388 (CA) (England)

- Denning:
- **FACTS:** board of trade appointed inspectors to investigate the affairs of Pergamon Press→ principals of PP demanded to see transcripts of the evidence of witnesses adverse to them, an opportunity to cross-examine, and an opportunity to respond to those findings
- **ANALYSIS:** counsel for inspector submitted that when there was no determination or decision but only an investigation/inquiry, the rules of natural justice do not apply→ Denning doesn't accept this, but

acknowledges that inquiries aren't even quasi-judicial as they don't decide anything but that this shouldn't minimize the significance of their task (i.e. their reports may have wide repercussions i.e. reputational, report could lead to judicial proceedings etc.)
- **DECISION**: the inspectors can obtain info in any way they think best, but before they condemn someone, they must give them a fair opportunity for reply

Re Abel and Advisory Review Board, (1979), 97 DLR (3d) 304 (Ont Div Ct), aff'd (1981), 119 DLR (3d) 101 (Ont CA)

- Grange J:
- **FACTS:** Advisory Board created by order in council under the Mental Health Act. Major function was to review annually all patients who were confined in psychiatric institutions after being charged with criminal offences and being found NCR. It then made a report about each patient and included recommendations for release to the lieutenant governor. Lawyers for patients asked for disclosure of the files kept by the institutions and were refused. Brought application
- **ANALYSIS:** LG is not bound by the recommendations of the Board but they are the patient's only true hope for release. Board's main rationale for not releasing the information was to protect the position of the staff. Doesn't outweigh the significance to the individual, yes only recommendation but really is only way out, risks spending rest of life in prison
- **DECISION:** is subject to a duty of fairness under the common law b/c of extreme unlikeliness that the Minister would ever overturn a review by the Board recommending the patient not be released (thus is closer to a dispositive decision than a true recommendation)
- **SPECIFIC CONTENT:** Board need not disclose all files in order to protect candid assessment by medical staff but must consider the possibility of full or partial disclosure in each case
- NOTE: the procedural right of the patients doesn't include a right to the full file; Review Board problem→ Board didn't turn its mind to whether or not aspect of the file could have been disclosed and instead just concluded that disclosure was beyond its jurisdiction
- **GENERAL CONTENT:** low level of fairness (for protection of staff)
- **SPECIFIC CONTENT:** only right is to partial access of the file at the discretion of the advisory review board and here the board didn't do this at all

Re Munro (1993, Sask CA)

- **FACTS**: "Sentencing" at the Executive of the Teacher's Federation upon the recommendation of the Discipline Committee – denied the recommendation of the Discipline committee, instead, recommending different penalty to minister
- **Held**: duty of fairness owed
  - "It is clear that the mere power to make recommendations does not necessarily shield an administrative board from its obligations to act fairly."
  - Importance of the hearing in the context of sanctions – huge consequences to individual
    - Livelihood of the teacher was at stake
  - Needed to provide copy of discipline committee report

Procedural Fairness: General Content and Legitimate Expectations

Key Cases: Baker; Mount Sinai; Congregation des temoins de Jehovah de St-Jerome-Lafontaine v Lafontaine (Village) (SCC) (McLachlin's reasons in entirety and paras 37 and 85-92 of LeBel's dissent)

The Level of Procedures

- With ***Nicholson***, SCC expanded the reach of the common law in the procedural realm→ common law procedural fairness requirements extended beyond judicial/quasi decision to include administrative decisions
- ***Nicholson*** also made clear what constitutes sufficient procedural fairness protections (the level or content of procedural fairness required by the common law depends on the context in which a specific decision is made)

- Procedural fairness obligations of DMs lie on a spectrum b/w trial type procedures (afforded more rights like in-person hearing, full disclosure rights etc.) to more informal procedures (i.e. where rights are to more informal procedures like written notice and opportunity to comment)
- Post Nicholson: courts identified factors to assist in assessment of how full the procedural obligation so specific DMs must be
  - Many of these factors include those discussed in the cases on the common law threshold (i.e. legislative or policy driven; statutory framework; dispositive/non-dispositive etc.)
- In ***Baker***, SCC sought to lay out a methodology to determine the appropriate content of procedural fairness and set out non-exhaustive list:
  - 1) Nature of the decision
  - 2) Nature of the statutory scheme and the terms of the statute pursuant to which the DM operates
  - 3) The importance or significance of the decision to the affected individuals
  - 4) The legitimate expectations of the person challenging the decision
  - 5) The choices of the procedure made by the DM

The Baker Factors

1. The nature of the Decision and the Process Followed in making it

- L'Heureux-Dube, relying on Knight noted that "the more the process provided for, the function of the tribunal, the nature of the DMing body, and the determinations that must be made to reach a decision resemble judicial DMing, the more likely it is that the procedural protections closer to the trial model will be required by procedural fairness"
- Though "judicial nature" is no longer determinative of the existence of a duty of fairness, decisions that involve an adjudication b/w parties, directly or indirectly affect their rights and obligations, or require the DM to apply substantive rules to individual cases, will require more extensive procedural protections than regulatory decisions bearing on the implementation of social and economic policy
- **Application:** Court decided that the H&C decision involved many "open-textured" principles and factors and indicated a need for fewer procedures

2. The nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates

- Where a statute provides an official with investigatory or fact finding powers as a preliminary step to a hearing before a decision-maker with the power to make a dispositive decision, minimal procedures may be owed at the initial stage
- BUT when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests may not be submitted," greater procedural protections will be owed.
- The relevance of the statutory scheme is not limited to the dispositive nature of the decision or the existence of an appeal
- **Application:** for example, the role of the minister's H&C power as the source of discretionary exceptions to the normal application of the general principles of Canadian immigration law set out in the Immigration Act indicated that fewer procedures were warranted.

3. The importance of the Decision to the affected individual(s)

  - The more important the decision is to the lives of those it affects, the higher the level of procedural protections mandated by the common-law procedural fairness
  - **Application:** the consequences of an unfavourable humanitarian and compassionate decision to Baker, her partner, and her children, including possible separation and the interruption of Baker's psychological treatment, pointed toward a higher level of procedural fairness.

4. The legitimate expectations of the person challenging the decision

- Legitimate expectations may be raised by decision-makers' representations about available procedures or substantive results
- Where a claimant has a legitimate expectation that certain procedure will be followed, then that procedure will be required by procedural fairness

- Where a claimant legitimately expects a certain result, in his or her case "fairness may require more extensive procedural rights than would otherwise be accorded"—such as notice that the decision-maker intends to renege on the substantive promise or representation and an opportunity to argue against such a course of action
- Application: court not satisfied that the Gov's ratification of the Convention on the Rights of the Child would amount to a representation on how H&C apps would be decided or on the accompanying procedures → thus indicated neither a higher or lower level of procedures

5. The choices of procedure made by the agency itself

- Design of appropriate procedures is situation-sensitive→ i.e. an agency with a fuller awareness of the nature of the issues that are likely to arise, its own budgetary constraints, etc. may have a better appreciation than the courts of what represents an appropriate compromise among competing claims of fairness
- This is compelling in cases of agencies engaged in high-volume DMing such as refugee status determination
- In ***Baker***: court noted that courts should sometimes be deferential and "give important weight" to agencies' procedural choices

Application of the 5 Factors in Baker

- Considering that some factors suggested stricter requirements under the duty of fairness while others suggested more relaxed, the duty of fairness was more than "minimal" as previously held by the FCOA
- **DECISION:** [T]he circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

Note:

- ***Suresh v Canada*** (Minister of C and I), 2002 SCC 1 → case involves the constitutionality of procedures governing a minister's power to declare Convention refugees to be a danger to CAN's security and to remove them to states where they are at risk of torture. Unanimous SCC reasoned that b/c fundamental justice demanded, at a minimum, compliance with common law procedural fairness, it was appropriate to look to the factors discussed in ***Baker*** to "inform" its analysis of the procedural safeguards required by s. 7

Legitimate Expectations

Mount Siniai Hospital Center v Quebec (Minister of Health and Social Services) 2001 SCC 41 (Que)

- **FACTS:** for many years the hospital had been functioning in violation of its licence (had changed from a long-term care facility to a short and medium term care facility) → Minister agreed that if the hospital relocated, its licence would be regularized. Hospital went through extensive fund-raising efforts and relocated. When hospital sought to have its licence updated, new minister under new gov refused on basis that this would commit it to financial support that wasn't one of their priorities
    - Hospital sought manadamus to compel the minister to issue licence, QB SC refused to on basis that legitimate expectation couldn't be used to achieve substantive outcomes
    - QBCOA accepted this but ruled that the hospital was entitled to a revised license on basis of doctrine of public estoppel → Minister appeals to SCC
- **ANALYSIS:** case turned on fact that earlier ministers had already made a decision conditional on the hospital relocating → current minister had no basis for overturning this decision
- **DECISION**: hospital had an entitlement to the formal issuance of a licence in terms of that initial decision
- **Concurring** judgment saw it differently: The current minister had made a patently unreasonable decision and failed to act in a procedurally fair manner in refusing the licence. Since there was only one other possible outcome, mandamus was available to compel the issuance of the licence.
- BOTH judgments turned to a significant degree on the finding that the minister's reasons for denial were not supported by the facts (nothing suggested there would be further financial commitments)
- Binnie and McLachlin (On Doctrine of Legitimate Expectation):

- R's argue that the doctrine of legitimate expectations can be used to compel both procedural protection and substantive results
- R's argue that jurisprudence is changing so as to allow this (cite Eng and CAN authorities)
- It thus appears that the English doctrine of legitimate expectation has developed into a comprehensive code that embraces the full gamut of administrative relief from procedural fairness at the low end through "enhanced" procedural fairness based on conduct, thence onwards to estoppel (though it is not to be called that) including substantive relief at the high end
- In ranging over a vast territory under the banner of "fairness" it is inevitable that sub-classifications must be made to differentiate the situations which warrant highly intrusive relief from those which do not
  - Eng cases on low end fit within CDN principles of procedural fairness, but on the high end they are considered inappropriate in absence of successful Charter challenge
- CDN cases tend to differentiate the concepts of procedural fairness and legitimate expectation
- Under CDN case law, the availability and content of procedural fairness is generally driven by the nature of the applicant's interest and the nature of the power exercised by the public authority in relation to that interest → doctrine of legitimate expectation looks to the *conduct* of the public authority in the exercise of that power (***Old St. Boniface***).
- Holds that if the court is to give substantive relief, more demanding conditions precedent must be fulfilled than are presently required by the doctrine of legitimate expectation
- In Reference re Canada Assistance Plan, Sopinka noted 2 limitations: 1) a purely ministerial decision, on broad grounds of public policy will typically afford the individual no procedural protection and any attack on such a decision will be an abuse of discretion 2) public bodies exercising legislative functions may not be amenable to judicial supervision
- Affirms that doctrine of legit expectation is limited to procedural relief, though at times it is difficult to distinguish the procedural from the substantive
- **DECISION**: "In this case, as stated earlier, the Minister's decision will be set aside through the application of the ordinary rules of procedural fairness. There is no need to expand either the availability or content of procedural fairness because of the conduct of successive Ministers which amounts, in this respect, only to an aggravating circumstance. There is, in short, no need to resort to the doctrine of legitimate expectations to achieve procedural relief and, as explained, substantive relief is not available under this doctrine."

Congregation des temoins de Jehovah de St-Jerome-Lafontaine v Lafontaine (Village) (SCC) 2004

Legitimate expectations and reasons for decisions

- Three decisions by Lafontaine Municipal Council denying a re-zoning application by the Congregations of Jehovah's Witnesses to build a place of worship
- There were three zones (residential; commercial; and public institutional use zone); JW said they can't find an available location in the preferable public institutional zone and so they looked to use the residential zone
  - First decision: rejected proposal to build in residential zone; Council cited burden on residential taxpayers following a study
  - Second decision: rejected proposal to build in commercial zone; Council says that lots are still available in a 'P-3' community zone
  - Third decision: indicated that no lots were available and stated that approval fall within the municipality's discretion; 'The municipal council of Lafontaine is not required to provide you with a justification and we therefore have no intention of giving reasons for the council's decision.' (para 91)

SCC Majority: municipality owed duty of fairness; content based on *Baker* factors -

i. Nature of the decision: both administrative and political; delegated discretion of elected officials to decide in the public interest; but may not act arbitrarily (cites *Roncarelli*)
ii. Statutory scheme and its provisions: no appeal mechanism (weighs in favor or more process)
iii. Importance to the Congregation: practice of religion
iv. Legitimate expectations: 'Here, the municipality followed an involved process in responding to the Congregation's first rezoning application, in so doing giving rise to the Congregation's legitimate expectation that future applications would be thoroughly vetted and carefully considered.' (para 10)

v. <u>Procedural choices of the decision-maker</u>: in rezoning, municipalities have greater expertise than the judiciary; but less weight given here because no record indicating that village engaged its expertise

- **Municipality was required 'to carefully evaluate the application for a zoning variance and to give reasons for refusing them.' (para 12)**

  '*Giving reasons for refusing to rezone in a case such as this serves the values of fair and transparent decision making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials.... This duty applied to the first application, and was complied with. If anything, the duty was stronger on the Congregation's second and third applications, where legitimate expectations of fair process had been established by the Municipality itself.' (para 13)*

- **Municipality acted unlawfully:**

  'In refusing to justify its decision to deny the second and third applications for zoning variances, the Municipality breached the duty of procedural fairness it owed to the Congregation…. The Municipality acted in a manner that was arbitrary and straddled the boundary separating good from bad faith.' (para 30)

  - **<u>NOTE:</u>** Arbitrariness and bad faith are typically if not exclusively part of the substantive review analysis;
  - **<u>VH:</u>** In this case, I see the usage of these terms in Baker factor 1 and also here in this quote to really be representative of the court just conveying a message that they're not getting a "good feeling" from this case.

<u>HELD:</u> Second and third refusals set aside; remitted to municipality for reconsideration

Procedural Fairness: Specific Content (Notice & Reply; Hearings)

The Choice of Procedures

- Now consider the content of procedural entitlements once the threshold to the assertion of any procedural claims has been crossed
- The nature and extent of procedural claims made by applicants for judicial review don't fully emerge from discussions on sources and threshold, need to also look at participatory rights in rulemaking and the procedural dimensions arising from pressures generated within certain tribunals for institutional responsibility for and influence on decisions in particular matters
- As the threshold for the assertion of procedural claims has been lowered, the issue of procedural content has become that much more prominent and controversial
- The emergence of the doctrine of procedural fairness brought problems with it→ based on the traditional paradigm of the rules of natural justice (i.e. used in the criminal and civil courts) was simply inappropriate for a wide range of administrative decisions
- Advent of the Charter only added further complexity to this: do the principles of fundamental justice call for greater or different procedures than the common law rules of natural justice or procedural fairness?
- Prior t the emergence of the procedural fairness doctrine, there was much debate about the desirability of legislated general procedural codes→ this produced the SPPA

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1

Procedural Protections under S. 7 of the Charter

- **FACTS:** S applicant for landed immigration status, minister issued a certificate under s. 53(1)(b) of the Immigration Act to the effect that S was a danger to national security. Certificate was to deport S from CAN. S had a chance to make written submissions and file material with the minister, he didn't get a copy of the immigrations officer's report based on which the certificate was issues
- **ISSUE**: are the procedures for deportation set out in the Immigration Act constitutionally valid?
- **NOTE**: POFJ under s. 7, though not identical to the duty of fairness set out in ***Baker,*** are the same principles underlying that duty. In ***Singh***, Wilson recognized that the POFJ demanded at a minimum, compliance with

the common law requirements of procedural fairness. S. 7 protects substantive as well as procedural rights (***Re BC Motors Vehicle Act***).
- Court finds it appropriate to look to the factors discussed in ***Baker*** in determining whether the common law duty of fairness has been met, AND in deciding whether the safeguards provided satisfy s. 7
- **NOTE**: common law factors only to inform the s. 7 procedural analysis
- **APPLICATION OF BAKER FACTORS**:
  - 1) Nature of the decision to deport bears resemblance to judicial proceedings→ decision is serious but also one that needs discretion in order to examine past present and future behaviour of the individual (court finds that this factor equals neutral procedural safeguards)
  - 2) Nature of statutory scheme suggests need for strong procedural safeguards. While s. 40.1 of Immigration Act tries to ensure that the certs are issued fairly, there is a lack of parity b/w protections under s. 40.1 and s. 53(1)(b) (under the latter there are no procedures outlined at all)
  - 3) Nature of right affected: significant, faces not just deportation but deportation to torture→ The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the Charter. Militates in favour of strong procedural protections
  - 4) Legitimate expectations→ Given Canada's commitment to CAT (prohibits the deportation of persons when there are substantial grounds to believe they may be tortured) appellant had the right to procedural safeguards at the s. 53(1)(b) stage of proceedings
  - 5) Choice of procedures made by the agency→ Minister is free under the statute to choose whatever procedures they wish in making a s. 53(1)(b) decision. Minister must be allowed considerable discretion in evaluating future risk and security concerns. This factor also suggests a degree of deference to the Minister's choice of procedures since Parliament has signaled the difficulty of the decision by leaving to the Minister the choice of how best to make it. BUT this must be weighed with the elevated level of procedural protections mandated by the serious situation of refugees like S.
- **DECISION**: weighing all the factors, the procedural protections under s. 7 don't require the Minister to have a full oral hearing or judicial process, but requires more than what S had. Those facing deportation to torture must be informed of the case to be met (subject to privilege). Thus, the material on which the Minister is basing their decision should be disclosed to the individual. Also requires the opportunity to respond. Minister must also provide written reasons for their decision
- **NOTE**: these procedural protections won't be invoked in every case, only if there is a risk of torture→ for the applicant to make out a prima facie case there is a risk of torture upon deportation

Specific Content Issues

- Section considers specific content issues that have arisen in the context of common law, Charter, Bill of Rights and interpretations of provisions in the general statutes
- Issues can be divided into 2 sections:
  - 1) Pre-hearing content issues (i.e. issues of notice, claims to pre-hearing disclosure/discovery, delay in processing of admin proceedings etc.)
  - 2) The nature of the actual hearing itself (should it be oral, written a mix? Is there a right to cross-examine witnesses?)
    - Part of this is looking at what types of evidence a DM may rely on and the extent of the DMs obligations to reveal the evidence to affected persons
- Must keep in mind that procedural fairness issues, as the apply to administrative processes, apply to a much wider DMing context then judicial/quasi proceedings

Pre-Hearing Issues

Notice

- Notice is necessary b/c without it, the other rights a person may have can't be exercised effectively (or at all)
- Most issues here can be put into one of 4 groups:
  - 1) Problems about form

- 2) Problems about manner of service
    - 3) Problems about time
    - 4) Problems about the contents
- Notice can be written or oral, though, written is more common (and usually required by courts)
- SPPA requires notice to be written or electronic
- Personal service (notice handed or told to a party in some personal way) sometimes required (if it is notice to a large body of people, legislation regulates it, i.e. some form of public notice)
    - If no legislation specification is made, courts will normally permit notice to be given through some public way i.e. advertisements in newspapers
- ***Re Central Ontario Coalition and Ontario Hydro, (1984) 10 DLR (4th) 341 (Ont Div Ct)***
    - **FACTS:** Ontario hydro needed to link plants together, had two proposed lines, favoured was one that ran through London, alternate through Barrie. Made public notices but didn't give exact routes for alternate route, just said it would be in "Southwestern Ontario". Favoured route was rejected and Ontario Hydro decided to build it through alternate route. Parties affected successfully challenged this by showing that only 5% of affected people had been made aware and that no one actually knew the route before hand.
    - **DECISION**: despite efforts of Ontario Hydro, the notice was inherently defective
- **Note**: this is in contrast to ***Re Joint Board under the Consolidated Hearings Act and Ontario Hydro et al (1985)*** where it was found that by using "Eastern Ontario" the affected area was plainly included
- Issue of using mail and notice not being received at all
- ***Re City of Winnipeg and Torchinsky (1981) (Man QB)***
    - Assessment procedures of property in the city to be done in writing, responses/appeals also to be done in writing by a certain time, can't appeal after a certain time frame
    - Assessment was made of T's property, sent to her in mail with a right of appeal until May 12, 1981, notice didn't get to her until May 12, she responded in a few days. City sought to prohibit the board from hearing her appeal b/c it was late.
    - DECISION: dismissed City's claim and allowed appeal
- Although admin DMs must make reasonable efforts to provide notice of hearing, they are entitled to rely on the addresses provided by the parties and the regulatory regime governing mail delivery
- ***Wilks v Canada (CIC), 2009:***
    - W appealed a deportation order to the IAD by filling a notice of appeal, he was told that he must keep them updated on his contact info, year and a half later IAD sent him notice of hearing, he didn't get it because he had moved. IAD determined his appeal had been abandoned. W argued he wasn't given procedural fairness, IAD determined there was no breach which was upheld by FC.
- Notice must be given long enough before the date of the proposed hearing to give the party enough time to decide whether to participate and prepare
- When notice is too short, it normally can be fixed by way of adjournment
- Notice must give enough information about the issues to enable the party to prepare to respond → ***Zeliony v Red River College, 2007 MBQB***: school didn't provide her with the 48 hour notice of witnesses, but her counsel refused the adjournment so as not to further delay her classes. Court found she waived her procedural rights she would have otherwise had
- ***R v Ontario Racing Commission, ex parte Taylor, [1970] (H Ct J):*** One of Taylor's horses had an intestinal issue and a vet gave him a substance that was prohibited, was questioned by the stewards who showed him their ruling and referred it to the commission. After hearing he was suspended and fined. He sought certiorari and succeeded

The Actual Hearing

Oral Hearings

- "Oral hearings" can mean different things, but for this section, it means face-to-face encounters with the actual DM, and where relevant, the other parties
- Thus, its contrasted from purely written or electronic proceedings
    - Also different from proceedings where in person interviews are conducted but actual decision not made in presence of the parties

- Oral hearing doesn't mean automatic access to other procedural entitlements (i.e. formal presentation of evidence, right to counsel etc.)
- Traditionally, an oral hearing was required as an element of natural justice, though not always (***Komo Construction Inc c Commission des Relations de Travail du Quebec, [1968]***)
- With the emergence of the procedural fairness doctrine, the presumption in favour of oral hearings as the norm disappeared in the expanded common law procedural terrain

Khan v University of Ottawa (1997), 34 OR (3d) 535 (CA)

- **LASKIN (Majority):**
- **FACTS:** When Khan, a 2nd year student failed her evidence exam, her grade point avg dipped below faculty min and she was required to complete an additional semester of courses. She appealed the grade to the Faculty Examinations Committee on the ground that she had submitted a fourth answer booklet that hadn't been graded. Committee met without giving her notice or asking her to appear. After the meeting, they dismissed her appeal. She unsuccessfully appeal to University Senate Committee and then sought judicial review of the decisions denying her appeal
- Only record of Committee's reasons is a memorandum from the chair to the Senate dated almost one month after the committee met, their reasons for denying:
    - Strict careful procedures in place so these types of situations don't happen
    - Situation like this has never happened before
    - On first booklet she indicated that she completed 3 books
    - Very little was written in the 3rd book
- Committee wasn't convinced that the 4th book existed
- **DECISION:** a university student threatened with a loss of an academic year by a failing grade is entitled a high standard of justice. Thus, procedural fairness before the Exam Committee required: 1) Committee should have given K an oral hearing b/c her credibility was a critical issue on her appeal (i.e. should have had an opportunity to appear in person before those deciding her case) 2) Committee should have looked into exam procedures to make sure they were proper 3) K should have been given a chance to contradict the "factors" the committee relied on. Committee didn't do this
- **ANALYSIS:** entitled to an oral hearing b/c under the faculty law regulations a student can have a grade reviewed where it would result in a significant error or injustice. It was admitted by Chair that if she had written the 4th book this would be an error/injustice. Thus only evidence to this was her word, credibility major issue that should have been addressed at oral hearing.
- **NOTE:** in many academic appeals, procedural fairness will not demand an oral hearing
    - K need not show actual prejudice to prove that she had been denied procedural fairness → just needs to show that the Committee's breach of its duty may have reasonably prejudiced her (***Kane v University of British Columbia, [***1980]).
- **FINLAYSON (dissenting):**
- Doesn't believe that her case is one that deserves the same procedural protections as those students charged with personal misconduct
- K functioned on assumption that if 4th booklet had been graded she would have passed, but Committee was aware of caliber of first 3 books, may not have passed anyways (i.e. "More of the same wouldn't have been beneficial")
- Her focus on credibility puts too strong an onus on the committees to search and find the booklet
- She was given opportunity to provide full written reasons, she never expressed any issue with not being able to attend the hearing until after the fact
- Sees her only being entitled to a full opportunity to be heard, which she was
- K argued that where credibility is a serious issue, there is an exception to the general proposition that written submissions will satisfy the requirements of natural justice by relying on Wilson in ***Singh***
    - Dissent distinguishes this on grounds that the SCC's conclusion an oral hearing was necessary was inextricably linked to the serious nature of the rights at stake
- No allegations of cheating against K, she just failed

Pleasures Gentlemen's Club [2008] (Ont CA) (Rouleau JA for court)

FACTS:

Decision by Hamilton City Council, on recommendation of licensing committee, to revoke licence to operate adult entertainment parlour

- Wanted licencees to actually be operating and running an entertainment parlour – just about making use of space

Club sought judicial review, arguing that City breached its right to a fair hearing

- City By-law regulates adult entertainment parlours; proposes reduction from four to two via expiry or revocation of existing licences
- City's 'Issuer of Licences' may recommend revocation of licence to licensing committee where licensee has not carried on business "within a reasonable period of time"
- Licensees have procedural rights under By-law, including right to a hearing prior to revocation plus written notice of hearing (including. grounds for revocation)
- The notice stated that the hearing was to revoke her license, but included **no grounds**, only included:
  - "The grounds for the hearing are:
    - (a) The following documents:
      - (i) Certified copy of expired liquor licence.
      - (ii) Certified copy of cancellation notice of liquor licence application.
      - (iii) Inspection reports of Standards & Licensing Inspectors.
      - (iv) City of Hamilton Adult Entertainment Parlour Licence.
      - (v) City of Ham "Sale of Lands for Tax Arrears" notice.
    - (b) By-law 01-156…."
- **What is wrong with the above notice: unclear/misleading, no idea what grounds for hearing is, no knowledge of evidence**
  - Grounds for the hearing are documents? Why are you thinking of making this decision – what leads you to make this decision
  - This notice on its face looks inadequate – does not say how the decision is being made, what the evidence is, or what the outcome could be
  - If you look at the list of documents, the concern was that the owner did not open the entertainment parlour often enough
    - The documents do not demonstrate this concern
    - Documents make it look like the club has been serving underage patrons or property taxes
- Counsel to Club requested particulars of evidence to be introduced at hearing from City
  - What you do? Ask for more evidence: should have asked for evidence
- City responded with general outline of evidence (see para. 11)
  - Did not really get to the heart of the issue – only something quasi related to the fact that shop was not open enough
- At the hearing, counsel objected to lack of notice of evidence, but hearing proceeded
- At the hearing, it emerged that information provided by the City was false or misleading (see para. 14)
  - Some of the evidence not provided, some of the evidence did not exist
  - The inspector did not attend or give evidence at the hearing
- At the hearing, owner of Club indicated intention to open the club immediately, even without liquor licence

Result:

- City licensing committee voted unanimously to revoke licence to operate for failure to carry on business within reasonable time

- **Divisional Court** dismissed application for JR on basis that adequate particulars of evidence had been given and no bias or bad faith was established

ISSUE:	• Did city breach requirements of a fair process?
HELD:	• **Substantive content of notice provided (based on Municipal Bylaw & common law) inadequate**

REASONS:	**YES – duty of fairness owed in the statutory context, but content is minimal**
	• No need to consider the standard of review re: procedural fairness (para. 23)
	• City's failure to provide proper disclosure/notice violated the right to a fair hearing and tainted hearing from outset
	  o **"Procedural fairness generally requires disclosure unless some competing interest prevails" – need to know the case you must meet (para 25)**
	  o **Need not supplement the by-law any more through common law – breached its own bylaw**
	• By-law requires that basis for proposed revocation be provided prior to hearing
	• City's notice of the hearing did not refer to the grounds for revocation, but to "a series of largely irrelevant documents and sections of the By-law…" (para 30)
	  o No clue about what case she would need to meet
	• "The subsequent letter from the city… came two days before the hearing and served only to further mislead the appellant about the nature of the evidence…. [I]t failed to clearly define the issue to be determined" (para 31)
	• **"If proper disclosure had been made, the appellant would have known well before the hearing date that the failure to open was the basis of the recommendation**…. It is not for this court to speculate as to whether the result would have been the same had there been timely and adequate disclosure: *Cardinal*…."
	
	• **Remedy**: decisions of licensing committee and City Council are set aside; effect is to reinstate licence to operate (*certiorari* remedy – set aside decision)

Procedural Fairness: Specific Content (Case Study on Public Inquiries)

Public Inquiries & the Criminal Process

Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy) 1995	
FACTS:	• Provincial inquiry into Westray mine disaster (explosion killed 26 miners) – two mine managers faced criminal charges • **Mine managers applied to quash subpoenas from Inquiry or delay their testimony until after the criminal process was complete** • Rights to a fair trial and against self-incrimination • Inquiry proceedings had been stayed pending judicial review of mine manager's application • CA agreed with mine managers
ISSUE:	• Should court quash subpoenas from Inquiry or delay their testimony until after the criminal process was complete?
HELD:	• Allow inquiry to continue

REASONS:
Sopkina +4
	By the time of SCC hearing, mine managers had opted for trial by judge alone and the trial was underway
	• Therefore, no violation of 11(d)
	• On this basis, the stay on Inquiry proceedings should be lifted
	• Nothing to say that publicity would effect a trial judge
	• But what about the right against self-incrimination? Rejected s. 7 violation (which requires a consideration of PFJs) because they had yet to be compelled to testify at the inquiry. He said that it was unlikely they would be required to testify before the criminal charges were disposed of
	  o Does not provide satisfying resolution in terms of possibility of self-incrimination
	  o In order to resolve the **tension between self-incrimination and coercive nature of inquiry**, we need to look to Cory J's reasons below

Cory J +2	**Balancing Approach – Public Inquiries do not violate the *Charter***
	• Balanced: No 11(d) violation – even if by jury because the public interest in a full and open inquiry was sufficiently compelling in the social and historical context of the mining disaster and because the protections available both at the inquiry and trial could accommodate pre-trial publicity concerns
	  o Should consider publication ban to protect them
	• **Also said no violation of s. 7 so long as any evidence at the inquiry was barred from the subsequent trial** – this ties in with derivative use and immunity
	• **Derivative use immunity for witnesses at public inquiry**
	  o In criminal trial, the crown cannot rely on any information that it learns from inquiry – protection of witnesses
	  o Criminal trial judge should be holding the crown to a rigorous standard of proof that evidence entered was not derived from the public inquiry
	• Government runs risk of jeopardizing a subsequent criminal prosecution
	  o Makes a decision to search for truth in public versus criminal prosecution – *may be possible that crown will not be able to show that they found evidence sufficiently independent of inquiry*
	    ▪ The more that the inquiry lays out, the harder it may become
	• "… the government must, and undoubtedly has, carefully considered the choices open to it. If it chooses to proceed with the Westray Inquiry and to endow the Commissioner with an unlimited power to subpoena, then it runs the **risk that the criminal trials of the accused managers may possibly be irreparably compromised**…. On the other hand, if the government wishes to take every possible precaution to ensure that there is no risk to the criminal trials, then it could choose to halt, delay, or limit the powers of the Inquiry. To follow this latter course, however, involves the inevitable risk that the public will **lose faith both in the government's ability and willingness to get at the truth and in the political system as a whole**…." [para 97]
	• ***What does the public really want?***
	• **Future Inquiries:** Cory's approach is helpful because (1) it accepts that there are circumstances in which the government should have the authority to conclude that the public interest in conducting a public inquiry outweighs any potential jeopardy to future criminal proceedings and (2) he laid out a reasonably clear procedural approach to protect Charter rights without defeating the ultimate reasons for calling an inquiry

Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System) (1997) SCC

- **BAKGROUND FACTS:** 1,000 Canadians were infected with HIV and 12,000 infected with hepatitis C from blood and blood products. This resulted in the public inquiry presided over by Krever JA of the OCA (page 286)
  - The commissioner adopted rules of procedure and practice, agreed to by all parties, which included several procedural protections: parties and witnesses had a right to counsel; parties had the right to cross-examine witnesses; parties could apply to the commissioner to have witnesses called; parties could introduce documentary evidence and receive copies of all documents entered into evidence; hearings were public; and although the commissioner could admit evidence not admissible in a court of law, he would be mindful of the dangers of such evidence, including its effect on reputation
  - Commissioner assured participants the inquiry was not concerned with criminal or civil liability but rather what had caused or contributed to the contamination

Cory J

- **FACTS:** Commissioner issued 45 notices of potential findings of misconduct, involving 95 individuals, corporations and governments. A number of recipients brought applicants for judicial review. FC said no misconduct for 47 of the applicants. Many recipients whose notices were not quashed appealed. FCA only quashed one more and dismissed the rest (page 287)

- **Relevant statutes:** No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel - *Inquiries Act, RSC, 1985, c. I-11 s. 13* (page 288)
- **NOTE on commissions of inquiry:** Commissions of inquiry do not have authority to determine legal liability and do not necessarily follow same laws of evidence or procedure that a court or tribunal would observe
    - Commissions make all relevant findings of fact necessary to explain or support their recommendations, even if they adversely reflect on individuals. May make findings of misconduct if necessary to fulfil purpose of inquiry and may make finding of failure to comply with certain standard of conduct so long as the standard is not legally binding such that it pertains to criminal or civil liability
    - Need procedural fairness when a reputation is at stake (para 55)
    - The more detail included in the notice the better assistance it is to the party. Even if notice appears to make finding that would exceed jurisdiction it must be assumed that the commissioner will not exceed their jurisdiction in the final publicized report (para 56)
- Para 57 provides a useful summary of the nature of inquiries as discussed above
- **Issue 1:** Did the Commissioner exceed his jurisdiction by the nature and extend of the allegations of misconduct set out in the notices? **No**
    - Potential findings were within a broad mandate given to the commission
    - **He concluded that the challenge was premature** – should have waited until the release of the report and challenged the scope at that point, not based on the notices received (page 290)
    - The language in the notices did not convey findings of criminal or civil liability but rather possible findings of misconduct – only used terms like 'failure' (para 61)
- **Issue 2:** Did the appellants receive adequate procedural protections? **Yes**
    - Appellants said that they interpreted comments made by the Commissioner during the Inquiry as assurances that he had no intention of making the types of findings suggested in the notices – if the assurances had not been made they would have requested tighter evidentiary procedures, greater ability to cross-examine and other procedural protections (para 64)
    - Three corporate appellants were not uninformed bystanders, but rather had full knowledge of the blood system and the tragedy under investigation – could not be surprised at the critical language in the notices (para 65)
    - Procedural protections granted were 'extensive and exemplary' (para 67)
    - So long as adequate time is given to allow them to call the evidence and make submission they deem necessary the late delivery will not constitute unfair procedure – timing of notices will vary on circumstances – no way for Commissioner in this case to know until late or near the end findings (para 69-71)
- **Ratio:** Timing of notices depends on the circumstances of the case; the more complex and extensive the evidence the more likely the notice will come later.

Ontario (Human rights Commission) v Ontario (Board of Inquiry into Northwestern General Hospital) 1993 Ont Div Ct

- **BACKGROUND FACTS:** A board of inquiry was set up under the Ontario Human Rights Code to hear a complaint of racial discrimination made by ten nurses employed by a hospital (page 295)
    - Commission was ordered to provide respondent with all statements made by complaints and its investigators at the investigation stage and with the statement and identity of any witnesses interviewed by the Commission or its agents who the Commission did not propose to call and whose statements might reasonably aid the respondent in answering the case – this was challenged by the Commission
- **Relevant Statutes:**
    - S. 8 of the *Statutory Powers Procedure Act*: Where the good character, propriety or conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto
    - *S. 12 (1) of Statutory Powers Procedure Act:* A tribunal may require any person, including a party by summons, (a) to give evidence on oath or affirmation at a hearing; and (b) to produce in evidence at

a hearing documents and things specified by the tribunal relevant to the subject-matter of the proceeding and admissible at a hearing

- **Issue:** Should the board of inquiry required disclosure of the contested documents? **Yes**
    - The court held that justice is better served when parties are prepared to address the issues and meet the case against them on the basis of complete information (page 296)
    - Furthermore, at was held in *R v Stinchcombe* (a criminal case) the 'fruits of the investigation' are not the property of the Crown but the rather the public to be used to ensure justice – the point was held to equally apply to proceedings before a board of inquiry and that the fruits of the investigation were not the property of the commission (page 297)
    - Allegations of racial discrimination can also have serious consequences for those involved
    - The court acknowledged the risk that public disclosure of complaints of racial discrimination could have by discouraging future victims from coming forward but it held that the public interest in justice overrode that consideration and the procedures of the Commission still offered adequate protection (page 297)
- **Ratio:** Justice is better served when parties are prepared to meet the case before them based on complete information

CIBA-Geigy Ltd v Canada (Patented Medicine Prices Review Board) 1994 FCA

- **FACTS:** Utilizing its powers under the Patent Act ("the Act"), the Board scheduled a hearing to determine whether the drug Habitrol marketed in Canada by the appellant is being sold at an excessive price. (para 2)
    - In deciding to hold a formal hearing, once a patentee has refused to make a voluntary compliance order the Chairman of the Board considers a report from the Board staff to the effect that the market price charged for the drug in Canada exceeds the Board's guidelines (para 3)
    - **The appellant seeks the disclosure to it of all documents in the Board's possession which relate to the matters in issue in the s. 83 hearing, particularly the report on which the Chairman acted in ordering the hearing**
- The Board rejected the request for disclosure on the basis that the Board must balance its duty to allow the respondent to know the case against it against its responsibility to ensure that its orders do not have the effect of limiting its ability to discharge its responsibilities in the public interest on an ongoing basis – it must be confident that it is getting candid, complete and objective advice from its staff
- **HELD:** The court agreed with the Board – it is a regulatory tribunal and is not to be treated as a criminal court. To require it to disclose all possibly relevant information would unduly impede its work from an administrative viewpoint
- **NOTE:** It was distinguished from *Northwestern General Hospital* because the consequences were economic in nature and not dealing with human rights
- **NOTE:** the court is using a contextual approach to disclosure

Truth Before Punishment: A Defence of Public Inquiries: Gus Van Harten

- **Thesis:** Inquiries should be permitted to survive, but not thrive in the Charter era and should be established only in cases where there is grave public concern about an event with broad ranging tragic or scandalous consequences
- General info: Established under the *Public Inquiries Act*. The duty of the commission is to get to the truth. Independence is central to the functioning of an inquiry (245-247)
    - Not bound by strict rules of evidence, findings and recommendations not subject to appeal, **and most importantly it has extensive investigative powers including the powers to compel witnesses to testify and to obtain search warrants to compel the production of relevant documents – the coercive powers allow inquiries to function outside government control** (247-248)
- Can public inquiries with coercive powers ever be justified?
- What are the alternatives?
    - **Legal Alternative:** Criminal trial: differs in purpose – determining an individual's culpability and impose sanctions in accordance with criminal law. Inquiries on the other hand can address issues related to institutions and the system as a whole where a broader investigation is called for and look to future reform (249)

        - Evidence is also limited given the protections afforded to the accused and the evidence that is procured is often not given public scrutiny as many plead guilty before a trial (250)
    - **Political Alternative:** A public inquiry without broad coercive powers. These types of royal commissions can have outstanding contributions to policy-making. Regular public bodies often make recommendations after collecting and analyzing data but it is often in regard to issues that do not demand a thorough and independent investigation (251)
- **<u>Importance of coercive powers:</u>** Public inquiries require coercive powers for two reasons: to demonstrate that the inquiry process has been thorough and independent, and to enable the inquiry to make relevant and forceful recommendations (252)
    - **Credible Fact finding:** without ability to compel testimony they inquiry would have to rely on goodwill of those involved who may choose not to testify
    - **Forceful recommendations:** Coercive powers allow the inquiry to make useful and compelling recommendations based on a clear and detailed factual context. Facts are the hooks on which an inquiry hangs its recommendations. Historical links to specific failures makes the government more accountable in future reform. Also gives recommendations more force since public knowledge and confidence in the investigation fuels expectations in the government (255)
    - **The potential for Abuse:** Must intrude only as far as is essential to effectively carry out its mandate. There is legitimate concern for those individuals who are subject to concurrent criminal investigations (258)
- **Protection of Individual Rights:**
    - **Charter concerns:** (1) compelling a person to testify at a inquiry in the face of a prospective criminal prosecution violated his or her protection against self-incrimination pursuant to s. 7 and (2) the claim that pre-trial publicity arising from an inquiry made it impossible for those whose conduct was subject of inquiry evidence to subsequently receive a fair trail by an impartial jury, thus violating 11(d) (262)
        - *Nelles*: Provinces can establish inquiries to examine the role of individuals in past events, so long as the inquiry's mandate was broader than the conduct of specific persons and the subject matter fell within provincial powers
        - *O'Hara*: even though criminal charges could have followed the court did not find the inquiry ultra vires the province. However, the court declined to address whether or not it violated the Charter
        - *Starr*: Declined to address arguments regarding the Charter but the court went further than it did in O'Hara and stated that a person cannot be compelled to testify before an inquiry about involvement in suspected criminal activity
            - Reinforced the principle that a provincial inquiry is unconstitutional if it scouts territory for a criminal charge
- **Phillips v Nova Scotia (Charter continued):** Explosion of coalmine killed 26 miners. Managers were called as witnesses and they were subject to both regulatory and criminal investigations. Managers applied for a stay of proceedings until all criminal and quasi-criminal charged had been disposed of (267-8)
    - **SC, Sopinka (majority):** No violation of 11(d) because they elected for a trial by judge alone (left open possibility that had they elected for a trial by jury it would have constituted a violation). Also rejected s. 7 violation because they had yet to be compelled to testify at the inquiry. He said that it was unlikely they would be required to testify before the criminal charges were disposed of and said that if it did happen that it *might* be a material factor in determining the purpose of the compelled testimony – **leaves things confusing for future inquiries. Also does not say anything about being compelled to testify in the face of appeals**
    - **Cory (minority):** Considered the balance between the search for the truth and protection of individual right: no 11(d) violation – even if by jury because the public interest in a full and open inquiry was sufficiently compelling in the social and historical context of the mining disaster and because the protections available both at the inquiry and trial could accommodate pre-trial publicity concerns
        - To protect potentially prejudicial pre-trial publicity he said that (1) the commissioner should consider on application by the mine managers a ban on publication of their testimony and (2) that publication of the final report should be delayed until the managers

        - had an opportunity to review it and if so bring an application to ban its publication until criminal charges were disposed of
        - Also said no violation of s. 7 so long as any evidence at the inquiry was barred from the subsequent trial – Crown would have to show it uncovered the evidence absent the inquiry
- **Future Inquiries:** Cory's approach is helpful because (1) it accepts that there are circumstances in which the government should have the authority to conclude that the public interest in conducting a public inquiry outweighs any potential jeopardy to future criminal proceedings and (2) he laid out a reasonably clear procedural approach to protect Charter rights without defeating the ultimate reasons for calling an inquiry (275)
    - **Left power to call inquiries with government rather than courts knowing that even with certain procedures in place an inquiry can work to undermine a criminal trial**

Procedural Fairness: Charter/Bill of Rights Threshold

Introduction

- Bill of Rights applies only to judicial review while the Charter applies throughout Canada (175)
    - But it only applies to acts of government
- However, it can be difficult to define what is and is not government (175-6)
    - *McKinney*: universities not government
    - *Eldridge*: hospital board subject to Charter when implementing specific government policy
- Note difference between Bill of Rights and s. 7 of the Charter
    - 'Individual' and 'person' are used, s. 1(a) includes enjoyment of property and 2(e) of procedural guarantees to the 'determination of rights and obligations' and there is no section 1 equivalent

Singh v Canada 1985 (SCC)

- **FACTS:** convention refugee claimants landed in Canada. The minister, acting on advice of Refugee Status Advisory Committee determined they were not convention refugees. Appealed to IAB but it was not referred to an oral hearing because the board determined on the strength of the material submitted that there were no reasonable grounds for believing that they could establish their claims at a hearing. Appealed to the federal court alleging s. 7 infringements, which failed but then was granted leave by SC.

Wilson J

- Refugees have a right to remain in Canada when they do not have a safe haven elsewhere (184-5)
- S. 2(1) of the Act defines refugee: well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social or political opinion and cannot return (185)
- S. 45 outlined: determination of refugee status (185)
    - Did not provide for an oral hearing – only through claim on transcript of an examination under oath (186)
    - Acknowledges that the advisory committee is removed from the people it is deciding on but says while there is a duty to act fairly the court cannot impose procedural restraints that are incompatible with the decision-making scheme set up by Parliament (186)
- S. 70-71 gives right of appeal to IAB for a determination hearing (186-7)
    - 71(1) will have hearing if it is of the opinion that there are reasonable grounds that a claim could be established at a hearing
    - It was agreed that that hearing would be quasi-judicial where full natural justice would apply
- **ISSUE:** The claim is that they did not have a fair opportunity to present their claim or to know the case they had to meet (187)
    - Does the Charter require the court to override Parliament's decision to exclude the kind of procedural fairness sought by the appellant?
- **REASONS:**
    - S. 7 includes everyone including the appellants – conceded by counsel for Minister but counsel argued that the appellant's s. 7 rights were not infringed in this case (187)

- NOTE: government advanced a 'single right' theory for s. 7 but the court said there are still three elements to the right (188)
- If a convention refugee's fear is well founded it does not automatically mean he will be deprived of life or liberty – it may happen (188)
- **However, it will deprive him of his security** – no matter what a definition must include freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself (189)
  - S. 55 gives refugees the right not to be removed to country where life or freedom would be threatened
  - **<u>She is saying that she is using s. 7 to override the procedures of the Act</u>**
- **NOTE:** appellants are not entitled to refugee rights; their claim is that they are entitled to fundamental justice in the determination of whether they are Convention refugees or not
- ***Mitchell*:** Does the Bill of Rights apply to s. 16(1) of the Parole Act requiring the parole board to provide parolee with a fair hearing before revoking parole? No according to majority but Laskin dissented stating that parole could not be characterized as a mere privilege
- **Given the potential consequences for the appellants of a denial of the status of refugee it is 'unthinkable' that the Charter would not apply to entitle them to fundamental justice in the adjudication of their status (**190)
  - In summary, I am of the view that the rights which the appellants are seeking to assert are ones which entitle them to the protection of s. 7 of the Charter. It is necessary therefore to consider whether the procedures for the determination of refugee status as set out in the Act accord with fundamental justice
- Written submissions are not an adequate substitute for an oral hearing in all circumstances – specifically when a serious issue of credibility is involved. Greatest concern is inadequacy of claimant's opportunity to be heard (191)
  - Concern is therefore not the absence of an oral hearing but the inadequacy of the opportunity the scheme provides for a refugee claimant to state his case and know the case he has to meet
- Minister and Refugee Advisory Committee could take into account policy consideration and information about world affairs to which the refugee claimant had no opportunity to respond (191)
  - The proceeding before the IAB was quasi-judicial and should only have relied on material submitted by the claimant
  - **Furthermore, it was adversarial because the Board had the determination of the Minister based in part on information and policies to which the applicant had no means to access and therefore could not adequately meet the case before him**
  - **Because s. 71(1) requires the Immigration Appeal Board to reject an application for redetermination unless it is of the view that it is more likely than not that the applicant will be able to succeed, it is apparent that an application will usually be rejected before the refugee claimant has had an opportunity to discover the Minister's case against him in the context of a hearing - undermines principals of fundamental justice**

- **S. 1 Justified?** Administrative convenience (saving time and money) is not an answer in every case (193). Administrative convenience does not override the principals of fundamental justice. It is not justified in this case

Beetz

- Takes an approach from the Bill of Rights (2(e)).
- Oral hearing not required in all cases: most important factor for procedural content of fundamental justice in a given case is the nature of the legal rights at issue and the severity of the consequences to the individuals concerned (195)
  - Deserved at least one oral hearing

- NOTE: *Kazemi Estate v Islamic Republic of Iran*: State Immunity Act barred estate of tortured and killed Canadian journalist from bringing civil action against Iran because it was held that 2(e) does not provide

the right where no adjudicative process exists. There is no jurisdiction in Canada to adjudicate the claim. Immigration Act already had a process in place. In *Amaratunga* it was held that 2(e) does not create a substantive right to make a claim but provides a fair hearing if and when a hearing is held

- *Chiarelli* (1992): wanted to deport him for being inadmissible and he challenged based on s. 7 because he and his counsel were excluded when government witnesses were giving evidence and his ability to cross-examine was limited
  - Upheld by court: non citizens do not have an unqualified right to enter and remain in Canada
  - Balancing competing interests of the state in effectively conducting national security and criminal intelligence investigations and in protecting police sources with the interest of the individual in a fair procedure – held that these interest were reasonably balanced
    - Provided him with several documents summarizing the information it had received from ministers and a summary of the in camera evidence presented at the hearing, which gave him knowledge of the allegations against him and allowed him to respond. Also allowed him to cross examine RCMP witnesses who testified in camera

Charkaoui No. 1 [2007] 1 SCR 350 (Can) (McLachlin CJC for court)	

FACTS:	Security certificates, issued by ministers, declaring a permanent resident or foreign national to be inadmissible to Canada on security grounds
	• Security certificates are administrative decision by Minister
	  o Not subject to usual protections of criminal law
	• C, a permanent resident, and Almrei and Mohamed, foreign nationals recognized as convention refugees, brought the case. Federal Court judge had to review the certificate to determine if it was reasonable
	• May lead to removal from Canada or to indefinite detention (or other restrictions on liberty) pending removal
	• Cannot be issued against Canadian citizens (only permanent residents & foreign nationals)
	
	Certificates are reviewed for 'reasonableness' by a Federal Court judge in closed proceedings
	• While the ministers and the reviewing judge could rely on undisclosed material, neither the named person nor their counsel could see it. The reviewing judge was required to disclose to the named individual a summary of the case against him or her; however, the summary could not disclose material that might compromise national security
	• Judge's decision was final and could not be appealed
	• Could be removed to states where they faced a substantial risk of torture
	• Our focus:
	  o Are closed proceedings ever justified where s. 7 is engaged?
	  o If so, in what circumstances?
	• **The standard of proof / review on the state was much reduced from criminal proceeding** – only had to provide evidence that the issuance of the certificate was "reasonable," not beyond reasonable doubt
	• **O'Connor ACJO** in Arhar: "the security certificate process provides for broader grounds of culpability and lower standards of proof than criminal law" (cited in *Charkaoui II* at para 54)

ISSUE:	• Do the provisions violate s. 7 of the Charter?
HELD:	• Yes, s. 7 is violated
REASONS:	**Strikes down the security certificate regime (violates s. 7)**, but gives one year to parliament to revise the scheme: • The prospect of deportation/ detention engages interests protected by s. 7 • BUT National security considerations may necessitate closed proceedings o **NEED to see '<u>adequate substitutes</u>'** to the procedures of open proceedings must be employed in order to accord with the principles of fundamental justice • **The substitute procedure must provide 'meaningful and substantial protection'** of due process in order to satisfy s. 7 (*another way to look at is what does PFJ require of the specific*

	content of fairness in this context)
	
	"The issue at the s. 7 stage… is not whether the government has struck the right balance between the need for security and individual liberties; that is the issue at the stage of s. 1 justification … The question at the s. 7 stage is **whether the basic requirements of procedural justice have been met, either in the usual way or in an alternative fashion appropriate to the context, having regard to the government's objective and the interests of the person affected**." (para 63)
	• No balancing at s. 7
	
	Look to **<u>context, seriousness of societal concerns (para 58) & seriousness of violation</u>** (para 22)
	• Closer to criminal law, more process required (para 25)
	
	Basic facets of PFJ (para 29): Before state can detain people for significant periods of time it must accord them fair judicial process
	• (1) Hearing, (2) before independent judge, with a decision (3) based on facts and law and (4) right to know case against you and right to answer that case
	• <u>Here</u>, the procedure for judicial review of security certificates did not conform with the principles of FJ because it failed to ensure a fair hearing, for three reasons… (compare these reasons to what VH listed about the absence of individual… etc. above)
	    o **(1) The procedure precludes a judicial decision based on all relevant facts and law** (links up to the absence of the individual and more). Scheme denies the named person the opportunity to know the case put against him or her, and hence to challenge the government's case. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law
	    o (2) **The procedure deprives the individual of the right to know the case to meet and to reply** (notice and reply; absence of individual)
	    o (3) **The judge is 'not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring'** (para 64) (judicial dependence on the executive – problematic). Judge only sees what the minister put before him or her and can therefore not identity errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be
	• Thus, s. 7 is violated
	
	The violation of s. 7 is not justified under s. 1 b/c there are alternatives:
	• Alternatives exist to review of security certificates in closed proceedings by a judge alone, e.g. – signals alternative models that may satisfy the PFJ requirements:
	    o <u>Previous role of counsel to the Security Intelligence Review Committee (SIRC)</u>
	        ▪ Before the regime that was challenged here was enacted, SIRC played the role of judge – SIRC was taken out of the picture, because at SIRC, you had SIRC counsel appointed by SIRC that would test the state's evidence and argument
	        ▪ Takes the pressure off the judge to play the adversarial role – SIRC counsel could speak to the individual (not disclose information) and cross examine CSIS officials
	    o <u>Role of *amicus curiae*/ commission counsel at the Arar Inquiry</u>
	        ▪ Instead of judge, you have commissioner of inquiry
	        ▪ Commission counsel can speak with the individual
	        ▪ Amicus was former SIRC director – provided much context
	        ▪ Although individual was not in room, the commissioner had many people to look to
	    o <u>Role of 'special advocates' in the United Kingdom</u>
	        ▪ Special advocates cannot speak to the individual – can only speak to individual before the disclosure of the state's case
	Worried that special advocates would release information / not know what was private

NOTE:	• Demonstrated that specific content is very dependent on specific context - **Section 7 of the**

	Charter requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake (para 20)
NOTE:	• Led to introduction of the use of special advocates under Bill C-3

Charkaoui II [2008] 2 SCR 326 (Can) (LeBel and Fish JJ for court)	
FACTS:	C, a permanent resident, was detained from May 2003 to Feb 2005 when Federal Court judge authorized his conditional release after fourth review of detention • Prior to fourth review, government counsel revealed to judge that a document that should have been disclosed to C in May 2003 was not disclosed due to an oversight • Document was a summary of CSIS interviews with C in 2002 • C requested disclosure of complete notes and recordings of the CSIS interviews • There were no recordings in the file and CSIS policy is to destroy notes of CSIS interviews once CSIS officers complete their reports • C applied for stay of proceedings and requested that the certificate be quashed
ISSUE:	• Did the *Act* and *Charter* require CSIS to retain the information & to disclose it to all parties (subject to security exceptions)?
HELD:	• **Yes, under the s. 12 of CSIS Act and the Charter**

REASONS:	If there is physical detention contemplated, CSIS must maintain original notes
	• **Strong message** – must maintain documents on individuals if you detain and intend on launching a security certificate against that person (serious consequences to the individual)
	• CSIS breached its duty under the *CSIS Act* to retain and disclose information
	    o C was detained on the basis of summaries, not the actual transcripts of the occurrence
	• Existing *Charter* s. 7 case law on disclosure and retention of information required **CSIS to retain all information** relating to security certificate investigations and to **disclose it to relevant ministers and FC judge**
	    o Then, FC judge will disclose non-confidential information to affected individual
	• **Notes are "a better source of information, and of evidence"; retention would "make it easier to verify the disclosed summaries and information based on those notes"** (para 39)
	• Earlier decision of SIRC cited report to SIRC by Foreign Affairs that was found to be inaccurate and misleading because CSIS information had been inaccurate and incomplete
	• Although CSIS is not a police agency, it has a duty of disclosure going beyond mere summaries
	• Security certificate proceedings are not criminal trials but procedural fairness under *Charter* s. 7 required "a procedure for verifying the evidence adduced against [the individual]" centring on review by the designated judge (para 56)
	• **"... If the original evidence was destroyed, the designated judge has access only to summaries prepared by the state, which means that it will be difficult, if not impossible to verify the allegations made in disclosed summaries and information based on those notes**....
	• "As things stand, the destruction by CSIS officers of their operational notes compromises the very function of judicial review. To uphold the right to procedural fairness of people in Mr. Charkaoui's position, CSIS should be required to retain all the information in its possession and to disclose it to the ministers and the designated judge. The ministers and the designated judge will in turn be responsible for verifying the information they are given." (Para 61-62)
	• **Concerns come from the 3rd element → dependence on the executive: conscious that the judges and ministers are reliant on state**
	    o Need to be able to go back and test the evidence put forward because there is no opposing counsel
	• **<u>Higher expectations of disclosure and document retention because of the liberty at stake of the individual, closed proceedings, s. 7 – decision flows form serious consequences of the decision</u>**

NOTE:	• Must take a contextual approach in assessing the rules of natural justice and the degree of procedural fairness to which an individual is entitled – in this context the named person deserves

	the disclosure of evidence adduced against him or her in a manner within the limits that are consistent with public safety concerns (para 56) – **again demonstrating the importance of specific context**

Procedural Fairness: Procedural Statutes

General Procedural Statutes

- General procedural statutes comprise thresholds governing the application of their specific procedural protections

Ontario's Statutory Powers Procedure Act

- SPPA contains a formula that provides for the Act's general application, subject to specific exceptions
- s. 3(1) sets out two requirements:
  - 1) A decision-maker must exercise a statutory power of decision conferred by or under (thus catching powers conferred by subordinate legislation) an Act of the legislature
    - "Statutory Power of decision" is defined in s. 1 as: "a power or right, conferred by or under a statute, to make a decision or deciding or prescribing, (a) the legal rights, privileges, immunities, duties or liabilities of any person or party, or (b) the eligibility of any person or party to receive, or to the continuation of, a benefit of licence, whether the person is legally entitled thereto or not
    - "Deciding or prescribing" implies that non-final decision-making doesn't fall within the SPPA's scope (this is confirmed by a specific exemption in s. 3(2)(g)
    - SPPA applies to rights and privileges (such as licenses) or benefits
    - Doesn't apply to legislators
  - 2) The decision maker must be required "by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision"

Section 3(2) holds the exemptions (see short summary pg. 57).

Key Provisions:

- S. 2: Liberal construction of the rules
- S. 3(1): Where this Act applies
- S. 3(2): Exceptions to where the Act does not apply
- S. 4: Panels/role of Chair
- S. 5: Definition of a "party"
- S. 6: Reasonable notice of hearings
- S. 8: Circumstances where a specific level of notice is required
- S. 9(1): Requirement for open proceedings (may be varied for reasons of public security or to protect intimate private or personal information)
- S. 10: Right to counsel and to call and cross-examine witnesses
- S. 11: Witness' right to counsel
- S. 12: Power to issue summonses
- S. 14: Immunity for witnesses compelled to testify
- S. 17(1): Obligation to give written reasons for final decision, if requested by a party
- S. 20: Obligation to keep record of proceeding
- S. 25.0.1 and 25.1: Power to make orders/rules governing the tribunal's practice and procedure

Procedural Fairness: Specific Content (Disclosure; role of in-house counsel)

Charkaoui II (2008) (359) (SCC)

- **FACTS:** Counsel for ministers failed to disclose a summary of two interviews that Charkaoui had with CSIS officers – CSIS policy required that operational notes be destroyed after they had been transcribed into a report – Charkaoui said his procedural rights were violated and applied for stay of proceedings and requested that certificate be quashed
- Court looked to criminal law cases in which it had been stated that there is a duty to disclose and preserve relevant evidence (para 48-49)
- However in security certificates no charges are laid – looking to expel the person but the serious consequences of the procedure on liberty and security of the person bring s. 7 considerations into play (para 50)
  - Investigations by CSIS play a central role in the decision on the issuance of a security certificate, which can have consequences more severe than many criminal charges (para 54)
  - **Given that a FC judge must make a determination on the reasonableness of the certificate it is also not a purely administrative procedure** (para 55)
- Must take a contextual approach in assessing the rules of natural justice and the degree of procedural fairness to which an individual is entitled – in this context the named person deserves the disclosure of evidence adduced against him or her in a manner within the limits that are consistent with public safety concerns (para 56)
- **Importance of original documents** (para 61)
  - The destruction of operational notes compromises the very function of judicial review – makes it difficult if not impossible to verify allegations made in disclosed summaries and information based on those notes
  - The ministers and designated judge will be better prepared to make decisions if they have all the evidence and will be able to verify and the judge can then exclude any evidence that might pose a threat to national security and summarize remaining evidence (para 62)
- **DECISION:** In conclusion, it is our view that the destruction of operational notes is a breach of CSIS's duty to retain and disclose information. CSIS is required—pursuant to s. 12 of the CSIS Act and based on a contextual analysis of the case law on the disclosure and retention of evidence—to retain all its operational notes and to disclose them to the ministers for the issuance of a security certificate and subsequently to the designated judge for the review of the reasonableness of the certificate and of the need to detain the named person – decision flows from the serious consequences the investigation will have for named individual
  - **NOTE:** it is not a balancing act the judge must undertake – does not have to weigh the interests of disclosure against those in favour of non-disclosure (see note 6 at bottom of 368)
- **NOTE:** Judge was eventually provided with some operational notes and the special advocates challenged the minister's claim that evidence could not be disclosed for reasons of national security. Judge decided some evidence could be disclosed, but the ministers decided to withdraw the evidence knowing the certificate would no longer be reasonable and planning to go to the FCA for a decision on disclosure but the FC judge stopped that from happening (364) – the judge did that in three ways
  - Tremblay-Lamer J held that, in light of the ministers' withdrawal of the supporting evidence, the certificate no longer complied with the requirements for its referral to the court and declared that the certificate was void. In the alternative, she decided that the certificate was not reasonable in view of the ministers' admission that they could not meet their evidentiary burden. Finally, she refused to certify any questions for appeal
  - **Para 75-6 of Charkaoui 2009: If it in the judge's opinion – judge owes no deference to the assertions made by CSIS or the Ministers in this regard, nor to the special advocates – for the judge alone**
- Van Harten: two problems in security closed proceedings: the absence of the individual and the public and the court's dependence on the executive – creates an atmosphere that reflects the culture of the security realm – may make the judge lean towards the executive's position – make an adjudicative environment in which the security interest obtains a privileged status as a result of its more direct and responsive representation before the court (367-8)

Pritchard v Ontario (2004) (SCC)

- Employee of Sears files human rights complaint alleging gender discrimination, sexual harassment and reprisal (para 1)
- Commission decided not to deal with complaint and she sought judicial review and brought motion for production of all documents before Commission when it made decision including legal opinion provided by in house counsel for Commission
- Appeal dismissed
- The Commission was of the view that the appellant had acted in bad faith in bringing the complaint because she had previously signed a release which expressly released Sears from any claims under the Code (4)
  - In return she was paid her statutory entitlement under the ESA plus two weeks salary (5)
- **ISSUE:** The question is whether a legal opinion, prepared for the Ontario Human Rights Commission by its in-house counsel, is protected by solicitor-client privilege in the same way as it is privileged if prepared by outside counsel retained for that purpose
- *Solosky v Queen*: (1) communication between solicitor and client, (2) which entails the seeking or giving of legal advice *and*, (3) which is intended to be confidential by the parties (15)
- Only be breached in rare circumstances (18)
- In house can be protected by privilege when acting in legal capacity but not when acting in a non legal capacity (19)
  - Case by case basis (20)
- Common interest exception does not apply – Commission does not share interest with those before but acts as a disinterested gatekeeper for human rights complaints (22)
- The opinion provided by counsel in this case was a legal opinion – no applicable exception (28-29)
- **DECISION: Procedural fairness does not require the disclosure of a privileged legal opinion.** Appellant was aware of the case to be met without the production of the legal opinion (31)
  - Legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively (33)
  - Where the legislature has mandated that the record must be provided in whole to the parties in respect of a proceeding within its legislative competence and it specifies that the "whole of the record" includes opinions provided to the administrative board, then privilege will not arise as there is no expectation of confidentiality. Beyond that, whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter that does not arise in this appeal (34)

London Limos (2012) (MBCA)

- LL applied to Taxicab Board for a taxicab business license. Granted in part without written reasons. Objectors appealed stating that failing to give reasons breached the duty of fairness. Court of Appeal duty of fairness was met as it was protecting the company's confidential business information and the appellants were not parties to the proceeding
- In some cases it will be plain and obvious that reasons should be given and if they are not then resort to the court may be permitted but in all other cases they must first be requested before resorting to the court (426-7)
- While the failure to request reasons does not bar appellate review when determining whether reasons were required in any particular circumstance, the failure of the person complaining to ask for reasons may indicate the rationale for the order was understood without written reasons (para 44-45) – an adverse inference
- **In any case, the record acted as a sufficient surrogate for formal, written reasons** (para 47) – there is sufficient understanding of the rationale of the Board to allow for judicial review
- **Context is important:** In this case, context would include the information contained in the disclosure summary, the information made public at the Board hearing and, in part, confidential business information. It would also include the fact that the question being dealt with was one of economic regulation rather than, for example, one of professional discipline. [51] As well in this case, the entire proceedings were recorded and transcribed. The test applied by the Board for considering whether to grant new licenses is clear from the transcript of the hearing

- Objectors understood test to be applied and did not present any evidence to support their objection that additional limousine licenses were not needed to fulfill public convenience or necessity (54)

Bias & Lack of Impartiality (focus on bias at the individual level)

Introduction

- Generally ask whether the particular situation of the decision-maker gives rise to a sufficient risk that an impermissible degree of bias will exist
  - Do not look for specific evidence into the adjudicator's actual state of mind – this would require the adjudicator to testify, which could compromise the principle of confidentiality in decision making by tribunals. Furthermore, it could undermine the principle of unbiased adjudication by undermining public confidence in the impartial resolution of disputes by creating doubt amongst the public (page 440)
- **Bias:** A decision is tainted by bias if it is based on illegitimate interests or irrelevant considerations, such as the decisionmaker's pecuniary interests, relationships with parties, and preconceived attitudes toward the issues at stake in the proceedings. Even the perception of bias in the reasonable observer undermines public confidence in the administration of justice (page 442)
- **Impartiality:** Impartiality, as the Supreme court noted in the context of judicial proceedings, refers to "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case – approaches a decision with an open mind and without bias, actual or perceived (442)
- **Judicial Independence:** The complete liberty of individual judges to hear and decide the cases that come before them: no outsider—the 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 or makes his or her decision. The objective of judicial independence is to ensure the public's perception of impartiality (442)

Bias The General Test

- **<u>Reasonable apprehension of bias</u>**
  - From *Committee for Justice and Liberty et al v National Energy Board et al*: "The apprehension of bias must be a reasonable one, held by reasonable and right minded people, applying themselves to the question and obtaining thereon the required information. In the words of the court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude." (443)
  - There has been inconsistency regarding the knowledge that is to be attributed to the reasonable bystander
- **<u>Four categories giving rise to a disqualifying bias</u>**
  - 1. Antagonism during a hearing by a decision-maker toward a party (or his or her counsel or witnesses);
  - 2. An association between one of the parties and a decision-maker;
  - 3. An involvement by a decision-maker in a preliminary stage of the decision; and
  - 4. An attitude of a decision-maker toward the outcome.
- Antagonism during a hearing:
  - Most commonly manifested by unreasonably aggressive questioning or comments about testimony. Can also manifest in attitude toward the issue being decided (*Computers Inc v Ontario* – adjudicator continued to ask about association with Tamil Tigers even when it was denied when the proceeding regarded the revocation of a license). Baker is an example of bias being found in written reasons. This can also reach to lawyers who are employed to assist a tribunal at the hearing (444-5)
- Association between party and decision-maker:
  - Direct or indirect. May arise due to a past professional relationship: *Marques v Dylex*: employer challenged decision of Labour Board to certify union b/c one member of the board practiced as a lawyer for a union that became part of the certified union – the challenge failed b/c he had not worked with the firm in over a year and the Board is expected to have those who have been involved with labour law in the past on it. In *Terceira, Melo v Labourers International Union of North*

America the decision of the LB was overturned b/c a vice chair who had acted as counsel for one the parties several years ago did not recuse himself
    - Personal relationships may also give rise to reasonable bias. *Gedge v Hearing Aid Practitioners Board* – reasonable apprehension of bias found b/c members of the tribunal knew the individual personally and one was even a competitor

United Enterprise Ltd v Saskatchewan (Liquor and Gaming Licensing Commission) 1997 (Sask QB)

- **FACTS:** Decision by commission was overturned due to apparent bias. Applicant applied for review of suspension of licence.
    - On first day of hearing members of commission's panel arrive with in house counsel (Counsel L) from the commission acting in opposition to the applicant arrived together and entered the hearing room through a side door.
    - When applicant's general manager and counsel were invited into the hearing room counsel L was already seated and conversing with members of the commission – occurred four times
    - Commission chair referred to counsel L by first name while referring to applicant's counsel by surname
    - At end of hearing commission chair confirmed an invitation for counsel L to attend barbeque that evening and in house counsel responded positively
- On appeal to Sask. Queen's Bench the judge rejected the commission's submission that mere familiarity is insufficient to give rise to a reasonable apprehension of bias (447)
    - Cannot treat one party with familiarity and not the other. Parties are entitled to a level playing field. Any deference shown to one party is a strong indication that the same deference will be shown to their respective submissions – while not a court a tribunal must respect the principles of natural justice. It was the cumulative effect of the acts in this case

DeMaria v Law Society of Sask (2013)

- **FACTS:** candidate denied admission to Bar in Saskatchewan; judicial review of admission committee's decision. Questionable conduct in articling after admitted cheating in bar ads course
    - Alleged bias of committee chair for email sent to Law Society counsel, forwarding committee's decision
    - Email ended: "Do you want my copies of the transcript, I could bring them to Elk Ridge in Sept…. Is anyone going to golf up there? Cheers GWP
        - This was sent to Law Society's lawyer
- **No reasonable apprehension of bias; Schwann J:**
    - "To place the email in context, its purpose was to electronically convey the final [Committee] Decision to the Law Society subject to receipt of counter-part signatures from the two other Committee members. In Mr. Patterson's mind, the decision was final subject to receipt of the counter-part signatures…."
- Would the result have been different if the email was sent before the committee's final decision?
- Should the timing make a difference?
- What are the differences b/w the two cases?
    - Less frequent, is one occurrence
    - If we operate on the logic of this case, then in above case, if only issue was the BBQ invitation, then it wouldn't be sufficient to have proven RAB
    - VH: why is the timing relevant? Its not like the familiarity was created when this email was sent (despite it being sent post-the decision being made) they were clearly familiar before this
        - Doesn't this indicate a level of familiarity for the proceedings as a whole
    - VH: case is very close to the wire
    - VH: we don't want DMs to actively hide their familiarity and then reveal it at then end→ better to have it revealed at the beginning so that we can assess the bias before hand
- **NOTE:** Is there a risk that our RAB test creates an incentive to hide things we want to be open to evaluate in a transparent way? Built-in incentive in the legal test that makes it more difficult to figure out what is actually going on behind appearances

Attitudinal Bias

Paine v University of Toronto (1980) Ont Div Ct

- **FACTS:** Denied tenure – applied for judicial review. An assessment was requested by all tenured members of the Department of Fine Arts as internal referees – **one was negative and stated it was clear in his mind the Candidate was not acceptable for tenure**
    - Candidate was informed that the Committee would include three department members and at least one tenured person outside the department – he was advised to let them know if he objected to any potential members in those categories
- Held: procedural unfairness stemmed form fact that with prior knowledge of the views he held the chairman of the Committee appointed a senior member of the department who had submitted a thoroughly negative assessment of the applicant who had concluded already that he was not acceptable for tenure

Ont CA

- Overturned Div Ct decision
- Weatherston HELD:
    - Members of committee are tenured members of the staff and as a matter of course must all have formed opinions as to the suitability of the candidate and it makes little difference whether that opinion was expressed before or at meetings of the committee – members act on own knowledge of candidate and on assessment and references provided to them.
    - Also, a recommendation for tenure need only 5 of 7 votes and all 5 that voted (two abstained)
    - No suggestion that one member of the committee dominated the proceedings
    - An appeal committee and a second appeal committee appointed by the president rejected all grounds of appeal
- **MacKinnon**
    - The parties to the instant appeal had contractually agreed to have their domestic disputes resolved in a certain way, and as I have noted, there is no suggestion that there were "flagrant violations" of procedural fairness or otherwise, in the proceedings before the tenure appeal committees. The validity of the rejection of tenure rested, in the last resort, on the decision of the tenure appeal committee which the parties by their agreement and actions had determined to be the knowledgeable arbiter of the issues raised – no manifest error

Pelletier v Canada 2008 FC

- **FACTS:** Inquiry set up to investigate alleged misuse of government funds as part of a federal sponsorship program aimed at enhancing federal visibility in Canada and especially Quebec. Two parties who were criticized in the report, PM Chrétien and his chief of staff, Pelletier claimed an apprehension of bias based on statements made by commissioner to the media during the inquiry (page 459)
- **HELD:** apprehension of bias existed (para 79)
- **REASONS:**
    - **Statements he made indicated he had formed conclusions before hearing all evidence.** After only three of nine months of hearings he told media that the sponsorship program was 'run in a catastrophically bad way.' When he said that he had yet to here testimony of the applicant (Pelletier) who he concluded supervised the whole program (para 80-83)
    - Second, to conclude that the mismanagement was "catastrophic" before hearing all the evidence undermined the very purpose of the commission of inquiry, creating a sense that the proceedings were perfunctory in nature (para 84)
    - Also said that Chretien's answer to being asked who was responsible for managing the program was the 'only answer that counted as far as I was concerned…I had everything that I needed' – raises doubts as to whether he was impartial in his fact-finding mission or if he was in search of specific answers that supported pre-determined conclusions (para 85)
    - Also said at one point in an article that the 'juicy stuff' was yet to come – telegraphed a prediction that evidence of wrongdoing was forthcoming when in terms of public interest the most important witnesses were yet to come (the applicant, PM and senior officials) – indicating what might be expected from them (para 87-88)

- **<u>Restatement of test at para 92:</u>** The determinative test, as stated above, is whether a reasonably well-informed person, viewing the matter realistically and practically, would conclude that there is a reasonable apprehension of bias. As I have already stated, I am satisfied that the test for a reasonable apprehension of bias has been met in this case
  - Comments revealing impressions and conclusions related to the proceedings should not be made extraneous to the proceedings either prior, concurrently or even after the proceedings have concluded (para 98)
  - Decision-makers should not become active participants in the media (para 99)

Newfoundland Telephone Co v Newfoundland (board of Commissioners of Public Utilities) (SCC)

Apprehension of bias standard using *Baker* factors

- **FACTS:** Decision by utilities board in regulating Newfoundland Telephone, which had a monopoly on service. Parent statutes said commissioners could not be employed by, or have any interest in a public utility. One Commissioner (Wells), previously a municipal councillor, had been an advocate for consumer rights – when appointed he said publicly that he intended to play an adversarial role.
  - The statute did not provide for or prohibit the appointment of commissioners as representatives of any specific group and Wells's appointment was not challenged
  - Described pay and benefits package of NT's executives as ludicrous and unconscionable after hearing an accountants' report on costs and accounts of NT.
  - He publicly made highly critical statements about NT
  - NT objected to Wells's participation but the board continued with him and he continued to make critical comments during the hearing
  - The board decided to disallow the costs of an enhanced pension plan for certain senior executives as an expense for rate-making purposes but did not make an order on individual salaries
- **DECISION:** Reasonable apprehension of bias exists
- **REASONS:**
  - Administrative boards that are primarily adjudicative in their functions will be expected to comply with a standard applicable to courts and show no reasonable apprehension of bias
  - While boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors the standard will be much more lenient (page 469)
    - **In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile**
    - **Boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors**
  - Member of a board which performs policy formation should not be susceptible to a charge of bias simply b/c of the expression of strong opinions prior to the hearing – still must base decision on the evidence before them
  - **APPLIED:**
    - The board in this case is dealing with policy – closer to legislative end of spectrum. A board member can make public statements so long as the statements do not indicate a mind so closed that any submissions would be futile
    - <u>At the investigative stage, the "closed mind" test was applicable. Once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness then required the board members to conduct themselves so that there could be no reasonable apprehension of bias</u>
    - Statement made by Wells before hearing did not raise apprehension of bias but statements made during the hearing did – there was a reasonable apprehension of bias and he demonstrated that he had a closed mind

Sternberg v Ontario Racing Commission (2008) Ont. Div. Ct	
FACTS:	• A Panel of the Ontario Racing Commission was convened to hear the appeal of two licensees who were represented by the applicant.

	• In the course of the hearing, the applicant verbally attacked the Chair of the Commission. B/c of his conduct he then appeared before a panel of six commissioners, excluding the Chair, but including the two other panel members from the appeal hearing. • During his submissions, he apologized for his conduct. The panel rose, reconvened after eight minutes and read a lengthy pre-typed decision. The decision stated, inaccurately, that the applicant had not apologized. The applicant was ordered prohibited from appearing as counsel before the Commission pending receipt from him of an unqualified apology to the Commission. The applicant applied for judicial review of that decision
ISSUE:	• Was the panel biased toward S?
HELD:	• **YES**: Panel was biased toward S; decision quashed, no further role of ORC hearing

REASONS:	**Panel pre-judged the issues arising at the hearing**
	• The reasons were pre-prepared and detailed [**did not acknowledge apology** – really seemed like it was a **show trial**] – would have been impossible to have deliberated and drafted the reasons in 8 minutes
	• Only met for 8 minutes to consider issue of considerable importance
	• Two members of the panel sat on the original panel chaired by Mr. Seiling
	    o This is **one factor** among a number of factors that gave rise to RAB
	    o By itself, this should not be enough to find a RAB (especially given the OCA in *Paine*)
	        ▪ But you could distinguish these two settings given the nature of the decision and the nature of the decision maker
	• S was not allowed to make submissions on the penalty
	
	ORC <u>lacked jurisdiction under the SPPA</u> to conduct the hearing and make the order against S; in effect, it was a contempt hearing reserved for Div Ct (*SPPA, s. 13(1))*
	• Div Ct says not within power → power to make own rules does not mean you can conduct your own contempt proceedings
	• Cannot read the general power to determine own roles as duplicating the contempt jurisdiction of Div Ct in s. 13 of *SPPA*
	• "**The Commission's jurisdiction to entertain contempt allegations is limited to deciding whether to state a case to the Div Court**" (para 21)
	• This "**hearing was, in pith and substance, a contempt hearing**" (para 23)
	
	No useful purpose in referring the matter back to the ORC
	• S's conduct now appropriately before the Law Society, having been referred by ORC counsel after the original hearing

Bias & Lack of Impartiality (focus on bias at the institutional level)

Previous section dealt with individual bias – this section deals institutional bias – where the institutional problems were the result of internal choices about modes of operation, the intervention was based on the common law. Where the structures were established by statute, the court needed a constitutional or quasi-constitutional basis to intervene (482)

2747-3174 Quebec Inc v Quebec (Liquor Licensing) 1996

- **FACTS:** *R v Lippe*: if system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met
    - In this case Act authorizes employees of the Regie to participate in the investigation, the filing of complaints, the presentation of the case to the directors and the decision – large role at various stages of liquor permit cancellation process
- **ISSUE:** Role of lawyers employed by legal services

- **HELD:** An informed person having thought the matter through would in this regard have a reasonable apprehension of bias in a substantial number of cases
- **REASONS:**
    - **Relevant statute**: S. 23 of Quebec Charter states that where a tribunal is acting in a judicial or quasi-judicial manner it must be independent and impartial
    - **TEST for institutional bias**: A well-informed person, viewing the matter realistically and practically—and having thought the matter through—would have a reasonable apprehension of bias in a substantial number of cases
        - The nature of the dispute to be decided, the other duties of the administrative agency and the operational context as a whole will of course affect the assessment (para 45)
- **APPLIED:**
    - Overlapping functions is not always a ground for concern but it must not result in excessively close relations among employees involved in different stages of the process
    - **Lawyer's job:** The Act and regulations do not define the duties of these jurists. The Régie's annual report, however, and the description of their jobs at the Régie, show that they are called upon to review files in order to advise the Régie on the action to be taken, prepare files, draft notices of summons, present arguments to the directors and draft opinions
        - The annual report and the silence of the Act and regulations leave open the possibility of the same jurist performing these various functions in the same matter
        - Annual report mentions no measures taken to separate the lawyers involved at different stages of the process
        - <u>A lawyer that made submissions to the directors might then advise them on same matter – this is disturbing (para 54)</u>
        - <u>Functions of the prosecutor and adjudicator cannot be exercised together</u>
    - Reasonable apprehension of bias reinforced by fact that directors have power to decide to hold a hearing and then decide the case on its merits as well – <u>Possibility that after an investigation a director could decide to hold hearing and then participate in decision-making process causes reasonable apprehension of bias</u>
- **NOTE:** court rejected company's arguments that bias existed because of the security of tenure and institutional independence of the tribunal
    - Said the directors had sufficient security of tenure (para 68)
        - Can only be dismissed for specific reasons and can go to ordinary courts to contest an unlawful dismissal
        - Even though terms may only be for two years the court said this was okay
    - General supervision of Minister of Public Security over tribunal was not enough to raise bias (para 69-70)
        - Not shown how Minister could influence decision making process

Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch) 2001

- **FACTS:** Members of board functioned part-time, fixed term appointments and could be removed at pleasure
- **ISSUE:** Whether members of the liquor appeal board are sufficiently independent to render decisions on violations of the Act and impose the penalties it provides
- **HELD:** They are independent enough within the confines of the enabling statute
- **REASONS:**
    - Degree of independence required of tribunal members may be ousted by express statutory language or necessary implication – legislature decides nature of tribunal's relationship to the executive – <u>courts must defer to legislator's intention in assessing degree of independence required of the tribunal</u>
    - This reflects fundamental distinction between administrative tribunals and courts – tribunals lack constitutional distinction from executive (para 23-24)
        - Given primary policy-making function of tribunals it is role of parliament to determine composition and structure of tribunal

- Preamble of 1867 Constitution, which was used by Lamer CJ in *Provincial Court Judges Reference* as affirming unwritten constitutional principle for judicial independence, only applies to superior and provincial courts (para 29-30)

- **NOTE:** if a statute clearly authorizes the existence of a statutory scheme, there will be no remedy available unless those affected can point to a constitutional or quasi-constitutional argument for independence (page 490). Absent a constitutional challenge, a statutory regime prevails over common law principles of natural justice (para 19)
- **NOTE:** Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice (para 21)
- **NOTE:** *McKenzie v Minister of Public Safety and Solicitor General 2006* distinguished itself from the above: residential tendency adjudicator's appointment was rescinded mid-term – court decided unwritten constitutional guarantee of judicial independence extended to residential tendency adjudicators – noted that in *Ell v Alberta* SCC extended the constitutional guarantee to justices of the peace b/c they exercised judicial functions directly related to enforcement of law and the court system – by analogy the court held that residential tendency adjudicators whose functions were highly adjudicative and whose jurisdiction has been taken directly from courts of civil jurisdiction should also enjoy independence – BCCA dismissed appeal b/c statute had been amended by that time
- **NOTE:** Sometimes the Bill of Rights may be used to support challenges to ADM either on a common law basis or by reference to s. 1(a) and 2(e) and s.7 of the Charter. In *Bell Canada v Telephone Employees Association 2003* 2(e) of Bill of Rights was invoked to challenge aspects of Canadian Human Rights Act, which empowered the CHRC to issue guidelines on the CHRT regarding interpretations of the Act in a 'class of cases' and authorized the tribunal's chair to extend terms of tribunal members in ongoing inquiries – SCC said that while a high degree of independence was required by Bill of Rights and the common law due to tribunal's adjudicative function, its role in implementing policy means a lower standard was required than of that for courts

Bias & Lack of Impartiality (case study from International Law)

A CASE FOR AN INTERNATIONAL INVESTMENT COURT: Van Harten

- **Thesis:** states should be encouraged to establish an international investment court in accordance with well-known principles of judicial decision-making
- Treaty-based arbitration does not have security of tenure for arbitrators and thus lacks impartiality and independence (2)
- Note that it is a reasonable suspicion of bias (not actual bias) arising from structural failings of arbitration when used to determine matters of public law (2)
  - It is an institutional bias – not critiquing individuals
- Investment treaty arbitration is a public law system, uniquely constituted at the international level, which replicates the structure of judicial review in domestic public law to a greater degree than other forms of international adjudication (5)
  - **Resolving disputes between individuals and a state in relation to the state's assertion of its unique authority to regulate** (6) – not like international commercial arbitration or inter-state adjudication – disputes arise in a regulatory, not reciprocal, legal relationship where the state exercises authority no private party can possess
  - Involves adjudicative body having the competence to determine the legality of the use of sovereign authority
- **Other distinctions**
  - Individuals are authorized to bring claims against states
  - State consent is prospective
  - Primary remedy is a damages award against the state
  - No need for individual to exhaust local remedies before an international claim can be brought

    - Treaty awards are enforceable in the courts of as many as 160 countries with limited opportunity for judicial review
    - The above make it the closest we have to an international constitutional or administrative court (8)
- Common law tradition of security of tenure (10)
    - **Need independence from legislative/executive as well as private interests (business or corporate interests)** (11)
- **Only speaking of the perception of bias** – actual bias is too difficult to prove and it would be unbecoming of the adjudicative process to require the adjudicator to testify in advance to his or her state of mind (12)
    - Justice must be seen to be done to ensure public confidence in the justice system
- **Adjudicators in this context are appointed on a vase by case basis**
    - <u>Under investment treaties this power is allocated to decision makers that lean heavily towards capital-exporting perspective and by extension towards foreign investors and the major capital-exporting states</u> (17)
    - Appointing authority commonly exercised by International Centre for the Settlement of Investment Disputes (ICSID) where the Cahir of the ICSID admin counsel or ICSID secretary general exercise the authority – former is ex officio position of the president of the World Bank who is in turn nominated by US government and confirmed by Bank's Board of Directors (where 60% of voting power is exercised by Executive Directors from 11 major capital-exporting states) and later is nominated by the Chair of the admin counsel and approved by two-thirds of the admin counsel – in both cases appointing authority is vested in an official who is customarily chosen by US Administration wit concurrence of other major capital-exporting states - **reasonable for an informed observer to conclude that ICSID appointing authority will tend toward the position of the major capital-exporting states and their firms**
        - This is all done without security of tenure
    - Some treaties even give appointing authority to business organizations that are accountable directly to investors and businesses (19)
- <u>Arbitrators may be seen to even interpret treaties in ways that encourage claims by investors and in turn allows the relevant arbitration industry to thrive</u> (20)
    - Related to a lack of tenure – tenure would isolate them form this type of interest
- Counter-argument: if there is no actual bias then everyone okay – problems with proving actual bias stated above
- Counter-argument: b/c investment disputes happen on international stage it is unfeasible to import domestic ideals of judicial independence into it and the international treaties are better than imperfect domestic courts – states have regularly given tenure to international adjudicators and some domestic judiciaries like the US and Canada have constitutionalized independence
- Counter-argument: tenure not needed for all domestic administrative tribunals - investment treaty arbitration is not confronted with flood of disputes like domestic tribunals and the issues being dealt with by each are much different – dealing with legality of legislative acts or broad policy decisions of government leading to potential re-allocation of substantial public funds to private business
    - Regardless many domestic tribunals are staffed by members who have set tenure and who are not assigned by a case by case basis and thus have more independence and impartiality (25)
    - And most importantly when a domestic tribunal is handling an important question of general law the decision can be appeal to an independent court (25)
- Counter-argument: parties should be permitted to choose an adjudicator or adjudicative process they believe will better serve to deal with the dispute between them - Regulatory disputes between states and investors are not disputes between juridical equals. In this context, it is more accurate to say that the state (or states, by treaty) authorized a particular form of dispute settlement that the individual subsequently opts to take advantage of, as where a person brings a claim against the state under a domestic statute or constitution
    - It is thus not convincing to argue that investment treaty arbitrators do not require security of tenure because the disputing parties often reach agreement on who should be appointed as presiding arbitrator. Such agreements are reached against the backdrop of the parties' perceptions of the probable predilections of those who the appointing authority would otherwise likely appoint

Remedies

- When considering remedies, crucial question for counsel to ask is when as a matter of law and when as a matter of expedience they should use a route other than the regular court to challenge a decision
- **NOTE:** procedure for obtaining a particular remedy may differ b/w provinces → will focus on statutory regimes for judicial review at federal level and in BC & ONT b/c they are the most frequently invoked in the country
- Three areas where first instance courts are commonly faced with *hard remedial issues*:
  - Applications for interim or interlocutory relief to prevent governmental action pending the determination of an application for judicial review
  - When the courts should deny relief (as a matter of discretion and irrespective of the merits of the claim being advanced)
  - Problems with standing (*locus sstandi)* to seek judicial review

- Set of questions that may alert you to potential remedial problems once you have identified an apparent reason for redress:
  - **i.** Are there alternatives other than recourse to the courts for resolving the matter in dispute?
  - **ii.** If recourse to the courts appears to be the appropriate course of action, what is the nature of that recourse: judicial review or some other form of remedy under the common law, equity, or a statute (such as a right of appeal)?
  - **iii.** If judicial review is the appropriate course of action, does the matter in dispute involve federal or provincial agencies? If the former, does the application for judicial review have to be made to the Federal court under the Federal Courts Act or does it come within the residual jurisdiction of the provincial superior courts over a federal statutory authority?
  - **iv.** Among the options provided by the public law of judicial review, what is the nature of the relief that is required? What are the grounds on which relief is being sought?
  - **v.** Are there limitations on the availability and scope of judicial review, as manifested in leave to apply requirements, privative clauses, limitation periods, or immunities from suit and testifying? What are the notice requirements?
  - **vi.** From the perspectives of procedure and evidence, is the matter one that is capable of satisfactory resolution based on affidavit evidence in the context of summary proceedings?
  - **vii.** Is there any potential problem with the standing of the person who is seeking judicial review?
  - **viii.** Are there any discretionary reasons that may cause a court to refuse or limit the relief that is available?

Remedies for Unlawful Administrative Action

Judicial Review @ Common Law:

- Originated in prerogative writs (PW) through which the monarch controlled the exercise of authority by officials who acted or purported to act under royal or parliamentary warrant
- Types of PWs: *Certiorari*, *mandamus*, prohibition, *habeas corpus*→ vehicles for ensuring that the administrative arms of government were kept under control
- Process involved the formal record of a proceeding before such a body being delivered to the Court of King's or Queen's Bench for inspection so that the court was able "to be informed"
- **Remedy of *Certiorari*:** If the record revealed that the body was acting WITHOUT jurisdiction or that it had committed an error of law on the face of the record, its process would be quash
- Crucial element that remains relevant today in determining the appropriate reach of the remedies that have succeeded the PWs: is this body sufficiently public in its origins, purposes, or powers to make it subject to the supervisory authority of the superior courts as exercised through judicial review?

Reach of Public Law Remedies

- There may be contexts where it doesn't matter much whether the litigation is public or private → the remedy sought will be the same and the allegations may be located in either the public or private domain; i.e. challenge to the procedurally unfair expulsion of a member from an associate with its own constitutive statute

- There may be contexts when public-private distinctions among remedial options is crucial; i.e. there is some CL authority that declaratory relief is NOT available against public authorities where certiorari and its statutory successors provide adequate relief
- There may be situations where the issue of whether the body or function is sufficiently public to qualify for review by way of public law remedies is in reality an issue as to the extent to which the courts can interfere with the decision in question
    - ***DUNSMUIR***: Not all employees under statute are entitled to a fair hearing before they are dismissed. Those who are excluded are said to have no access to public law remedies—only contractual ones—such that they may have no entitlement to a hearing before dismissal and no possibility of reinstatement as a remedy.

- **POLICY:** sometimes these decisions reflect policy choices; the need to choose between public and private law remedies is predicated on the principle that governments are sometimes subject to higher obligations than actors in the private sector. While, @ CL, private sector employers are not obliged to provide hearings before dismissing an employee and are not subject to specific performance where there has been a wrongful dismissal, more is often expected of governments in both respects.

- ***R v Electricity Commissioners (CA, 1924):*** Stated in dictum by Atkin that remedies of certiorari and prohibition were available "wherever any body of persons have legal authority to determine questions" → interpreted as confining the reach of public law remedies to bodies that were genuinely statutory. So, the inquiry on whether a body was sufficiently public in its origins, its purposes, or its powers was often determined by an examination of whether it exercised a "statutory power."

Government in the Conduct of Business

CASE: Volker Stevin NWT ('92) Ltd v Northwest Territories (Commissioner) (NWTCA, 1994)

- Advisory committee of civil servants & business reps established (as per a directive attached to policy document of NWT)
- Job was to designate businesses as "northern businesses" that were eligible for various gov't incentives (i.e. preference in the award of government procurement contracts)
- Directive provided for appeals from decisions of advisory committee to a committee of deputy minsters (Senior Management Preference Committee)
- Advisory committee revoked applicant's designation; applicant applied for an order in *certiorari* to quash the decision
- **NWT Supreme Court:** dismissed application; decisions under the policy document were NOT amenable to judicial review; judicial review available only to the exercise of statutory authority. Company appealed further.
- **NWTCA:** Disagreed with SC. Decision amendable to review for procedural unfairness. Remitted to chambers judge for reconsideration.
    - **i.** Judicial review is available to review decisions not only of public bodies exercising statutory authority but ALSO of admin bodies which obtain authority from prerogative powers; their decisions affect rights of others who come under their direction ***(R v Criminal Injuries Compensation Board, English CofA, 1976)***
        - **a.** Decisions of administrative bodies are reviewable on *certiorari* if an analysis of their functions discloses a duty of procedural fairness ***(Saunders J in Masters v Ontario, 1993)***
    - **ii.** The committees, the business incentive policy and authority exercised by virtue of the policy go beyond mere decisions by civil servants regarding procurement of goods and services → advisory committee power affects the status of business enterprises, their ability to compete in the NWT, and the right of a business to contract with the government & also with organization funded by it.
        - **a.** These aspects trigger the public duty and fairness component mentioned in previous authorities

NOTE 1: it seems that the courts were more influenced by the NATURE of the power than its origins (both in this case & in Saunders) → The threshold for the availability of the remedy is determined on the basis of the need for

procedural fairness rather than procedural fairness entitlements being contingent on the technical rules governing the remedy that is sought

NOTE 2: The distinction on whether procurement decisions of government are appropriate or not for judicial review seems to rest on whether the applicant's status is that of a subcontractor rather than a contracting party to the tendering process.

- Judicial review is limited in availability where it challenges gov't procurement subject to a contract → rationale: Once a contract has been awarded, the public has an interest in the avoidance of undue delays in its performance, and in ensuring that government is able promptly to acquire the goods and services that it needs for the discharge of its responsibilities ***(Irving Shipping Inc v Canada, 2010)***
    - **Context-Specific:** If a case arose where the misconduct of government officials was so egregious that the public interest in maintaining the essential integrity of the procurement process was engaged, then can't exclude the possibility of judicial intervention at the instance of a subcontractor **(only extraordinary circumstances where subcontractors should be permitted to judicial review)**
- A more expansive scope for judicial review is called for when a defeated bidder rather than a subcontractor is the applicant ***(Annis J in Rapiscan Systems Inc v Canada, 2014)***; Upheld defeated bidder's entitlement to challenge the fairness of a procurement process

Availability of court injunction beyond statutory framework

CASE: *Guelph (City) v Soltys* (Ont Sup Ct, 2009)

- **FACTS:** plaintiffs (city) looking to develop lands into a corporate & industrial park; after construction of roadway that crosses the creek, dead hybrid salamander discovered along road; In 2009, a number of ppl including Soltys (main support of environmental organization) entered property & shut down construction of roadway; plaintiffs bring a motion for an injunction to restrain defs from trespassing on lands & stopping construction. Defs served separate motion for an injunction to stop applicants from continuing construction activities based on potential impact on habitat of Salamander.
- **ISSUE:** P submits that the enforcement mechanisms conferred on the Ministry and the Minister under the Act are exclusive, so the Court is deprived of jurisdiction to grant an injunction to the defendants, even if they are granted standing as public interest litigants. Since the Minister and/or the Ministry have not issued orders under the Act, the Court should not do so.
- **HELD:**
    - **a.** Motion for injunction brought by P's will be granted to restrain trespassing & interference with construction activities b/c:
        - Defs have no right to take the law into their own hand, if they believe they have the right, on their own or as public interest litigants, then they should apply to the Courts for relief.
        - P's are the owners of the property & there's no evidence that is has traditionally been designated for public use; they are entitled to assert ordinary rights of property owners
    - **b.** Can't allow defendants to be granted a corresponding injunction to the defs as a way of bypassing the requirement that they establish their right to pursue an injunction as public interest litigants. Must satisfy three part-test to satisfy obtaining interlocutory injunction:
        - (a) that there is a serious issue to be tried; (b) that the plaintiffs will suffer irreparable harm if the injunction is not granted; and (c) the balance of convenience favours the plaintiff
        - If the moving parties can show that there is a series issue to be tried as to whether they qualify as public interest litigants, that may be sufficient to justify an interlocutory injunction, depending on the circumstances → found that they do.
    - **c.** The statutory scheme does in fact allow for an enforcement officer to make a stop work order if a regulation defining the area of habitat is in force, and if there is no such regulation, the Minister can make an order pursuant to the terms of s. 28.
    - **d.** Where the legislature has specified a tribunal having jurisdiction to adjudicate matters of specified nature, it is generally understood that the jurisdiction of such a tribunal is exclusive & jurisdiction of the courts is ousted

- **Application:** Legislature has chosen to confer enforcement powers on the Ministry of Natural Resources and, in some respects, on the Minister. Ministry in a batter position to assess the competing policy & legal considerations than the court
- **Exception:** exception to the general principle exists where it is sought to enjoin an activity until the statutory tribunal can exercise the statutory decision-making power
  - The district manager of MNR testified that the a stop work order counldn't be issues b/c a regulation defining the area of habitat hasn't been made but there's no evidence that the Minister has even considered making an order. If the construction activity commences immediately, it may prevent, or at least seriously limit any opportunity to consider making such an order

OVERALL: In this context, the defs have satisfied the three party test for an injunction at least to allow the Minster to make a decision on whether to issue a stop work order or not.

- It is for the Minister to decide whether the circumstances are such that an order under s. 28(1) of the Act is justified, and if so, whether her discretion should be exercised to grant one.
- The residual jurisdiction of the Court to grant injunctive relief should be sparingly exercised, and should be exercised in aid of, rather than in substitution for, the jurisdiction of the Minister.

Requirement to use alternative remedies

CASE: Volochay v College of Massage Therapists of Ontario (ONCA, 2012)

- **FACTS:** V = massage therapist & member of College; former female patient complained to Registrar of College that V engaged in sexual intercourse while she was patient; that is prohibited by Health Professions Procedural Code (penalty = loss of certificate to practice for min 5 years); Complaints Committee investigated but V not given notice of complaint or opportunity to make written submissions (contrary to requirements of Code); Matter referred to College's Executive Committee to consider full investigation; decision made without informing V of substance of allegations or giving him chance to refute it; successor body to Complaints Committee appointed an investigator to inquire into V's practice;
- **Application Judge:** granted judicial review & quashed initial decision of Complaints Committee b/c it violated its statutorily mandated procedures & didn't comply with basic principles of natural justice & PF. Also quashed the later decision to appoint an investigator on the ground that it was "simply a ratification" of the initial decision. Concluded that the issue before her was a question of jurisdiction.
- **College appealed on three grounds:** (1) app judge erred in holding that the College's failure to give V notice of complain raised a true question of jurisdiction; (2) No exceptional circumstances justified judicial review before the College proceedings were completed, especially b/c V had an alternative remedy, a review before the Health Professions Appeal and Review Board (HPARB), which he declined to exercise; (3) V's egregious conduct after the complaint was made disentitled him to relief

- **ISSUE:** whether the application judge was wrong in principle to grant judicial review and quash two decisions of the College's investigatory bodies.
- **HELD:** Appeal allowed; app Judge wrong to grant judicial review
  - **Principle:** App Judge recognized the principle that unless exceptional circumstances exist, a court should not interfere in an admin proceeding until it's completed, especially where adequate alternative remedies are available under the admin scheme
    a) **Was a review by the HPARB an adequate alternative remedy?**
      - To be an effective or adequate remedy, the defect alleged – here a denial of procedural fairness – must be capable of being raised before the reviewing body, and the reviewing body must be capable of "curing" the defect. A review before the HPARB satisfies these two criteria.
      - What the HPARB could not have done was give V the remedy he sought, and that was granted, in the Divisional Court: an order quashing the decision of the Complaints Committee and the later decision appointing an investigator. BUT, a reconsideration of the investigation after giving V notice of the complaint and the opportunity to make submissions would be an adequate alternative remedy
      - V's failure to seek a review of the Complaints Committee's decision before the HPARB ought to have precluded relief by judicial review, absent exceptional circumstances.

b) Were there exceptional Circumstances?

- The Complaint's Committee's decision to examined V's entire practice was a far-reaching order especially having been made without giving V PF. But a review before HPARB was an adequate alternative remedy to mitigate that. If it weren't for the availability of that remedy, Judge would have quashed the College's decision
- There is no hardship, prejudice, cost or delay that would support V's decision to bypass the HPARB and apply for judicial review. He initially applied for this admin review process for 15 months and then withdrew it for no good reason.

Misconduct of Applicant –

- Sometimes courts will deny a remedy b/c of the way in which the person seeking relief has behaved
- Derived from refusal of equitable relief →"whoever comes to equity must come with clean hands"; imported into law relating to public law judicial review

CASE: Homex Realty v Wyoming (SCC, 1980)

- **FACTS:** Homex had right to an opportunity to be heard but didn't receive it before the passage of By-law 7 by the Village
- **ISSUE:** is Homex entitled to the remedy sought: quashing of the by-law on judicial review
- There are principles governing the discretion to decline the grant of the extraordinary remedy of certiorari, including whether the conduct of the party applying has or has not been one that would disentitle them to relief
- **HELD:** deny the issuance of the order of judicial review relating to by-law 7
    - In the preliminary stages of this application for judicial review, H has taken inconsistent and even contradictory positions.
        - Examinations on affidavits were protracted because of a lack of simple frankness on the part of H's president.
        - H has sought, after its application to this Court to set aside the by-law, to put its lands beyond the reach of municipal regulations by means of checker-boarding
        - H's attempt to avoid the burden of the "Atkinson" agreement to service these lands by shifting that burden to the ratepayers in the Village by the undoing of the municipal action taken in the form of By-law 7.

Side Note: The criticism that the exercise of judicial discretion to deny the remedy is akin to the Court applying or imposing its own code of morality is unfounded; the principles upon which *certiorari*, and now the modern order in judicial review, have been issued have long included the principle of disentitlement where a Court, because of the conduct of the applicant, will decline the grant of the discretionary rem

Standing

Overview of standing

- Standing means **full participation in the process** (disclosure, submissions, etc.)
    - Pub. Interest Stand: get full rights on issues / grounds you would have as a private litigant
- Traditionally, the common law limited standing in judicial review to individuals whose private rights (i.e. contract, tort, property) were directly affected by a government action or decision
    - Narrower class of those who could JR decisions
- No standing was afforded where the public interest alone was at stake (e.g. re: legality of administrative action) – discretion of Attorney General alone whether to seek judicial review
    - Did not impact an individual directly *per se*, so no one could seek JR
    - No check on the government operating pursuant to statute in these situations
- Reminder: courts are not the only mechanism for accountability of government (voting)
- Expansion of participatory rights in public law begins in the US in the 1940s; later it expands in Canada, especially post-*Charter*

Government Accountability (Beyond Courts)

Government accountability mechanisms other than Attorney General/judicial review?

- Legislative oversight
  - Questions in the House, legislative committees that can compel witnesses to testify in public under oath, investigations by MPs or MPPs
  - In a minority government, the legislature can act as a cheque as well
- External executive oversight
  - Police investigation/ prosecution, independent audits, review by the ombudsman, public inquiries
  - In senate scandal today, it is the RCMP running the show – but there are obvious limitations for this (specifically no remedy for the people involved, just penal)
    - Criminal prosecution requires huge evidentiary threshold
    - **Problem**: Not good at systemic prevention and public reporting – only good at punishing a few people
- Internal executive oversight:
  - Investigations by an investigator authorized by the minister or other senior officials, employment disciplines, cultural checks in the workplace/ profession (norms within a field as to what is acceptable)
- Extra-governmental oversight:
  - Media, lobby organizations, civil society

Courts are not the only places where government decisions can be reviewed in the public interest

Why allow broader participatory rights in judicial review? Why limit such rights?

- **Should trees have standing**? (C. Stone, 1973) (when we are going to potentially cut them down)
  - Corporations can be given legal standing if interest is in case
  - Churches given standing
  - Environmental clusters that could get standing

In favour of broad standing rules: judicial review is a unique means of accountability

- Some kinds of decisions will only be challenged if we allow a broader opportunity for standing
- Limiting the scope of standing could perhaps **insolate decision makers** because certain issues are systemic issues
  - *Downtown Eastside*: "does this issue transcend…"?
- VH: judicial review is a special mechanism for accountability
  - Something unique about courts that make us want to have transcendental issues in front of the courts – we are seeking to have courts decide transcendental decisions
  - Offer a cheque against majoritarianism
  - Moreover, specifically on JR, this allows for unique accountability

Against broad standing rules: commentators express these concerns

- (1) **Floodgates** and the impact on an overburdened court system; 'busybody' claimants (courts are concerned with these types of claimants – whether they are real or not);
  - Judicial economy concern
- (2) Impact of conventional framework of **adversarial litigation**;
  - Will the public interest party have less incentive to properly inform the court – not like *amicus* or intervener – you are substituting a party for a public interest litigant
    - Need that Darwinian instinct of survival
  - But do we *really* have a battle of equals in litigation –middle class has no A2J
  - ALSO, public interest standing fit with the **binary** adversarial approach of the courts?
- (3) '**Politicization'** of courts and danger that only those already well-positioned to defend their interests in the public realm will benefit from wider legal access to the courts
  - Example: US court of appeal on the federal circuit set aside an arbitration award – at the SCOTUS – all the interveners are private industry people
  - **Certain actors are better positioned to take advantage of even intervener standing**

- Do not get away from imbalance of access
- **Not the role of courts**

Debate over standing is a debate over the appropriate role of courts in decision-making

Statutory Rights to Standing

Many statutes have rules that deal with standing – especially if there is investigative work

- The ones below do not do much to change the common law requirements

Public Inquiries Act, R.S.O. 1990, c. P.41, s. 5 (1).

"A commission shall accord to any person who satisfies it that the person has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest."

- "Substantial and direct interest" captured common law standard at the time

Statutory Power Procedures Act, R.S.O. 1990, c. S.22, s. 5.

"The parties to a proceeding shall be the persons specified as parties by or under the statute under which the proceeding arises or, if not so specified, persons entitled by law to be parties to the proceeding."

- Who has right of standing in administrative tribunals subject to *SPPA*?
  - Look to parent statute of decision maker; if not, Persons entitled by law (common law)

Public Interest Standing

IMPORTANCE: Opens up the door to public interest standing

***Finlay v Canada (Minister of Finance)* [1986] 2 SCR 607 (Can) (Le Dain J for court)**	

FACTS	Individual trying to challenge the federal government's approach to transfer payments
	• F challenged the legality of federal transfer payments to Manitoba under the Canada Assistance Plan
	• Basis of claim was that relevant Manitoba social welfare legislation did not comply with the CAP transfer payment
	• F alleged that compliance by Manitoba with its CAP obligations would have produced a higher level of monthly social assistance for F
	  ○ Arguing that federal government was not holding Manitoba to the commitments of the transfer agreement
	  ○ F alleged that Canada's failure to require Manitoba to meet its CAP obligations reduced F's monthly payment
	    ▪ **Indirect challenge – the real relationship is with Manitoba**
	• JR of the decision of federal government (see case for the details of how he structured the challenge – what in fact he was JRing)
	
	Manitoba CA granted standing to F to seek declaratory relief

ISSUE	(1) Does F have a sufficient personal interest to be granted standing? (2) Should F be granted public interest standing?
HELD	**Not** a sufficient personal interest, but **YES**: Granted public interest standing
Le Dain J for the court	(1) Because his direct interest is in what Manitoba is doing, insufficient nexus for court to connect his complaint with Federal government • Finlay has 'a direct, personal interest in the alleged provincial non-compliance', but 'I am on balance of the view that the relationship between

	the prejudice allegedly caused to the respondent by the provincial non-compliance with the conditions and undertakings imposed by the [CAP] Plan and the alleged illegality of the federal payments is too indirect, remote or speculative to be a sufficient causative relationship for standing under the general rule.'
	
	(2) Does the Court have the discretion to recognize **public interest standing re**: challenge to the legality of the federal transfer program?
	• YES: 'the policy considerations underlying judicial attitudes to public interest standing' and 'values… assigned to the public interest in the maintenance of respect for the limits of administrative authority' call for public interest standing as in constitutional cases
	• AG should not have exclusive authority to grant standing in the public interest
	• **VH**: calls this a **judicial power grab** – changing the rules to make it easier for the courts to rule on decisions that they have yet to rule on
	
	Three requirements for public interest standing:
	1. Must be a serious, justiciable issue raised – here, yes
	2. Must be a genuine interest on the part of the citizen – here, yes
	3. Must be no other reasonable and effective manner to bring the issue before a court
	  ○ 'Here is it quite clear from the nature of the legislation in issue that there could be no one with a more direct interest than the plaintiff who would be likely to challenge the legislation.'
	    ▪ The people effected are all in the same boat as the applicant, and none will have a closer nexus to federal government

HELD: The test for public interest standing is broadened – now on balance of probabilities

***Canadian Council of Churches v. Canada*, [1992] 1 SCR 236 (Can) (Cory J for court)**	
FACTS	Council coordinated churches' refugee work/ advocacy • Council challenged newly amended *Immigration Act*, claiming violation of *Charter* and Bill of Rights ○ Council's approach was a shotgun approach – challenged everything **Fed Court** judge granted standing on basis that there was 'no reasonable, effective or practical manner for the class of persons more directly affected by the legislation, that is refugees, to bring before the court the constitutional issues raised….' **Fed CA** limited standing to four provisions involving short time limits for detention/ removal (short time limits hampered the claimant's ability to challenge the laws)
ISSUE	(1) Should Churches be granted standing?
HELD	**NO**: Not entitled
Cory J for the court	Cory J widens SCC's approach to granting standing in administrative proceedings • 'The whole purpose of granting standing is to prevent the immunization of legislation or public acts from any challenge. [Is this really the purpose? No –

	AG can bring a challenge; and the legislation is not really immunized – other remedies] The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant.' **Cory J considers three issues:** • Some aspects could be said to raise a serious issue of validity / review • There is no doubt that the Council has a genuine interest • However, the legislation directly affects all refugees (each one of could challenge its constitutionality) and the disadvantages of refugees as a group do not preclude effective access to the courts ○ The third factor was dispositive – alternative means available (there were already refugees bringing challenges) **So, the Council not entitled to public interest standing**

HELD: further broadens the test for public interest standing

Canada v. Downtown Eastside Sex Workers, 2012 SCC 45 (Cromwell J for court)	
FACTS	Constitutional challenge to *Criminal Code* provisions dealing with prostitution • Society works to improve working conditions of female sex workers • AG argued that Criminal Code provisions could be challenged by persons charged under them → apparently 100s are charged ○ How is this any different than *Council of Canadian Churches*? There were tons of immigrants there
ISSUE	(1) Does Society have a sufficient personal interest to be granted standing?
HELD	**Yes**: granted public interest standing

Cromwell J
for the court
	NEW TEST
	1) A serious and justiciable issue of constitutionality (or importance) must been raised;
	2) The proposed Plaintiff must have a genuine interest in the claim
	3) Whether the proposed suit is, in all of the circumstances, ... a reasonable and effective means to bring the challenge to court
	
	"These [three] factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best services those underlying purposes." (para 20)
	• **Weighing the factors, not just checking off the boxes**
	    ○ Could be a case where factors 1 and 2 are super powerful
	    ○ Justicability arguments are not as common anymore
	
	"It would be better… to refer to [the] third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations…, a reasonable and effective means to bring the challenge to court." (para 44)
	• Change from "only way to do it" to "this is a reasonable way of doing it" –

	under this approach, we may allow an application where there is, on the balance of probabilities, private litigants o Perhaps looking to the quality of plaintiff bringing the claim? **Relevant matters for third factor → more tools to work with:** • Capacity of plaintiff to advance the claim • Transcending nature of the case • Availability of realistic alternatives • Potential impact on rights of others who are equally or more directly affected **Policy considerations underlying public interest standing** - Avoid insulation of government action just because there is no private interest (*remember critique above though – other mechanisms*) - Scarce judicial resources (busybodies) versus A2J - Are the issues presented in a context suitable for judicial determination in an adversarial setting? o Needs to be justiciable; contending points of view & evidence - Could a private actor have done this? - Would permitting the proposed action to go forward serve the purpose of upholding the principle of legality? **APPLICATION** 1) **A serious and justiciable issue of constitutionality (or importance) must been raised**; • Not precluded by principle of *stare decisis* for particular aspects of claim o AG argument's – some cases have already been decided in other provinces o Cromwell J rejects this 2) **The proposed Plaintiff must have a genuine interest in the claim** • The Society clearly has a genuine interest in the matters raised due to longstanding engagement on behalf of sex workers 3) **Whether the proposed suit is, in all of the circumstances, … a reasonable and effective means to bring the challenge to court** • Claim not precluded by a similar civil case in another province • Individual sex workers faced serious obstacles to mounting a claim, even if they were willing to testify as witnesses • Parallel criminal prosecutions may not allow for a systemic challenge to the legislation – the case is transcendental o *CC* does not lend itself to systematic challenge of the law o May be preferable to review the constitutionality of *all* provisions o **Argument for efficiency as well – hear it all at once?** ▪ **But** you will not have a precisely defined factual record – need connection to life situations ▪ Concentrates the risk of the public interest of a case into just one case – strategically, putting them all together in one case may mean you lose big at all at once ▪ Individual interests collected into one group – is that fair?

Should cases that are "transcendental" be going to the court like this at all?

- Czech Republic has a constitutional court that reviews cons'ality in the abstract before enactment
- Is public interest standing allowing general review of constitutionality that is not part of our system?

How is public interest standing related to JR?

- Primary domain of this type of standing is constitutional litigation (*Finlay* was a JR though)
- Think creatively of how we can use public interest standing in JR in different way
    - Substantive review context & opportunities to alter decisions

Evolution of the Public Interest Standing Test

From *Finlay 1986*

- "**NO** other reasonable and effective manner to bring the issue before a court" (*Finlay*)

To *Chuches 1992*

- If, on a "balance of probabilities, it can be shown that the measure will [not] be subject to attack by a private litigant" (lower threshold)

To *Downtown Eastside 2012*

- "**A reasonable and effective means to bring the challenge to court"** (as one of three non determinative factors)
    - Based on: (a) capacity of plaintiff to advance the claim, (b) transcending nature of the case, (c) availability of realistic alternatives, (d) potential impact on rights of others who are equally or more directly affected
- Broader, more to work with

Shift from "only way to do it" to "this is a reasonable way of doing it"

- Under new approach, we may allow an application where there are, on the balance of probabilities, private litigants