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LAW 450: Administrative Law

Instructor: Jennifer Raso

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# Introduction

## The Administrative State (Flood & Dolling)

### Orders of Government

* The legislative branch is responsible for making rules and legislation, but also regularly passes legislation that delegates powers to the executive branch.
* The executive branch includes the Crown (represented by the governor general), the governor in council (prime minister and Cabinet, advising the governor general), and ministers delegated executive powers by the legislature to make decisions.
  + Where the executive branch is vested with powers in a particular domain under an enabling statute, they can enact subordinate legislation (i.e., rules and regulations) without parliamentary scrutiny.
  + The executive branch also includes the plethora of administrative boards empowered by enabling legislation.
    - These bodies act independent of Cabinet but are still only empowered to the extent allowed by their enabling legislation.
    - These bodies sometimes play a quasi-judicial or quasi-legislative role, creating, interpreting, and applying laws and regulations.

### Tensions in Administrative Law

* There is a tension in administrative law between administrative action and judicial oversight.
  + In the late 19th and early 20th centuries, there was a *formalist* view that creating independent bodies responsible for decision-making was inconsistent with the Canadian system of responsible government and represented a rejection of the common law courts as legitimate arbiters of regulatory issues.
    - In 1934, Mulock CJ described tribunals as non-judicial bodies, often ignorant of the law, bound by no law, free to disregard the evidence and the law, and practically at their own will, to dispose of citizen's rights.
      * Reflected the belief that "liberty" imposed a negative obligation on the state not to interfere with individuals and their actions.
  + In the 1920s and 1930s, several *functionalist* legal academics who believed that liberty imposed a positive obligation on government to provide for individuals embraced the new welfare state. They viewed delegated legislation as essential to the achievement of the policy goals of social welfarism.
    - For John Willis, while he recognized the risk posed by unlimited administrative discretion, he believed that the courts were not well-suited to considering appeals from tribunals.

## Aboriginal Administrative Law (Metallic & Promislow)

* Little attention is paid to the role that administrative law plays in reconciling the relationship between Indigenous peoples and the Crown, which exercises significant discretionary control over nearly all aspects of the lives of Indigenous peoples.
* Canada's "Indian policy" over Indigenous peoples for the 70 years following Confederation was animated by assimilation.
  + Colonial governments segregated them on small and less-than-desirable reserves, prevented them from exercising their traditional subsistence livelihoods, and pursued a policy of cultural genocide.
* After WWII, with the rise of the administrative state, neither order of government could agree on who would be responsible for providing services to First Nations on reserve.
  + The provinces argued that Indigenous peoples were a federal responsibility, and the federal government argued that the provision of services to Indigenous peoples was a provincial responsibility.
* In the 1960s, due to public outcry about poverty in Indigenous communities, the federal government was compelled to provide for a system of social services on reserves.
  + It did this not by enacting legislation, but by obtaining a Treasury Board Directive to spend federal funds for social assistance on reserves. It then adapted provincial laws and policies to create federal policy manuals to apply on reserves in different provinces.
    - This practice of regulating by policy manuals, absent a legislative framework, continues to this day.
* Over time, the federal government introduced funding agreements that allowed Indigenous governments to hire their own staff to deliver social services (i.e., "program devolution" or "self-administration").
  + With these agreements, it is still the federal government that dictates the terms and conditions under which programs are offered, as well as onerous reporting and accountability requirements.
    - If a First Nation defaults on any requirements of their agreement, Canada is entitled to step in and take control of its financial management or even cancel the agreement.
    - This approach has been criticized as assimilative and culturally inappropriate, coercive, and not premised on a true nation-to-nation relationship.
  + There have since been calls to replace the current relationship between First Nations and the federal government with a system of self-government.
  + *Canada's provision of services to Indigenous peoples absent any governing legislation is at odds with the rule of law, which expresses the notion that published laws should exist to bind ordinary citizens and government.*
    - Having published laws serves to (1) protect against arbitrary exercises of power by the government, and (2) inform citizens of the standards governing themselves and others.
* Indigenous administrative decision-makers include (Stacey):
  + *Band councils*: bodies recognized under the *Indian Act* that exercise delegated federal power by bylaw making over certain aspects of life on reserves (like municipalities).
    - Imposes a model of accountability that is foreign to traditional Indigenous ways of governing, as rules passed by band councils must accord with the *Indian Act* and are subject to review by federal courts.
  + *Modern treaties*: create institutions which have certain powers to enact laws.
  + *Collaborative governance*: the product of negotiations between a nation and an order of government which set out a model of shared decision-making that reflect both Canadian and Indigenous laws.

## *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

Facts:

* s. 2.1 of the *Immigration Regulations*, enacted pursuant to s. 114(2) of the *Immigration Act*, allows the federal government to admit a person to Canada where they are satisfied that admission should be allowed based on humanitarian and compassionate (H&C) grounds.
* Mavis Baker is a Jamaican citizen who entered Canada on a visitor's visa in 1981. She overstayed her visitor's visa for 11 years, during which she had four kids. When ordered deported in 1992, Baker submitted a written application to stay in Canada based on H&C considerations. She argued that her improving mental illness may deteriorate as a result of deportation. She also argued that she and her children would suffer hardship if she were separated from them. In 1994, Immigration Officer Caden rejected Baker's application, providing no reasons. Upon Baker's request, she was provided with notes produced by Officer Lorenz, which Caden relied on in making his decision. The notes suggested that Baker would be a strain on the social system, emphasizing the number of children she has, her training as a domestic worker, and her mental illness. The notes also showed frustration about how someone like Baker could remain in Canada for so long.
* Baker challenged the decision by Officer Caden on the grounds that she was not accorded procedural fairness. She argued that the duty of fairness required that she be allowed an oral hearing and that she be given written reasons for the decision. In doing so, she argued that the *Convention on the Rights of the Child* (ratified by Canada) gave rise to a legitimate expectation that her children's interests would be a primary consideration in the decision. She also argued that the notes of Officer Lorenz showed a reasonable apprehension of bias.

Procedural history:

* The FC held that since no reasons were provided and none were required, it would assume that, absent evidence to the contrary, Caden acted in good faith and made a decision based on correct principles.

Issues and holding:

1. Is the duty of procedural fairness engaged? **YES**
2. Is what is required by the duty of fairness affected by the existence of a legitimate expectation based upon the text of the *Convention on the Rights of the Child*? **NO**
3. Were the principles of procedural fairness violated in this case? **YES**
   1. Were the participatory rights accorded consistent with the duty of procedural fairness? **YES**
   2. Did the failure of Officer Caden to provide his own reasons violate procedural fairness? **NO**
   3. Was there a reasonable apprehension of bias in the making of this decision? **YES**
4. How much deference should the Minister be accorded? **Reasonableness *simpliciter***
5. Was the exercise of the H&C discretion unreasonable? **YES**

Analysis:

* The fact that a decision is administrative and affects the rights, privileges, or interests of an individual is sufficient to trigger the duty of fairness, the content of which varies depending on the circumstances.
* The purpose of the duty of 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.
  + A non-exhaustive list of factors that are relevant to determining what is required by the common law duty of procedural fairness include:
    1. The nature of the decision being made and the process followed in making it.
       - The more a process resembles judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.
    2. The nature of the statute pursuant to which the body operates.
       - Greater procedural protections will be required when the statute provides no appeal procedure or when the decision is determinative of the issue and further requests cannot be submitted.
       - Lower procedural protections are required when the decision investigative, fact-finding, or preliminary or when a party is seeking an exemption rather than application of a general rule.
    3. The importance of the decision to the individual or individuals affected.
       - The more important the decision is to the lives of those affected and the greater its impact on them, the more stringent the procedural protections mandated.
    4. The legitimate expectations of the person challenging the decision.
       - If a claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.
       - It would be unfair for decision-makers to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.
    5. The choices of procedure made by the agency itself.
       - Important weight must be given to the choice of procedures made by the agency itself and its institutional constraints, especially where the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has expertise in doing so.
  + While the lack of an appeal procedure and the significance of the H&C decision militate in favour of stringent requirements, factors which militate in favour of more relaxed requirements include:
    - An H&C decision is very different from a judicial decision since it involves the exercise of considerable discretion and requires the consideration of multiple factors.
    - The H&C decision in the statutory scheme is an exception to the general principles of immigration law.
    - The statute accords considerable flexibility to the Minister to decide on proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases.
* With respect to what is required of the duty of fairness:
  + An oral hearing is not always required to ensure a fair hearing and consideration of the issues involved; meaningful participation can occur in different ways in different situations.
  + In certain circumstances, the duty of fairness will require the provision of written reasons for the decision.
    - One such circumstance is where there is a statutory right of appeal or the decision has important significance for the individual (as it would be unfair for a person subject to a critical decision to not be told why the result was reached).
    - Reasons foster fair and transparent decision-making, reinforce public confidence in judgments, ensure that issues and reasoning are carefully thought out, and allow parties to assess the question of appeal.
    - While reasons might increase cost and delay and induce a lack of candour from decision-makers, these concerns can be accommodated by considering as sufficient various types of written reasons.
* Decisions must be made free from a reasonable apprehension of bias, by an impartial decision-maker; this applies to all those who play a significant role in the making of decisions.
  + There will be a reasonable apprehension of bias if a reasonable, informed person would think that, on a balance of probabilities, the decision-maker, whether consciously or unconsciously, would not decide fairly.
  + The standards for reasonable apprehension may vary depending on the context and the type of function performed by the administrative decision-maker involved.
* The functional and pragmatic approach to judicial review recognizes that standards of review fall on a spectrum, with certain decisions being entitled to more deference than others; three standards of review have been defined: (1) patent unreasonableness, (2) reasonableness *simpliciter*, and (3) correctness.
  + Factors relevant to determining the standard of review of an administrative decision (i.e., the amount of deference that an administrative decision-maker is owed) include:
    1. The presence or absence of a privative clause designed to limit or preclude judicial review.
       - Strong evidence that the court ought to show deference to the decision (*Pushpanathan*).
    2. Whether the statute contemplates judicial review.
       - If a statute has a clause permitting appeals, less deference should be given.
    3. The expertise of the decision-maker.
       - If a tribunal has been constituted with a particular expertise in achieving the aims of an Act, a greater degree of deference will be accorded (*Pushpanathan*).
    4. The purpose of the provision in particular and of the Act as a whole.
       - When an enabling statute grants an administrative decision-maker considerable discretion, courts should not lightly interfere with their decisions.
       - When legal principles are vague, open-texture, or involve a "multi-factored balancing test," this militates in favour of a lower standard of review (*Pushpanathan*).
       - When the purpose of the provision is to *exempt* someone from statutory rules, this is a signal that greater deference should be given to the decision-maker.
       - When the decision relates to the rights and interests of an individual vis-à-vis the government, rather than balancing the interests of various constituencies, less deference is owed.
         * In contrast, where a decision involves many interlocking and interacting interests and considerations, more deference is owed (*Pushpanathan*).
    5. The nature of the problem in question, especially whether it relates to the determination of law or facts.
       - When a decision is highly fact-based, the decision deserves more deference.
* An decision is unreasonable if, in light of the legislature's intention regarding how the discretion is to be used (as evidenced by the words of the statute), it is not supported by any reasons that can stand up to a somewhat probing examination.

Rationale: (L'Heureux-Dubé J)

1. Since the H&C decision affects the interests of Ms. Baker, the duty of fairness is engaged.
2. The Convention did not give rise to a legitimate expectation that when the decision was made, specific procedural rights would be accorded, a positive finding would be made, or particular criteria would be applied.
   * The Convention is not the equivalent of a government representation about how H&C applications will be decided.
3. The duty of fairness required in this case was more than minimal; however, the duty of fairness was not breached.
   * The opportunity for the appellant to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.
     + The appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker and from her psychiatrist.
   * The significance of the H&C decision made written reasons a requirement in this case, but that requirement was satisfied by the provision of the notes produced by Officer Lorenz.
     + Accepting the notes as sufficient reasons is part of the flexibility that is necessary when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrators and the many ways in which the values underlying the principles of procedural fairness can be assured.
   * The well-informed member of the community would perceive bias when reading Officer Lorenz's comments.
     + His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes.
       - He seemed to rely on her mental illness, her training as a domestic worker, and the fact that she has several children to conclude that she would be a strain on our social welfare system.
         * This conclusion was reached in light of a psychiatrist's letter stating that, with treatment, Ms. Baker could return to being a productive member of society.
       - It would also appear that his own frustration with the "system" interfered with his ability to consider impartially whether the appellant's admission should be facilitated.
     + Because they necessarily relate to people of diverse backgrounds, immigration decisions require a recognition of diversity, understanding of others, and openness to difference by those making them.
4. The standard of review of the Minister's decision is reasonableness *simpliciter* because:
   * The fact-specific nature of the inquiry, its role within the statute as an exception, the fact that the decision-maker is the Minister (who has some expertise relative to the courts), and the considerable discretion evidenced by the statutory language all militate in favour of considerable deference.
   * However, the absence of a privative clause, the explicit contemplation of judicial review by the FC in the *Immigration Act*, and the individual nature of the decision militate in favour of less deference.
5. Notwithstanding the important deference that should be given to the decision of the immigration officer, the Minister's decision was unreasonable because it was inconsistent with the values underlying the grant of discretion.
   * The wording of s. 2.1 of the regulation shows that Parliament's intention was that those exercising the discretion conferred by the statute act in a *humanitarian* and *compassionate* manner.
   * Acting in a humanitarian and compassionate way requires close attention to the interests and needs of children; indications of this are found in:
     + - s. 3(c) of the Immigration Act, which states that its objective is to facilitate the reunion of Canadians and their close relatives abroad (consistent with keeping relatives together *in* Canada).
       - The *Convention on the Rights of the Child*, the UNDHR, and the UN *Declaration on the Rights of the Child* place considerable value on the protection of children and their needs and interests.
         * While the Convention has not been implemented by statute, it acts as an aid in interpreting domestic law.
       - The ministerial guidelines for making H&C decisions, which require immigration officers to consider humanitarian values like keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections.
   * The reasons provided for Ms. Baker's deportation were completely dismissive of the interests of Ms. Baker's children and were hence unreasonable.
     + Additionally, Lorenz's reasons failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given that she had been in Canada for 12 years, might not be able to obtain treatment in Jamaica, and would be separated from some of her children.

Concurring: (Iacobucci J)

* Agrees with L'Heureux-Dubé J's reasons and disposition, but believes that the values underlying treaties unimplemented by domestic legislation should not be given weight in the course of statutory interpretation and administrative law.
  + To hold otherwise would inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch.

Notes:

* L'Heureux-Dubé J allowed the appeal because there was both a violation of the principles of procedural fairness (owing to a reasonable apprehension of bias) and because the H&C decision was unreasonable.
  + As a result, the matter was returned to the Minister of Immigration for redetermination by a different officer.
  + The finding of a reasonable apprehension of bias alone would have been enough to allow the appeal.
* An administrator is the master of its own procedure who is best suited to make decisions about the procedures that will be followed in decision-making as it is intimately familiar with the daily realities of decision-making (Kate Glover).
* As Clutterbuck argues, administrative law does not provide a totalizing remedy for racism, sexism, or ableism. It addresses only legally prohibited discrimination—observable acts of individuals, narrow acts of "objective discrimination."
  + As such, the SCC's decision focused on procedural issues and the issue of the rights of the child, leaving the equality concerns in Ms. Baker's request largely untouched and thereby sweeping racism, sexism, classism, and ableism in the administrative state under the rug.
* Further, Clutterbuck argues that the presentation of administrative agencies as fair and neutral only helps conceal the violence that they inflict on racialized, gendered, and disabled populations to protect and enhance the livelihood of the national populations.

# Building Blocks

## Superior Courts' Jurisdiction

* Because administrative agencies have only those powers conferred by statute, their powers are legally limited.
  + Courts patrol these borders to make sure an administrative agency does not step outside of its jurisdiction.
* There are three sources of the courts' power to review administrative decisions:
  + *Original jurisdiction*: courts have jurisdiction over the decisions of decision-makers when they are challenged by way of a citizen in contract or tort on the ground that the state has infringed an individual's private legal right.
  + *Statutory right of appeal*: statutes establishing agencies may provide a right of appeal to a superior court.
  + *Courts' inherent judicial review jurisdiction*: superior courts may review administrative decisions through the courts' inherent judicial review jurisdiction, which is constitutionally guaranteed.
    - Superior courts may hear any matter unless there is a specific statute that says otherwise or grants exclusive jurisdiction to another court or tribunal.

### Inherent Judicial Review Jurisdiction (Flood & Dolling)

* While the *Constitution Act, 1867* does not explicitly say anything about judicial review, the authority of the judiciary to review administrative decisions is said to be grounded in ss. 96–101, which *implies* a constitutionally guaranteed right to judicial review by superior courts.
  + This right trumps parliamentary supremacy in the context of a privative clause that seeks to preclude such review.
  + The basis for this argument is that Confederation represented a compromise. Section 92(14) of the *Constitution Act, 1867* gave the provinces jurisdiction over the administration of justice, but this wide power was subject to ss. 96, which gave the Governor General the power to appoint superior court judges (*Re Residential Tenancies Act*).
    - That said, the intended effect of s. 96 would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and confer on the tribunal the jurisdiction of the superior courts (*Re Residential Tenancies Act*).
  + The SCC in *McEvoy* confirmed that s. 96 constrains even Parliament's ability to delegate powers to administrators.
    - The court reasoned that to allow the federal government to create tribunals with powers ordinarily exercised by superior courts would deprive the Governor General of his power under s. 96 to appoint the judges who are supposed to hold these powers.
    - Therefore, s. 96 is a guarantee of independence of the superior courts from both levels of government.
* There are three branches of the test to determine whether a power can be transferred to an administrative tribunal without infringing the guarantee of judicial independence which s. 96 has come to stand for (*MacMillan Bloedel*):
  + Does the power or jurisdiction conform to the power or jurisdiction exercised by superior courts at the time of Confederation? If no, the inquiry ends here.
  + Is the impugned power a “judicial” power as opposed to a legislative or an administrative power?
    - A judicial power is one where there is a private dispute between parties, adjudicated through the application of a recognized body of rules and in a manner consistent with fairness and impartiality.
  + Considering the tribunal's function as a whole, what is the impugned function in its entire institutional context?
    - It is permissible for administrative tribunals to exercise powers historically belonging to superior courts provided those powers are "merely subsidiary or ancillary" to the general administrative functions assigned to the tribunal.

### *Crevier v AG (Québec) et al*, [1981] 2 SCR 220

Facts:

* Quebec's *Professional Code* created a Professions Tribunal to hear appeals from discipline committees of most statutory professional bodies in Quebec. The tribunal was composed of provincially appointed judges. The Act included a privative clause stating that the tribunal's decisions were final.

Issue and holding:

* Can a privative clause insulate the provincial adjudicative tribunal from review of jurisdictional decisions? **NO**

Rationale: (Laskin CJ)

* If a privative clause tries to oust review by courts over even strict jurisdictional questions, then the clause is not constitutionally valid because the province has *de facto* created a s. 96 court.
  + To give a provincial tribunal unlimited jurisdiction to interpret and apply law and preclude any supervision by superior courts creates a s. 96 court, as there is nothing that is more the hallmark of a superior court than the vesting of power in a provincial tribunal to determine the limits of its jurisdiction without appeal or other review.

Ratio:

* Privative clauses cannot prevent judicial review of *jurisdictional questions* (i.e., questions concerning the decision-maker's legal authority). In other words, administrative decision-makers never have the final say on the boundaries of their power.
  + However, they can prevent judicial review of other questions of law (e.g., statutory interpretation, evidentiary matters, etc.).

Notes:

* Before *Crevier*, there was controversy over whether any right to judicial review of administrative agencies was constitutionally guaranteed.
  + Ironically, Laskin CJ wrote in 1952 that judicial supremacy was not enshrined in any fundamental constitutional law, and that the cardinal principle of our system was legislative supremacy.
* In *Dunsmuir*, Binnie J said that the constitution restricts the legislature's ability to allocate issues to administrative bodies which s. 96 has allocated to the courts. He said that the purpose for this is that, if the limitation did not exist, the government could transfer the work of the courts to bodies that are not independent of the executive and by statute immunize the decisions of those bodies from review.
  + Thus, the rule of law and the notion of the separation of powers provide the normative basis for *Crevier*.

## Public Decisions

### *Air Canada v Toronto Port Authority et al*, 2011 FCA 347

Facts:

* Air Canada sought judicial review of two information bulletins issued by the Toronto Port Authority ("TPA"), the first “announcing a process . . .through which it intend[ed] to award [takeoff and landing] slots” at the City Airport and the second “announcing a Request for Proposals process”. Air Canada argued that these bulletins constituted unreasonable “decisions,” the effect of which was to give Porter Airlines priority use of terminal facilities and takeoff and landing facilities.

Issue and holding:

* Are the bulletins subject to judicial review? **NO**

Analysis:

* Under the *Federal Courts Act*, an application for judicial review can only be brought against a "federal board, commission, or other tribunal," which is defined as those which exercise powers conferred by or under an Act of Parliament.
* To be subject to judicial review, the conduct or power exercised must be of a public character; an authority does not act as a "board, commission, or tribunal" when it is conducting itself privately or is exercising a power of a private nature.
  + There is no clear rule used to determine what is public, though some relevant factors include:
    - The character of the matter for which review is sought.
      * Administrative law should not apply to what is essentially a matter of private commercial law.
    - The nature of the decision-maker and its responsibilities.
      * Is the decision-maker public in nature, such as a Crown agent or a statutorily recognized administrative body charged with public responsibilities?
    - The extent to which a decision is founded in and shaped by law as opposed to private discretion.
      * If the decision is authorized by or emanates directly from a public source of law (e.g., statute, regulation, or order), a court will be more willing to find that the matter is public (even more so if that public source of law supplies the criteria upon which the decision is made).
      * Matters based on a power to act that is founded upon something other than legislation, such as a contract or business considerations, are more likely to be viewed as private.
    - The body’s relationship to other statutory schemes or other parts of government.
      * If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as public.
    - The extent to which a decision-maker is an agent of government or is directed, controlled, or significantly influenced by a public entity.
      * e.g., private persons retained by government to investigate misconduct may be exercising a public authority.
    - The suitability of public law remedies.
    - The existence of compulsory power.
      * The existence of compulsory power over the public at large or over a defined group (e.g., a profession) may be an indicator that the decision is public in nature; this is contrasted with situations where parties consensually submit to jurisdiction.
    - An “exceptional” category of cases where the conduct has attained a serious public dimension.
      * Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable.

Rationale: (Stratas JA)

* The matters set out in the bulletins are private in nature; in dealing with these matters, the TPA was not acting as a "federal board, commission, or other tribunal."
  + In engaging in the conduct described in the bulletins, the TPA was not acting as a Crown agent.
    - The *Canada Marine Act* provides that the TPA is not a Crown agent for activities necessary to support port operations, and the granting of takeoff and landing spots is an integral part of operating the Airport.
  + The TPA is private in nature.
    - The TPA is to remain "financially self-sufficient." This suggests that it may pursue private purposes like revenue generation and enhancing its financial position.
    - To a considerable extent, the matters discussed in the bulletins have a private dimension.
  + The TPA is not woven into the network of government or exercising a power as part of that network.
  + There is no statute or regulation that constrains the TPA's discretion.
    - i.e., the discretions exercised by the TPA that are evidenced in the bulletins are not shaped by law, but rather by the TPA's private views about how it is best to proceed in all the circumstances.
  + There is no evidence showing that on the matters described in the bulletins, the TPA is instructed, directed, controlled, or significantly influenced by government or another public entity.
  + There is no evidence suggesting that the matters described in the bulletin have attained a serious public dimension or will cause a very serious effect on the rights or interests of a broad segment of the public.

### *McDonald v Anishinabek Police Service* (2006), 276 DLR (4th) 460 (Ont Div Ct)

Facts:

* The Anishinabek Police Service (APS) is an independent Aboriginal police service with its own Police Governing Authority. It was created by an agreement between the federal government, the Ontario government, and several First Nations (the "Tripartite Agreement"). Therefore, the APS Police Chief derives their authority from contract, not statute. The Commissioner of the OPP has the power to appoint and terminate individuals to and from the status of First Nations Constable under the *Police Services Act*.
* The applicant was a First Nations Constable with the APS. When several complaints of sexual misconduct were made against him, the APS Police Chief terminated his employment. He sought judicial review, alleging that the APS was without statutory authority in discharging him and that there was a denial of procedural fairness and natural justice.

Issue and holding:

* Are the APS Police Chief's actions "public" enough to warrant judicial review? **YES**

Analysis:

* In determining whether a decision is subject to judicial review, the court must look not only at the source of the power pursuant to which they are made, but at the nature of the decision.
  + Even where a decision is not authorized by statute, it is subject to public law if its decisions are public in nature.
  + Various factors can be used to distinguish private bodies from public bodies, including:
    - The source of the board’s powers.
    - The functions and duties of the body.
    - Whether government action has created the body.
    - Whether, but for the body, the government would directly occupy the area, such that there is an implied devolution of power.
    - The extent of the government's direct or indirect control over the body.
    - Whether the body has power over the public at large, or only those persons who consensually submit to its jurisdiction.
    - The nature of the body's members.

Rationale:

* The decision is subject to judicial review because it is difficult to imagine a function more public than law enforcement.
  + Although incorporated as a non-profit corporation, the APS was created by government action through the Tripartite Agreement.
  + But for the Tripartite Agreement, the government would directly occupy the area through the RCMP or the OPP.
  + The source of the power exercised by the APS is entirely public. Its constables derive their police powers from a statutory appointment by the Commissioner of the OPP.
  + The APS exercises their power without the need for consent from those affected and can seriously affect the rights of citizens and police alike.
  + The APS is funded by Ontario and Canada with public funds.

Notes:

* The Court went on to determine that, because the applicant was a public officer, he was owed a duty of fairness. Because the Police Chief dismissed him before he had an opportunity to know the case against him and to respond, that duty of fairness was not met. The Court thus granted his application for *certiorari* and quashed the decisions to dismiss him.
* In this case, the court said that both statutory authority *and* the Crown's prerogative power may be reviewed.
  + Where a decision is made pursuant to the Crown prerogative (i.e., the residue of discretionary and arbitrary authority which at any given time is left in the hands of the Crown), it is judicially reviewable if its subject matter affects the rights or legitimate expectations of individuals.

## Rule of Law

### The Rule of Law (Liston)

* According to Mary Liston, the phrase "rule of law" conveys the basic intuition that law should always minimize the risk of arbitrariness in public power. It contains four main features:
  1. All persons will be considered formally equal under the rule of law, including those holding public power.
  2. Public standards (e.g., statutes, regulations, etc.) will guide the creation, revision, and enforcement of all laws.
  3. The government and the legal system will treat individuals fairly.
  4. That an existing legal system enables access to legal processes for all persons in order to resolve complaints.
* In AV Dicey’s view, the rule of law possesses three features:
  1. The absence of arbitrary and discretionary authority in government, but especially in the executive branch.
     + For Dicey, the judiciary is the guardian of common law check on the arbitrary power of the executive and its statutory delegates in order to protect individual rights.
  2. Formal legal equality so that every person—including public officials—would equally be subject to the law.
  3. The existence of constitutional law as a binding part of the ordinary law of the land.

### Muscular vs. Deferential Judicial Review

* Muscular judicial review constitutes a more antagonistic approach towards administrative bodies (see AV Dicey).
  + It seeks to provide an essential accountability function by policing the exercise of delegated powers to ensure that they are confined to terms and purposes specified by the authorizing statute.
  + It is characterized by strong intervention with the exercise of discretion by administrative decision-makers to protect individual rights and the rule of law.
* Deferential judicial review represents an attitude of judicial respect “toward other decision-makers when their procedures and resulting decisions are fair, reasonable, proportionate, and communicated through quality reasons” (Liston).
  + With this approach, judges are conscious of the separation of powers and their lack of expertise in determining the merits of certain policy-making exercises.
  + Promotes a sort of "institutional dialogue” amongst the three levels of government, who share equal responsibility for maintaining the requirements of the rule of law and the constitution.

### *Roncarelli v Duplessis*, [1959] SCR 121

Background:

* Jehovah's Witnesses experienced a lot of discrimination after WWII because of their attempts to convert Quebec's Roman Catholic population and because of their views toward secularism. The Quebec government targeted Jehovah's Witnesses with laws against the publication of materials and gatherings.

Facts:

* The director of Quebec's liquor commission, acting under the express direction of Premier Maurice Duplessis, revoked the license of a Montreal restauranteur who had posted bail for several hundred Jehovah's Witnesses. The director purported to be acting under the commission's statutory power to cancel permits "at its discretion."

Issue and holding:

* Was the Liquor Commission’s decision to revoke Roncarelli's license authorized by law? **NO**

Rationale: (Rand J)

* To suggest that administration according to law can be superseded by action dictated according to the arbitrary likes, dislikes, and irrelevant purposes of public officers acting beyond their duty would signalize the disintegration of the rule of law as a fundamental postulate of our constitutional structure.
  + A decision to cancel a license must be based upon a weighing of considerations pertinent to the object of the administration. The considerations at issue in this revocation were not pertinent.
  + No legislative act can, without express language, prescribe unlimited arbitrary power exercisable for any purpose.
  + "Discretion" implies good faith in discharging public duty and does not justify departure from the objects of its enabling statute.

Dissent: (Cartwright J)

* There is no indication that the legislature has, either expressly or impliedly, laid down any rules to guide the commission as to the circumstances under which it may revoke a permit.
* Under the statute, no one has a pre-existing right to obtain a permit, and any permit may be cancelled at any time.

Notes:

* This decision shows that administrative decision-makers' power is *always* limited, even if framed broadly.
* This decision is a good example of a more muscular approach to judicial review.

### *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnalles)*, [1993] 2 SCR 756

Facts:

* Section 60 of Quebec's *Act respecting Industrial Accidents and Occupational Diseases* ("*AIAOD*") provided that an injured employee was entitled to 90% of their wages for 14 days following the beginning of their injury.
* On December 17, 1985, the appellant (an employee of Domtar Inc) was injured in an industrial accident. He was unable to work until January 2, 1986. Since Domtar had previously announced that it would temporarily shut down its plant from December 21, 1985 to January 2, 1986, it refused to pay the appellant for more than December 18–20, 1985. The appellant asked the compensation branch of the Commission de la santé et de la sécurité du travail ("CSST"), the body responsible for administering the *AIAOD*, to issue a payment order against Domtar.

Procedural history:

* The CSST refused to issue a payment order against Domtar. On appeal, the Commission d'appel en matière de lésions professionelles ("CALP") found for the appellant. This decision was inconsistent with a decision from the Labour Court (which deals with penal proceedings under the *AIAOD*), which held that s. 60 did *not* impose on employers a duty to pay an injured employee in the event of a layoff occurring within the 14-day period. Therefore, the CALP and the Labour Court arrived at two different interpretations of s. 60. Domtar brought an application for judicial review of the CALP decision.

Issues and holding:

* Does the fact that there were two divergent interpretations of the same legislative provision by two administrative tribunals give rise to judicial review? **NO**

Analysis:

* Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their affairs in an atmosphere of stability and predictability, fostering public confidence in the integrity of the regulatory process.
  + In other words, when statutory authorities fail to act consistently, and courts are faced with contradictory interpretations on the same point, imposing the "correct" interpretation is justified in light of the rule of law.
* However, the advisability of judicial intervention in the event of conflicting decisions among administrative tribunals, even when serious and unquestionable, cannot always be determined solely by the "triumph" of the rule of law.

Rationale: (L'Heureux-Dubé J)

* Inquiring into a case of decision‑making inconsistency and solving it where there is no patently unreasonable error risks eliminating the decision‑making autonomy, expertise, and effectiveness of tribunals and risks, at the same time, thwarting the original intention of the legislature, which has determined that the tribunal is in the best position to make the decision.
  + Administrative tribunals have the authority to err within their area of expertise, and a lack of unanimity is the price to pay for the decision‑making freedom and independence given to the members of these tribunals.

Notes:

* L'Heureux-Dubé J's approach aims to strike the balance between the courts’ essential role in upholding the rule of law, while avoiding “undue interference” with administrative powers.
* This decision is a good example of a deferential approach to judicial review, as it avoids interfering with administrative decisions where those decisions are generally fair, reasonable, and justified, even if the rule of law would suffer as a result.

## Statutory Interpretation

### Older Approaches (Liston)

1. *Plain meaning rule*: if the legislation is plain, unambiguous, and precise, the judiciary must construe it in its ordinary and literal sense, even if it leads to an absurd or unjust result.
   * If the statute is clear, external evidence of Parliament's intent is inadmissible.
2. *Golden rule*: directs judges to adhere to the grammatical and ordinary sense unless doing so results in manifestly absurd results and/or inconsistency with respect to the legislative scheme or purposes (e.g., *Roncarelli v Duplessis*).
   * Raises concerns about judicial subjectivity, as absurdity and repugnancy may be in the eye of the beholder.
3. *Equitable construction*: promote statutory purposes by curing any over- or under-inclusions in the implementing provisions and suppressing attempts to avoid the intended impact of the legislation.
   * Premised on the idea that judges are active participants in law-making and is thus in deep tension with the principle of parliamentary sovereignty.

### The Modern Approach (Liston)

* *The words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*.
  + Under this approach, the interpreter will consider a full range of interpretive aids to arrive at an interpretation that conforms to the text and furthers the legislative intent of the provision while producing an outcome that is just and reasonable on the facts of the case under consideration.
  + In hard cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. Or, more than one plausible interpretation exists and judges must engage in a difficult determination of which interpretation best “fits” legislative intent, history, and public law values.
    - The question in administrative law is: Who is best placed to provide the correct interpretation? The reviewing court? The expert arbitrator? The Minister? The administrative official?

#### *Mossop v Secretary of State* (1989), 10 CHRR 6064 (CHRT)

Facts:

* Section 7 of the *Canadian Human Rights Act* (“*CHRA*”) prohibits employment discrimination on the basis of prohibited grounds. Section 3(1) defines "family status" as a prohibited ground of discrimination, though it exists undefined.
* The father of the complainant's partner died. On June 4, 1985, the complainant wrote to his employer to request bereavement leave under his collective agreement. His collective agreement held that an employee can be granted bereavement leave where a member of his immediate family dies. It defined "immediate family" as including a common law spouse resident with the employee. It defined "common-law spouse" as including only members of the *opposite* sex.
* The complainant's application for bereavement leave was denied because the complainant’s partner was not of the opposite sex and was thus not a "common-law spouse" under the collective agreement. He made a complaint of discrimination to the Canadian Human Rights Tribunal, claiming discrimination on the basis of family status.

Issue and holding:

* Can homosexual couples rely on "family status" as a prohibited ground of discrimination? **YES**

Analysis:

* The term "family status" in the *CHRA* is not clear and unambiguous.
  + The term "family" encompasses a wide variety of relationships, whether by blood, kinship, marriage or adoption, and ties forged through household arrangements.
* The parliamentary record does not help in establishing the meaning of the term.
* The "general understanding" of the public is not helpful because, apart from its majoritarian aspects, it cannot be ascertained with any degree of confidence.
* Therefore, the task of the Tribunal is to select a meaning which the term “family status” is reasonably capable of bearing, and that best accords with the intention of Parliament, the object of the Act and the scheme of the Act.

Rationale:

* Given the varied understandings of "family," it is reasonable to conclude that a homosexual couple can constitute a family.
* The purposes of the *CHRA*, as stated in s. 2, are to secure equal opportunity for all to achieve the life they wish to have.
  + Excluding homosexual couples from relying on "family status" as a prohibited ground of discrimination would not advance this purpose.

Notes:

* The CHRT heard expert evidence on families which spoke of the complainant's relationship as a familial relationship.

#### *Canada (AG) v Mossop (CA)* (1990), [1991] 1 FC 18 (FCA)

Facts: *(see above)*

Issue and holding:

* Can homosexual couples rely on "family status" as a prohibited ground of discrimination? **NO**

Analysis:

* If the courts were to adopt, in interpreting human rights acts, a “living-tree” approach towards discerning new grounds of discrimination for proscription, or re-defining past meanings given to existing grounds, they would step outside the scope of their constitutional responsibilities and usurp the function of Parliament.

Rationale: (Marceau JA)

* The plain, generally understood meaning of the word "family" signifies a group of people with common genes, common blood, and common ancestors.
  + While homosexual couples may share some elements of a "family," such as mutual love between members, mutual assistance, joint residence, emotional support, sharing of domestic tasks, and sexual relations, there is a difference between being functionally akin to a family and being a family.
* The meaning of "family" should not be established in relation to a goal to be attained in a particular instance.

Concurring: (Stone JA)

* The evidence furnishes a strong indication that Parliament intended to limit “family status” in a way which did *not* include discrimination based on sexual orientation.
  + Until "family status" was added to the *CHRA* in 1983, the original English version of the Act included only “marital status” whereas the original French version included only “situation de famille”. The amendment appears to have been introduced to resolve a discrepancy between the two versions.
  + At the time “family status” was added to the *CHRA*, the Minister made it clear that the government decided not to include in the Act “sexual orientation” as a prohibited ground of discrimination.

Notes:

* This is an example of more muscular judicial review, as the FCA says that the CHRT has "no authority to reject the generally understood meaning given to the word 'family'." It thus overturns the decision without regard for its expertise.

#### *Canada (AG) v Mossop*, [1993] 1 SCR 554

Facts: *(see above)*

Issue and holding:

* Can homosexual couples rely on "family status" as a prohibited ground of discrimination? **NO**

Rationale: (Lamer CJ)

* To allow the complainant to rely on "family status" as a prohibited ground of discrimination would effectively introduce into the CHRA "sexual orientation" as a prohibited ground of discrimination.
  + However, when "family status" was made a prohibited ground, Parliament consciously chose *not* to prohibit discrimination on the basis of sexual orientation despite such recommendations.
* While it may be argued that the discrimination here applies to homosexual couples through their familial relationship and does not apply to the sexual orientation of Mossop as an individual, I cannot conclude that Parliament intended to exclude from the scope of the Act only discrimination on the basis of sexual orientation of individuals.

Concurring: (La Forest J)

* Neither the ordinary meaning, context, or purpose indicates an intention to include same-sex couples in "family status."
  + While the word "family" is sometimes used loosely to cover other relationships, in the ordinary use of language, "family" generally does not cover a same-sex living arrangement.
  + As Lamer CJ notes, nothing in the surrounding context supports the contention that the purpose of the purpose of the legislation was to protect persons living in the arrangement of the complainant.

Dissent: (L'Heureux-Dubé J)

* The determination of the CHRT as to the interpretation of "family status" should not be displaced.
  + The opinion of the CHRT, with its specialized expertise and view of the evidence, regarding the textual meaning of "family" is reasonable and should not be substituted.
    - While “traditional family” may have an ideological stronghold, it was open to the Tribunal to conclude that families may take many forms. Non-traditional families are on the rise, and they, like traditional families, feature intimate emotional connections and can provide social stability and child-rearing.
  + Human rights legislation must be given a purposive and liberal interpretation consistent with its overarching goals.
    - The goals of the *CHRA* are, as stated in s. 2, ensuring that people have an equal opportunity to make for themselves the life that they are able and wish to have without being hindered by discrimination.
  + Had Parliament intended that the protection for families be restricted to legally recognized families, the amendment to the Act could have made this clear. However, this was not done.
    - Instead, the surrounding circumstances show that the Minister determined that the task of dealing with ambiguity in the *CHRA* should be left to the tribunal charged with implementing it.

Notes:

* L'Heureux-Dubé J supports deferential review, noting that Parliament's intent in amending the *CHRA* was to give the CHRT the discretion to interpret the meaning of "family status."

## Availability of Judicial Review

* Courts do not have inherent appellate jurisdiction over administrative tribunals like they do with lower courts. A statute must provide a right of appeal. If no right of appeal exists, then the person must apply for judicial review.
* Previously, judicial review was defined by the common law. Now, statutes (e.g., *Alberta Rules of Court*) allow judicial review applications, organize the procedure to be followed, and specify which court has jurisdiction to review.

### Discretionary Bases for Refusing a Remedy (Ford)

* Courts always retain the discretion to hear, or not to hear, an application for judicial review, even where judicial review seems clearly warranted on the facts.
* Discretionary grounds for refusing relief derive from common law and equity, and include:
  1. Adequate alternative remedies are available.
     + Parties should exhaust all other legal avenues (e.g., a statutory right of appeal) before proceeding to the "last resort" of judicial review unless there those alternative avenues would be inadequate.
  2. The application is premature (i.e., prematurity).
     + Would provide grounds to deny judicial review of a tribunal's interim procedural and evidentiary rulings.
     + To obtain judicial review of a tribunal’s preliminary or interim ruling, an applicant must generally show exceptional circumstances, the presence of which mean the applicant should not be forced to wait until the administrative proceeding concludes.
       - Evidence of irreparable harm, prejudice, costs, or delay, or the absence of an appropriate remedy at the end of the proceedings may constitute special or exceptional circumstances.
       - Concerns that do not qualify include those about fairness or bias, jurisdictional issues, the presence of an important legal or constitutional issue, or the fact that all parties have consented to seeking judicial review early.
     + Some rationales for this rule include:
       - Interim judicial review protracts what are supposed to be more cost-effective proceedings.
       - Preliminary complaints may become moot as the proceedings progress.
       - The court can better assess the situation once a full record of the proceedings exists.
  3. Delay or acquiescence
     + Parties should object promptly to any perceived impropriety on the part of the tribunal.
     + Choosing not to attend a hearing could waive any right to judicial review.
  4. The issues are moot (i.e., mootness).
     + May be the case where a dispute is over or has not yet arisen, where a tribunal’s order has expired or no longer affects the applicant, or where the litigant no longer actually wants the remedy that the tribunal might have granted had it not erred.
  5. The applicant does not come with clean hands.
     + Could include seeking a remedy to facilitate illegal conduct or obtain an unfair advantage.
* While the factors to be considered in exercising discretion cannot be reduced to a checklist of general rules, the SCC in *Khosa* said that the discretion to grant or withhold judicial review must be exercised in accordance with proper principles.

### Threshold Questions for Judicial Review (Ford)

* In addition to overcoming the fundamentally discretionary nature of judicial review, an applicant will need to cross some specific thresholds in order to be heard.
  1. Is the tribunal whose actions are being challenged, in fact, a public body?
     + Only public bodies can be subject to judicial review.
     + Various factors go into determining whether a tribunal is a private body or a public one (see *Air Canada*).
  2. Does the party challenging the decision have standing? (i.e., are their interests directly at stake in the proceeding?)
     + Codified by the *Federal Courts Act*, which states that an application for judicial review can be made by the Attorney General or anyone directly affected by the matter in respect of which relief is sought [r. 18.1(1)].
     + While actual parties to the decision will have standing, others who have a collateral interest in the same matter and may want to challenge a decision that does not directly affect them may not.
     + Discretionary "public interest standing" allows an individual or group to challenge administrative action on behalf of others.
  3. To which court should the party challenging an administrative decision apply for judicial review?
     + Although a tribunal’s enabling statute will generally set out which court has jurisdiction to hear a statutory *appeal* to the courts, this is not the case for judicial review (which is an extraordinary remedy).
     + Both the provincial superior courts and the federal courts have judicial review jurisdiction; the choice of court is determined by *whether the source of the impugned authority's power is provincial or federal*.
       - The *Federal Courts Act* gives the Federal Court exclusive jurisdiction to hear and determine applications for judicial review made in respect of federal boards and tribunals [s. 18(1)].
         * This is qualified by s. 28(1), which provides that the Federal Court of Appeal has exclusive jurisdiction to hear and determine applications for judicial review made in respect of a number of enumerated federal administrative tribunals.
       - The Court of Queen's Bench hears applications for judicial review of provincial tribunals.
  4. Has the party challenging the administrative decision missed any deadlines?
     + Procedural statutes impose time limits within which a party must file an application for judicial review.
       - The *Alberta Rules of Court* provide that judicial review (except *habeus corpus* applications) must be filed within 6 months after the date of the decision [r. 3.15(2)].
       - The *Federal Courts Act* provides that the deadline for filing an application for judicial review is 30 days after the decision was handed down, though the FC may extend this deadline [s. 18.1(2)].
     + An administrative body's enabling statute may also impose deadlines for judicial review applications.
  5. Has the party established that they have exhausted all other adequate means of recourse for challenging the tribunal's actions?
     + The tribunal’s enabling statute may provide other means of recourse, such as: reconsideration by the same tribunal, appeals to internal appellate tribunals, and appeals to a court.
       - The *Federal Courts Act* prohibits judicial review by a Federal Court where an available appeal of a tribunal's decision to the Federal Court exists [s. 18.5].
     + However, not all alternative means of recourse will necessarily be adequate. Considerations include: the convenience of the alternative remedy, the nature of the error alleged, the nature of the alternate forum (including its remedial capacity), the existence of adequate and effective recourse in the present forum, expeditiousness, the relative expertise of the alternative decision-maker, and cost.
     + Courts will not find existing non-court appeal mechanisms to be inadequate based only on unproven allegations that an appellate tribunal will suffer from the same errors or biases as the original tribunal.
* If the sole ground for relief is a defect in form or a technical irregularity, the court may, if no substantial wrong or miscarriage of justice has occurred, refuse a remedy [*ARC*, r. 3.24(3); *FCA*, s. 18.1(5)].

### Statutory Rules

* The *Alberta Rules of Court* say that an originating application must be filed in the form of an originating application for judicial review [r. 3.15(1)].
  + The application must be served on the administrative decision-maker, the Minister of Justice and Solicitor General and/or the AG of Canada (as appropriate), every other person or body directly affected by the application, and whoever else the Court may require [r. 3.15(3)–(4)].
    - The Minister of Justice or the AG of Canada, or both, as required, are entitled as of right to be heard on an application for judicial review [r. 3.17].
* The *Federal Courts Act* provides that relief may only be granted on application for judicial review [s. 18(3)], in which case the Federal Court may grant relief if satisfied that the administrative decision-maker [s. 18.1(4)]:
  + - Acted without jurisdiction, acted beyond its jurisdiction, or refused to exercise its jurisdiction.
    - Failed to observe a principle of natural justice, procedural fairness, or other procedure required by law.
    - Erred in law in making a decision, whether or not the error appears on the face of the record.
    - Based its decision on an erroneous finding of fact that it made without regard for the material before it.
    - Acted, or failed to act, by reason of fraud or perjured evidence.
    - Acted in any other way that was contrary to law.

## Remedies

### Remedies on Judicial Review

* Unlike an appeal, an application for judicial review does not automatically stay the enforcement of the tribunal order.
  + However, the *Alberta Rules of Court* provides that the court may stay the operation of a decision of a tribunal pending final determination of the judicial review application [r. 3.23(1)].
    - No stay is to be made if the stay would be detrimental to the public interest or to public safety [r. 3.23(2)].
  + Further, the *Federal Courts Act* states that the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application [s. 18.2].
* Today, the remedies available on judicial review are grounded in statute, including the *Alberta Rules of Court*, the *Federal Courts Act*, and various enabling statutes.
* The remedies available in the *Rules* and the *Federal Courts Act* have their roots in the old prerogative writs (Cristie Ford):
  + ***Certiorari***: quashes a tribunal's decision, remitting it to the decision-maker for reconsideration.
    - Generally, the court cannot substitute its decision for the decision of a tribunal that the court finds erred, because the court has not been granted the statutory decision-making authority.
  + **Prohibition**: arrests the proceedings of any tribunal exercising functions in a manner not within its jurisdiction.
    - Unlike *certiorari*, which provides relief after a decision, prohibition is used to obtain relief pre-emptively.
    - To obtain such an interim ruling, an applicant must generally show exceptional circumstances, the presence of which means the applicant should not be forced to wait until the proceeding concludes.
  + ***Mandamus***: compels a government agency to perform a duty it is mandated to perform.
    - May be used in conjunction with *certiorari* to force a tribunal to reconsider a matter with directions (e.g., to adhere to procedural fairness).
      * Directions generally only protect against unfairness and do not tell the tribunal how to decide.
  + **Declaration**: states the legal position of the parties or the law that applies to them; in the public law context, they are used to declare some government action *ultra vires*.
    - Are not enforceable, and they cannot require anyone to take or refrain from taking any action.
    - They do tend to be respected, but this is not always the case (see *Khadr*).
  + ***Habeas corpus***: employed to bring a person before a court, most to ensure that their detention is not illegal.
    - Used in cases of administrative detention, transfers to higher-security prisons, solitary confinement, etc.
    - This is the one remedy that is *not* discretionary; judges *must* hear applications for *habeas corpus* because of the seriousness of someone being detained unlawfully.
    - May be combined with *certiorari* to have the court quash the decision that led to the detention.
    - The applicant must prove that (1) they've been deprived of liberty and (2) have a legitimate ground to question its legality. Once they do, the burden shifts to the state to prove that the detention is lawful.
  + ***Quo warranto***: used to inquire into what authority existed to justify acts by or powers claimed by a public office.
    - It is rarely used, and in some provinces, it has been abolished by statute (but not Alberta).
  + One may request a combination of remedies (e.g., stay, *certiorari*, and *mandamus*).

#### *D'Errico v Canada (Attorney General)*, 2014 FCA 95

Facts:

* Ms. D'Errico was in a car accident that caused her injuries. She applied for a disability pension under the *Canada Pension Plan*. The Minister denied her application and request for reconsideration. When a Review Tribunal dismissed her appeal, she appealed to the Pension Appeals Board. The Board dismissed D'Errico's appeal because she did not have a "disability" within the meaning of the *CPP*, focusing mainly on the fact that she was a part-time yoga instructor for $75 a week. D'Errico appealed to the FCA, asking it to quash the Board's decision (*certiorari*) and grant her disability benefits (*mandamus*).

Issue and holding:

* Was the Board's decision unreasonable? **YES**
* What remedy is appropriate? ***Certiorari* and *mandamus***

Analysis:

* The Board's decision is reviewable on a standard of reasonableness (i.e., asks whether the outcome the Board reached is acceptable and defensible on the facts and the law) (*Dunsmuir*).
* Section 44 of the *CPP* makes available a disability pension to contributors who are disabled, which refers to those with a "severe" and "prolonged" mental or physical disability [s. 42(2)(a)].
  + Someone has a "severe" disability if they are incapable of regularly pursuing any substantially gainful occupation with consistent frequency.
  + A disability is "prolonged" if it is likely to be long continued and of indefinite duration or is likely to result in death.
* Normally, in like cases, courts will award *certiorari* and remit the matter to the tribunal for reconsideration, reserving *mandamus* for cases where the evidence can only lead to one result.
  + However, *mandamus* may be appropriate where there has been a substantial delay and additional delay caused by remitting the matter to the decision-maker threatens to bring the administration of justice into disrepute.

Rationale: (Stratas JA)

* The Board did not apply the applicable legal standards in determining whether D'Errico had a "disability" under the *CPP*.
* This is an exceptional case where both *certiorari* and *mandamus* are appropriate (i.e., the Board's decision is quashed, and the tribunal must make an order granting D'Errico disability benefits).
  + There is sparse evidence in support of the outcome reached by the Board.
    - Earlier medical diagnosis shows that her extremely painful neck problem was “chronic” and “easily aggravated” by sedentary work and anticipated difficulty in D'Errico working even limited hours per week.
    - Medical reports indicate that doctors did not anticipate that D'Errico's condition would improve.
    - D'Errico pursued yoga instruction, but at $75 a week, this was neither regular nor substantially gainful.
      * The record shows that when she tries to work, her condition worsens from its already poor state.
  + The additional delay caused by remitting matter would risk bringing the administration of justice into disrepute.
    - D'Errico applied for benefits six years ago, and if the matter is remitted, a further two years could pass.
    - Disability benefits are meant to address a condition that prevents the earning of meaningful income. Parliament could not have intended the final disposition of disability benefits to take eight years.

Notes:

* Usually, when *mandamus* is ordered, the decision is remitted to the decision-maker with directions; however, in this case, the court ordered the Appeals Board to grant D'Errico benefits to avoid unreasonable delay.

#### *Canada (Prime Minister) v Khadr*, 2010 SCC 3

Facts:

* Starting in 2002, Omar Khadr was detained by the US in Guantanamo Bay for over seven years for allegedly throwing a grenade that killed an American soldier. In 2003 and 2004, Canadian officials contributed to Khadr's detention by interrogating him and collaborating with US authorities with the knowledge that he was subject to cruel and abusive treatment. In 2008, the Prime Minister announced his decision not to request his repatriation. Khadr applied for judicial review of the decision not to seek his repatriation on the grounds that it infringed his s. 7 rights, requesting that the FC order the government to request his repatriation.

Procedural history:

* The FC found that the ongoing refusal of Canada to request Mr. Khadr's repatriation offends the principles of fundamental justice and ordered Canada to request his repatriation. The FCA upheld this order.

Issues and holding:

* Did the PM's failure to request Mr. Khadr's repatriation breach of s. 7 of the *Charter*? **YES** (*reasons omitted*)
* Was the remedy sought appropriate and just in all the circumstances? **NO**
  + Is the remedy sought sufficiently connected to the breach? **YES**
  + Is the remedy sought precluded by the fact that it touches on the prerogative power over foreign affairs? **YES**
* If no, what is the appropriate remedy? **Declaration**

Analysis:

* An appropriate and just remedy is one that meaningfully vindicates the rights and freedoms of the claimants.
* The decision not to request Khadr's repatriation was made in the exercise of the prerogative over foreign relations, as the Crown prerogative in foreign affairs includes the making of representations to a foreign government.
  + The prerogative power is the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. It is a limited source of non-statutory power accorded by the common law to the Crown.
  + Prerogative powers may be subject to constitutional scrutiny, but judicial review of the exercise of the prerogative power remains sensitive to the fact that the executive is better placed to make such decisions.
    - The government must have flexibility in deciding how the power is discharged, with the courts being empowered to determine the legal and constitutional limits within which such decisions are to be made.

Rationale: (The Court)

* The remedy sought by Khadr (*mandamus*) is not appropriate and just in the circumstances.
  + The necessary connection between the breaches of s. 7 and the remedy sought has been established
    - The information obtained by Canadian officials during the course of their interrogations was relevant and useful and may form part of the case upon which Khadr is being held. For this reason, the breach of Khadr's Charter rights remains ongoing, and the remedy sought could potentially vindicate those rights.
  + However, the remedy sought should be precluded for touching on the prerogative power over foreign affairs.
    - Ordering the Canadian government to request Khadr's repatriation gives too little weight to the responsibility of the executive to make decisions about foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada’s broader national interests.
    - The impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court, which does not have all the necessary information regarding the range of considerations currently faced by the government in assessing Khadr's request.
* The appropriate remedy is to declare that Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment considering current information, its responsibility for foreign affairs, and its conformity with the Charter.

### Private Law Remedies (Ford)

* The remedy of judicial review does not allow a party to obtain monetary relief through judicial review.
  + To seek monetary relief, an aggrieved party must initiate a separate civil action for restitution or damages alongside, or in lieu of, a judicial review application.
    - Government agencies can be sued for breach of contract, negligence, or misfeasance in public office, though some statutes limit individual administrative tribunal members' liability.
    - When a party proceeds with its claim by way of private action, they must be content to take their money and leave the impugned order standing.
  + However, in *Paradis Honey*, the FCA said (in *obiter*) that as a matter of public law, courts should grant relief, including monetary relief, when (1) a public law authority acts unacceptably or indefensibly in the administrative law sense, and when (2) as a matter of discretion, a remedy should be granted.
    - The majority insisted that public law principles supported courts' discretion to grant monetary relief.

# Procedural Justice and the Duty of Fairness

* A failure to satisfy procedural obligations are one route through which one can challenge an administrative decision.
* The sources of procedural obligations include the Constitution, statutes, and the common law.
  + Statute is typically the first place to look for procedural obligations.
  + If the statue procedural requirements are insufficient, an applicant may seek recourse from the Constitution.
  + The common law helps to fill in some of the procedural gaps in statutes.
    - However, remember that statutes will trump the common law if there is a conflict.

## Statutory Procedural Obligations

### Procedural Obligations Arising from Statute (Glover)

* There are two types of statutes that lay out procedural obligations:

#### Enabling and Internal Instruments

* A decision-maker's enabling statute may set out no, some, or a complete code of procedural obligations.
  + Where the enabling statute sets out an incomplete code of procedure, it will be supplemented with additional obligations found in other sources.
* A decision-maker's statute may delegate the authority to establish procedural obligations to an executive actor (e.g., the governor or lieutenant governors in council, a minister, or the decision-making body itself).
  + These additional obligations may be established by delegated legislation in the form of rules and regulations, which have the full force of law.
* Procedural obligations may also be established by a decision-maker's internal policies and guidelines (i.e., "soft law").
  + Even if an enabling act does not have a section authorizing administrators to create soft law, it is understood that this is part of the practice of administration.
  + Soft law can include interpretive aids which help decision-makers navigate statutory rules, as well as guidelines that govern how/what information is presented, how decisions are communicated, etc.
  + Soft law provides a degree of consistency to administrative decisions.
  + The normative character of these instruments is somewhat ambiguous; while they are powerful sources of authority and may be treated as *de facto* binding, they are not legally binding on a decision-maker.
    - Treating soft law instruments as binding would elevate executive directions to the level of law and fetter the decision-maker in the exercise of his discretion in a way that is inconsistent with the rule of law.
  + Administrators’ guidelines may be effectively binding by virtue of the doctrine of legitimate expectations.
    - Where a guideline amounts to a clear, unambiguous, and unqualified representation that a certain procedure will be followed, the scope of the duty of owed to the affected person will be broader.

#### General Procedural Codes

* Some provinces (including Alberta) have *general* procedural statutes that set out common procedures that govern the decision-making bodies that fall within the scope of the statutes.
* Alberta's *Administrative Procedures and Jurisdiction Act* applies to administrative decisions designated by the lieutenant governor in council by regulation or by the express terms of a decision-maker's enabling statute.
  + The *Authorities Designation Regulation* specifies that this Act applies only to the Land and Property Rights Tribunal and the Natural Resources Conservation Board [s. 1].
  + The statute does not relieve a tribunal from complying with other procedures and applicable statutes [s. 8].
  + When an application is made to a decision-maker, or the decision-maker proposes to exercise a power on its own initiative, it must give all parties adequate notice of the application or of the power it intends to exercise [s. 3].
    - A "party" is a person whose rights will be affected by the exercise of the statutory power at issue [s. 1(b)].
  + Before a decision-maker exercises a statutory power that adversely affects a party's rights, they must:
    - Give the party a reasonable opportunity to present evidence to the authority, [s. 4(a)]
    - Inform the party of the facts in its possession contrary to the interests of the party in sufficient detail to give the party a reasonable opportunity to respond, and [s. 4(b)]
    - Give the party an adequate opportunity to make oral arguments to the authority, [s. 4(c)]
      * If needed to contradict or explain certain allegations, the party may cross-examine the person that made them [s. 5].
      * The statute does not require factual statements to be made under oath, and it does not require adherence to the laws of evidence [s. 9].
      * However, a party may not be permitted to make oral representations if they are afforded the opportunity to make representations adequately in writing [s. 6].
  + Where a decision-maker makes a decision that adversely affects the rights of a party, they must provide each party with its findings of fact on which it based its decision and the reasons for its decision [s. 7].
  + Administrative decision-makers do not have the jurisdiction to determine a question of constitutional law unless the lieutenant governor in council confers the jurisdiction to do so by regulation [ss. 11, 16].

### *Thamotharem v Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198

Background facts:

* Under the *Immigration and Refugee Protection Act* ("IRPA"), the Refugee Protection Division ("RPD") of the Immigration and Refugee Board ("the Board") has broad discretion to do things "necessary to provide a full and proper [refugee protection] hearing" [s. 165].
* "Guideline 7" was issued in 2003 by the Chairperson of the Board pursuant to the statutory power to "issue guidelines…to assist members in carrying out their duties" in s. 159(1)(h) of IRPA. The guideline provides that "in a claim for refugee protection, the standard practice will be for the [Refugee Protection Officer] to start questioning the claimant" (para. 19), although the order of questioning may be varied in exceptional circumstances (para. 23).
  + The purpose of the guideline was to make the procedures in refugee protection hearings more uniform and reduce lengthy and unfocussed examination-in-chief of claimants by their counsel.
* Thamotharem is a citizen of Sri Lanka who entered Canada in September 2002 on a student visa. Fearing persecution by the Tamil Tigers if he returned, Thamotharem made a claim for refugee protection in 2004 to the RPD. At his hearing, the Refugee Protection Officer ("RPO") questioned him before his counsel. The RPD dismissed Thamotharem's refugee claim.
* In his application for judicial review, Thamotharem claimed that Guideline 7 was an unlawful fetter on the discretion by individual RPD members to determine the order of questioning at a hearing, as there is no provision in the IRPA or the regulations dealing with this aspect of refugee protection claims.

Issues and holding:

1. Is Guideline 7 delegated legislation? **NO**
   * *Note*: if Guideline 7 *did* have the same legal effect as a statutory rule, it could not be characterized as an unlawful fetter on the RPO's discretion and the analysis could end there.
2. If no, is Guideline 7 nevertheless an unlawful fetter on the exercise of members' discretion on the conduct of refugee protection hearings? **NO**

Analysis:

* Effective decision-making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion (i.e., between the benefits of certainty/consistency and flexibility).
* Non-legally binding "soft law" documents like guidelines are an important tool for achieving an acceptable level of consistency in administrative decisions, especially for tribunals exercising discretion.
  + However, decision-makers must not apply guidelines as if they were law. *A decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside on the ground that the decision-maker's exercise of discretion was unlawfully fettered*.
    - This level of compliance may only be achieved through "hard" law (e.g., regulations or statutory rules made in accordance with statutorily prescribed procedure).

Rationale: (Evans JA)

1. Guideline 7, issued by the Chairperson pursuant to s. 159(1)(h) of IRPA, is not "hard law" (e.g., it does not lay down a mandatory rule from which members have no meaningful degree of discretion to deviate).
   * The Chairperson can make "rules" with the force of law; if guidelines also had the force of law, this would create an overlapping rule-making power.
   * The word “guideline” normally (but not always) suggests some operating principle or general norm which does not necessarily determine the result of every dispute.
2. Guideline 7 does not unduly fetter RPD members’ discretion to determine for themselves, case-by-case, the order of questioning at refugee protection hearings.
   * The language of Guideline 7 suggests a recommended but optional process.
     + It expressly permits RPOs to depart from the standard order of questioning in exceptional circumstances.
     + Paragraph 19 states that it “will be” standard practice for the RPO to question the claimant first; this is less obligatory than “must” or some similarly mandatory language.
     + The Board’s *Policy on the Use of Chairperson’s Guidelines*, issued in 2003, states that guidelines are *not* legally binding on members.
   * Those challenging the validity of Guideline 7 did not produce evidence establishing that members rigidly apply the standard order of questioning without regard to its appropriateness in particular circumstances.
     + While there is evidence that RPD members sometimes, and on a voluntary basis, complete a form asking them to explain why they had not followed a standard practice:
       - There was no evidence that any RPO had been threatened with sanction for non-compliance with the guidelines.
       - It is not an infringement of members' independence to have them explain their departure from standard procedure; this It helps avoid arbitrariness and provide guidance to other members.

Notes:

* The determination of whether a rule is "soft law" or "hard law" should start with the enabling statute.
  + If it says that a decision-maker can make legally binding rules, then those rules are hard law; if not, then they are likely soft law.

### *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FC 156

Facts:

* Ishaq is a Pakistani national and devout Muslim. Her religious beliefs obligate her to wear a niqab in public. She will only remove her veil if absolutely necessary to prove her identity or for security purposes, and even then only privately in front of other women. Her application for citizenship was approved in 2013 and she was granted citizenship under the *Citizenship Act* ("the Act") three days later. She then had to take an oath of citizenship at a citizenship ceremony to be considered a citizen. Section 6.5 of the Citizenship and Immigration Canada ("CIC") policy manual, *CP 15: Guide to Citizenship Ceremonies* ("the Manual"), provided that "[c]andidates wearing face coverings are required to remove their face coverings for the oath taking portion of the ceremony" to receive their citizenship certificates ("the Policy"). Ishaq objected to the requirement, as it was unnecessary for the purposes of security and identity. She filed an application for judicial review and sought an order enjoining the Minister from applying the Policy at her citizenship hearing. She claimed that the Policy violated ss. 2(a) and 15(1) of the Charter, was beyond the powers of the Minister, and unduly fettered the discretion of citizenship judges.

Issues and holding:

* Does the Policy unduly fetter the discretion of citizenship judges? **YES**

Rationale: (Boswell J)

* The Policy purports to constrain a citizenship judge’s scope of action.
  + The language of the Manual suggests that it is not just a guideline which citizenship judges are free to disregard.
    - Section 1 of the Manual states that it is about "the roles and protocols that different participants *must* respect during ceremonies."
    - At section 6.5.2, the Policy says that if citizenship candidates do not remove their face coverings, "...the certificate is NOT to be presented."
  + Internal correspondence between CIC officials demonstrates an intention that removal of a face covering be *mandatory* at public citizenship ceremonies.
    - e.g., one CIC official wrote in an email "Under the new directive…face coverings must be removed at the oath taking portion of the ceremony…"
  + The intention that it be mandatory for people to remove face coverings is also evident in public statements.
    - In 2011, the Minister, in explaining the Policy, said that people cannot make a solemn commitment to respect Canada's laws and be loyal to the country with their face covered.
* This constraint on citizenship judge's power is inconsistent with s. 17(1)(b) of the *Citizenship Regulations* ("the Regulations"), which requires a citizenship judge to "administer the oath of citizenship with dignity and solemnity, allowing the *greatest possible freedom* in the religious solemnization or the solemn affirmation thereof."
  + How can a citizenship judge afford the greatest possible freedom in respect of the solemnization or affirmation if the Policy requires candidates to violate or renounce a basic tenet of their religion?
* Since a citizenship judge cannot comply with both the Policy and the Regulations, and regulations enacted by the Governor in Council have a higher legal status than guidelines and policies, the Policy is invalid.

Notes:

* It would always be open to Parliament to give the Policy the full force of law using the more public law-making process.

## Common Law Procedural Obligations

* While common law obligations cannot override legislative procedures, the common law can supplement the procedures required by statute (Kate Glover).
  + - The common law framework for determining when the duty of procedural fairness applies and what the duty entails is set out in *Baker*.
* As a general rule, the law treats administrative decisions that are tainted by unfairness as void, even if the merits of the decision are substantively sound (*Cardinal*).

### When Do They Arise?

#### Triggering the Duty of Fairness (Glover)

* The duty of fairness applies to 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 (*Cardinal*).
  + This rule is interpreted broadly to ensure that the duty of fairness is applied expansively.
* There are exceptions and complications that complicate the general rule:
  + Decisions of a legislative nature are not subject to the common law duty of fairness (see *Homex*).
    - These decisions affect the rights and interests of large groups of people rather than those of one person; they consider the competing interests of many groups in society.
  + Public employees, employed under contract, are not entitled to procedural protections at common law when they are dismissed from their jobs.
    - Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law (*Dunsmuir*).
    - However, the SCC in *Dunsmuir* pointed out two situations where the duty of fairness will still apply in public employment contexts:
      * When the employee is not actually protected by an employment contract.
        + Because employees like ministers and judges hold their office “at pleasure,” procedural fairness is required to ensure that public power is not exercised capriciously.
      * Where the duty of fairness is applied by necessary implication from a statutory power governing the employment relationship.

#### *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643

Facts:

* s. 40(1) of the *Penitentiary Service Regulations* ("the Regulations") provides that an institution head may prevent an inmate from associating with other inmates if they are satisfied that it is desirable for the maintenance of order or in the best interests of the inmate. The segregation must be reviewed at least once a month by a Classification Board, which must make a recommendation to the institutional head whether the inmate should return to association with other inmates.
* The appellants were imprisoned in Matsqui Institution when they allegedly held a guard hostage at knifepoint. They were charged for forcible seizure and attempted escape. On July 28, 1980, they were transferred to Kent Institution, a maximum-security penitentiary, where they were placed in solitary confinement by the institution head ("the Director"). The appellants sought their release from solitary confinement by way of *habeas corpus* with *certiorari* on the ground that it was imposed or continued in breach of procedural fairness. In his affidavits filed in response to this application, the Director claimed that his decision to continue confinement was based on his "gut [feeling]" that, based on the seriousness of the alleged hostage-taking incident, the appellants' release may disturb order and discipline in the institution.

Procedural history:

* The BCSC held that the continuation of solitary confinement was unlawful by reason of a denial of procedural fairness, noting the Director's failure to provide reasons or allow the appellant's an opportunity to be heard. The BCCA held that the Director had *not* violated procedural fairness, citing the Director's broad discretionary power under s. 40 of the Regulations.

Issue and holding:

* Was the Director under a duty of procedural fairness in exercising the authority conferred by s. 40 of the Regulations? **YES**
* Was there a breach of the duty of procedural fairness in the *continuation* of the appellants' segregation despite the recommendation of the Segregation Review Board? **YES**

Analysis:

* Judicial interference will only be justified if there were some failure to act fairly, having regard to all the circumstances, and such unfairness caused a substantial (not trivial or merely technical), injustice which was capable of remedy.
* Since the nature of a prison requires officers to make "on the spot" disciplinary decisions, the power of judicial review must be exercised with restraint.

Rationale: (Le Dain J)

1. A duty of fairness lies on every *public authority* making an administrative decision which is *not of a legislative nature* and which *affects the rights, privileges, or interests of an individual*.
   * In *Martineau*, the Court held that the duty of fairness applied to disciplinary proceedings within a penitentiary.
2. Procedural fairness required that the Director inform the appellants of the reasons for his decision and give them an opportunity, however informal, to make representations concerning whether it was desirable to continue their segregation.
   * These minimal requirements do not unduly burden prison officials with unreasonable procedural requirements.
   * While it was argued that the Director’s decisions were reasonable and fair, *a denial of procedural fairness must always render a decision invalid, whether or not the hearing would likely have resulted in a different decision*.
     + The right to a fair hearing is an independent, unqualified right justified by the procedural justice which any person affected by an administrative decision is entitled to.
     + It is not for a court to deny procedural justice based on speculation as to what the result might have been had there been a hearing.

Notes:

* After the initial application was heard at the BCSC, the appellants were released from Kent Institution. The higher courts decided that the appeals should be heard because of the general importance of the issues raised.

#### *Homex Realty and Development Co v Wyoming (Village)*, [1980] 2 SCR 1011

Facts:

* Atkinson owned a parcel of land in the Village of Wyoming. As a condition of registration of a plan of subdivision on the land, he entered an agreement with the Village for installing municipal services in the subdivision. Homex then bought most of the lots on the subdivision and refused to install services on it. When negotiations between the Village and Homex concerning the installation of services proved fruitless, the Village, pursuant to s. 29(3) of the *Planning Act* and without notice to Homex, enacted a bylaw deeming the lots purchased by Homex to not be a registered plan of subdivision. Under the *Planning Act*, this meant that Homex would not be able to convey the lots without further permission of the Village. In September 1976, Homex made an application for judicial review seeking to have the bylaw quashed.

Issue and holding:

1. Was the Village under a duty of procedural fairness in exercising its authority under s. 29(3)? **YES**
2. In enacting the impugned bylaw, did the Village breach the duty of procedural fairness? **YES**
3. Is Homex entitled to the quashing of the bylaw on judicial review? **NO**

Analysis:

* When a statute is silent as to whether an agency owes a duty of fairness when interfering with property rights, the courts may fill in the blanks and require the agency to afford the subject an opportunity to be heard before it proceeds.
  + But courts will *not* supply a requirement of procedural fairness where the statute must be read as precluding it (e.g., if it is essential to the statute that a decision-maker be empowered to act promptly and without notice to the person sought to be affected, notice will not be required).
* Judicial review should not be granted, even on grounds otherwise legally sufficient, to applicants who in the matters before the administrative decision-maker do not come with clean hands.

Rationale: (Estey J)

* s. 29(3) of the *Planning Act* does not contain procedural requirements. However, the impugned decision was not in substance legislative but rather quasi-judicial in character to attract the duty of fairness.
  + While the by-law had some characteristics of a community interest by-law, it also represented the culmination of an adversarial dispute between Homex and the Village (i.e., even though the decision was legislative in form, it was administrative in substance).
* Even though it had every opportunity to explain its refusal to install services on the subdivision, Homex did not receive an opportunity to make known its position once fully aware of the Village's final intentions.
* Homex does not have clean hands; thus, judicial review should not be granted.
  + Homex has sought throughout these proceedings to avoid the burden associated with the subdivision of its lands.
  + In the preliminary stages of this application, Homex has taken inconsistent and even contradictory positions.
    - Examinations on affidavits were protracted because of a lack of frankness on the part of its president.
  + Homex has sought to put its lands beyond the reach of municipal regulations by means of "checkerboarding."

Notes:

* Decisions that are the product of an adversarial dispute, and that are thus quasi-judicial rather than legislative, trigger the duty of procedural fairness.

#### *Canada (AG) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735

Facts:

* After the CRTC approved a new rate structure for Bell Canada, the respondents appealed the decision to the Governor in Council pursuant to s. 64(1) of the *National Transpor­tation Act* (“the Act”), which reads: “[t]he Governor in Council may at any time, in his discretion, … vary or rescind any order … of the Commission…” The Governor in Council received recommendations from the Minister of Communications and the CRTC, reports from the Department of Communications, and the reply of Bell Canada to each of the respondents' petitions. The respondents did not receive the recommendations and reports but did receive Bell Canada's reply to the petition. The Governor in Council denied the respondents' petitions before they had filed their respective responses to Bell Canada. The respondents claimed that the Governor in Council violated procedural fairness by not affording them the opportunity to respond to the case made against them. They also claimed that their inability to answer the response by Bell Canada to their petitions also violated procedural fairness.

Issues and holding:

* Does the Governor in Council owe the respondents a duty of fairness? **NO**

Analysis:

* Where a decision-maker is fulfilling a legislative function, the subject matter of which is not an individual concern or a right unique to an applicant, those affected by its decisions generally have no implied right to be consulted or make objections.

Rationale: (Estey J)

* The wording of and circumstances surrounding s. 64 of the Act suggest that the Governor in Council did *not* owe the respondents a duty of fairness.
  + s. 64 does not, expressly or by implication, prescribe any procedural guidelines.
  + The supervisory power of s. 64 is vested in Cabinet to enable them to respond to the political, economic, and social concerns of the moment.
    - In doing so, it cannot be deprived of the right to resort to its staff, departmental personnel, and the comments and advice of ministerial members.
  + The added right in s. 64(1) that the Governor in Council may "of his motion" vary or rescind any rule or order of the Commission suggests that this is a legislative action.
  + The practicality of according procedural fairness to “all parties” must bear on the interpretation of s. 64(1).
    - There are many subscribers to Bell Canada, all of whom will be affected to some degree by the new rate structure. It would be unreasonable to give all of them an opportunity to weigh in.
  + While the Governor in Council used to conduct oral hearings with respect to such matters, the size of our political machinery and of the Canadian community have grown exponentially.
* Under this interpretation of s. 64(1), there is no need for the Governor in Council to give reasons for his decision, to hold any kind of a hearing, or even to acknowledge the receipt of a petition.

Notes:

* As the cases in this section show, the first step in determining whether there is a duty of fairness is seeing what the statute says. If the statute is silent, we determine whether the common law duty of fairness arises.

### What Do They Require?

#### Inherent Value of Fairness (Glover)

* Fairness in administrative decision-making processes lead to high-quality decisions.
* In addition, fairness is, in itself, an indispensable good in public decision-making; it expresses a commitment to integrity in exercises of public power and a respect for the dignity of the parties affected by state action.
  + *Note*: Douglas Ruck notes that so much of what administrative decision-makers do is provide the opportunity to speak and making sure that people feel like they are heard.

#### Extending the Reach of Procedural Obligations (Glover)

* Natural justice is a notion of fairness that encompasses two principles:
  + *Audi alteram partem*: hear the other side.
    - *Note*: requires a robust court-like proceeding where the parties can make written submissions, notice of the case to be met, an oral hearing, the opportunity to cross-examine, written reasons, etc.
  + *Nemo judex in sua causa*: no person can be the judge in his/her own cause.
    - *Note*: suggests that decision-makers should be independent and unbiased.
* Before *Nicholson*, judicial and quasi-judicial decisions attracted the demands of natural justice, while administrative decisions were not burdened by common law procedural obligations.
  + This changed with *Nicholson*, which subjected administrative decisions to a general duty of fairness.
* Over time, courts came to accept that all decision-makers, whether exercising, judicial, quasi-judicial, or administrative powers, should be subject to the same duty of fairness.
  + There was no need for the unwieldy distinction between natural justice and the duty of fairness (*Martineau*).
  + It came to be accepted that all decision-makers were subject to procedural obligations, the applicability and stringency of which should be assessed using a single set of considerations.

#### What Does the Duty of Fairness Entail? (Glover)

* The existence of a duty of fairness does not determine what requirements will be applicable in each circumstance (*Baker*).
  + Thus, once the common law duty is triggered, we turn to a second question: What specific procedures must a decision-maker follow to satisfy the duty of fairness?
* The weight of the duty of fairness is guided by the purpose of participatory rights: *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* (*Baker*).
  + Keeping context front and centre ensures that fairness is attuned to the realities of the decision-maker, the efficiency goals of the administrative state, and the rule of law.
  + Relevant contextual factors, as set out in *Baker*, include (but are not necessarily limited to):
    1. The nature of the decision being made and the process followed in making it.
    2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates.
    3. The importance of the decision to the individual or individuals affected.
    4. The legitimate expectations of the person challenging the decision.
    5. The choices of procedure made by the agency itself.
  + An assessment of the *Baker* factors leads to a determination of the measure of fairness owed in the circumstances.
    - The goal is to determine whether, in the circumstances, the burden of fairness is heavy, light, or somewhere between the two ends of the spectrum.
* Once the weight of the duty is determined, you then decide which specific procedures will satisfy it in the circumstances (i.e., those which ensure that affected parties have a meaningful opportunity to present their case fully and fairly).
  + The range of possible procedures is open and flexible.
    - The usual range of possibilities includes procedures dealing with notice, disclosure, hearings (oral, written, electronic, open, closed, etc.), the right to representation, opportunities to call evidence and cross-examine witnesses, deadlines and the relevance of timelines, the duty to give reasons, etc.
  + Notice (or disclosure) is the most fundamental participatory rights.
    - Without notice, it is impossible for an affected party to exercise her other rights of participation except by chance.
    - Notice must be adequate in all circumstances to afford to those concerned a reasonable opportunity to present proofs and arguments and respond to those presented in opposition (Brown & Evans); issues of the form, timing, and content of notice will have to be considered.
      * In circumstances in which decisions affect a defined population, personal notice may not be required, but rather general dissemination of information within a territory or through channels accessible to the population may be sufficient.
      * Notice must be given with sufficient time for a party to prepare, although the amount of preparation time that is called for will depend on the type of decision being made.
      * The content of the notice must give sufficient information for individuals to know they are affected and prepare submissions.
        + What counts as sufficient may depend not only on the type of decision being made, but also the knowledge and experience of the person receiving the information.
  + It is only in rare circumstances that an oral hearing will be ordered.
    - In many instances, an oral hearing would be inappropriate to the decision being made and would impose too great of a burden on decision-makers.
    - Often, a decision-maker can properly assess the relevant information, evidence, and arguments on a written record alone.
  + While the common law has not historically required decision-makers to provide reasons for their decisions, L’Heureux-Dubé J said in *Baker* that, in certain circumstances, the duty of procedural fairness will require them.
    - Such circumstances include where the decision has important significance for the individual or there is a statutory right of appeal.

#### *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311

Facts:

* The appellant was engaged as a constable by the respondent Board on March 1, 1973. The Board thereafter, but *within 18 months of his initial appointment*, purported to dispense with his services.
* Regulation 680, passed pursuant to the *Police Act*, provides that:

**27** No [police officer] is subject to any penalty under this Part except after a hearing and final disposition of a charge on appeal…or after the time for appeal has expired, but nothing herein affects the authority of a board or council,

…

1. to dispense with the services of any constable within [18] months of his becoming a constable;…

Issue and holding:

* Did the Board have a duty of fairness to the appellant? **YES**
* If yes, what is the content of the duty? *(See below)*

Rationale: (Laskin CJ)

* Although the appellant cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection; he should be treated "fairly," not arbitrarily.
  + To endow procedural protection on parties interested in judicial decisions while denying parties interested in administrative decisions any protections would be arbitrary and unjust when the results of statutory decisions raise the same serious consequences for those adversely affected.
  + That which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it.
* The appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing, to respond.
  + Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority, to decide whether a person in his position should be allowed to continue in office.

Dissent: (Martland J)

* The Board's decision was purely administrative; it was under no duty to explain to the appellant why his services were no longer required, or to give him an opportunity to be heard.

Notes:

* By recognizing but not elaborating a “general duty of fairness,” Laskin CJ created space for fleshing out of this legal guarantee through common law and statutory interpretation in future cases ([Lorne Sossin](https://sossinblog.osgoode.yorku.ca/2018/11/the-success-of-fairness-marking-the-40th-anniversary-of-nicholson-v-haldimand-norfolk-regional-police-commissioners/)).

#### *Canada (AG) v Mavi*, 2011 SCC 30

Facts:

* Under the *Immigration and Refugee Protection Act* ("IRPA"), the "family class" of immigrants is not required to meet financial selection requirements. Instead, they are sponsored by their family members in Canada, who execute a sponsorship undertaking. Under s. 145(2) of IRPA, if sponsored immigrants obtain social assistance after arriving in Canada, their sponsor is deemed to have defaulted on their undertaking and “*an amount that a sponsor is* ***required to pay*** *under the terms of an undertaking is* ***payable on demand*** *to Her Majesty … and* ***may be recovered*** *by Her Majesty…*”
* These proceedings were initiated by eight sponsors whose relatives received social assistance from the province of Ontario, which then enforced the debt upon the sponsors. The sponsors denied liability under the undertakings and sought various declarations to avoid payment. They contended that s. 145(2), namely the words "may be recovered" indicates the existence of a Crown discretion to collect or not to collect the debt, and that a duty of fairness was thus owed.

Issue and holding:

1. Do Canada and Ontario owe sponsors a duty of procedural fairness when enforcing sponsorship debt? **YES**
2. What is the content of the duty of fairness? *(See below)*
3. Were the requirements of procedural fairness met in this case? **YES**

Analysis:

* There is a general common law rule that a duty of procedural fairness applies to *every* public authority making an administrative decision not of a legislative nature which affects the rights, privileges or interests of an individual (*Cardinal*).
  + However, the duty of fairness, being a doctrine of the common law, can be overridden by statute.
* Once the duty of procedural fairness has been found to exist, the legislative and administrative context is crucial to determining its content; there is no "one-size-fits-all" doctrine.
  + Some of the elements to be considered were set out in a non-exhaustive list in *Baker*.
  + Where an official makes representations within the scope of their authority about an administrative process that it will follow, and the representations are clear, unambiguous, and unqualified, the government may be held to its word, provided the representations do not conflict with the decision maker’s statutory duty.
    - The official will breach the duty of fairness by failing to live up to its undertaking in a substantial way.
    - Representations will be sufficiently precise to ground a legitimate expectation if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.
* The factors relevant to determining the content of the duty of fairness in this case include:
  + Parliament has made clear in the statutory scheme its intention to avoid a complicated administrative review process, which militates in favour of a lower procedural burden.
  + The legislation leaves governments with a measure of discretion in carrying out their enforcement duties, which militates in favour of a lighter duty of fairness.
  + The nature of the decision in this case is final; the IRPA does not provide a mechanism for sponsors to appeal the enforcement decision, which militates in favour of a greater duty of fairness.
  + The effect of the decision on the sponsors is significant; sponsorship debts can be very large and accumulate quickly, which militates in favour of greater procedural protections.
  + Most importantly, the undertakings provide that the Crown "may choose not to take enforcement action to recover money…if the default is the result of abuse *or in other circumstances*."
    - This amounts to a government representation that there exists a discretion in how to collect sponsorship debts, which creates a legitimate expectation.
    - Such representations do not conflict with any statutory duty and are sufficiently clear to preclude the government from denying to the sponsor signatories the existence of a discretion to defer enforcement.

Rationale: (Binnie J)

1. It is clearly Parliament's intent to seek *eventual* payment of sponsorship debts, as evidenced by the phrases "required to pay" and "payable on demand" in s. 145(2); however, the text, context, and purpose of the IRPA suggest a level of discretion in whether to *defer* sponsorship debts, which attracts a duty of fairness.
   * s. 145(2) of the IRPA provides that the Crown "may" enforce the undertaking; the word "may" connotes discretion.
   * There is no exclusionary language in the IRPA ousting the common law duty of procedural fairness.
   * The purposes of the IRPA include promoting family reunification and successfully reintegrating new immigrants; debt collection without any discretion would not advance these purposes.
     + It would hardly promote “successful integration” to require individuals to remain in abusive relationships.
     + Forcing a sponsor into bankruptcy may deliver a short-term return, but hardly enhances the sponsor’s chances of becoming a positive contributor to Canadian society.
     + Excessively harsh treatment of defaulting sponsors may risk discouraging others from bringing their relatives to Canada, which would undermine the policy of promoting family reunification.
2. The duty of fairness does not require an elaborate adjudicative process, but it does oblige a government to:
   1. Notify a sponsor at his or her last known address of its claim.
   2. Afford the sponsor an opportunity within limited time to explain in writing his or her relevant personal and financial circumstances that militate against immediate collection.
   3. Consider any relevant circumstances brought to its attention keeping in mind that the undertakings were the essential conditions precedent to allowing the sponsored immigrant to enter Canada in the first place.
   4. Notify the sponsor of the government’s decision.
   * Given the legislative framework, the non-judicial nature of the process, and the absence of any statutory right of appeal, the duty of fairness in this situation does not extend to providing reasons in each case.
3. Ontario uses letters to notify sponsors that a sponsored relative has applied for social assistance and that they are now in default. The letters make clear Ontario's openness to considering reasons why the debt should not be enforced. If the sponsor does not agree to pay, the matter is referred to the Overpayment Recovery Unit ("ORU") for collection. The ORU will send additional notice letters and if the sponsor responds, the ORU will solicit the sponsor’s financial information to determine their ability to pay. In this process there is a limited but real opportunity for the sponsor to make representations to the government regarding the particular circumstances surrounding a default.

Notes:

* As Binnie J notes, in determining what the duty of fairness requires, a balance must be struck.
  + Administering a fair process slows matters down and costs the taxpayer money.
  + On the other hand, the public suffers a cost if government is perceived to act unfairly, or administrative action is based on erroneous, incomplete, or ill-considered findings of fact, conclusions of law, or exercises of discretion.

#### *Knaniche v Canada (Securité publique et Protection civile)*, 2020 FC 559

Facts:

* Under s. 42 of the *Immigration and Refugee Protection Regulations* ("the Regulations"), a foreign national who wants to withdraw their application to enter Canada can do so by filling out and signing the "Autorisation de quitter le Canada" form.
* Under s. 44 of the *Immigration and Refugee Protection Act* ("the Act"), an officer who believes that a foreign national is inadmissible may prepare a report for the Minister, who may order an admissibility hearing or make a removal order.
* The applicant, an Algerian citizen, was issued a multiple entry visa in 2017. In November 2018, he came to Canada to visit his brother for a month. When the applicant appeared at the immigration examination, he was questioned aggressively by a Canadian immigration officer. He then attempted to force the applicant to sign a voluntary departure form without giving him an opportunity to read it. The applicant refused, and just the officer signed it. The officer then forcibly boarded the applicant on a return flight to Algeria with his personal effects, telling him: "Get the hell back to your country." The officer's notes provided that the applicant failed to satisfy him that he would leave Canada at the end of his authorized period, but they do not make note of all the evidence which suggested that the applicant would leave.
* The applicant sought judicial review of the officer's decision to send him back to Algeria, arguing that his right to procedural fairness was violated by the officer's dismissive behaviour. The respondent argued that there was no “decision” to be subject to judicial review because no removal order was made against the applicant. The applicant voluntarily left Canada.

Issues and holding:

1. Was a "decision" made against the applicant? **YES**
2. Was the officer's decision tainted by a breach of procedural fairness? **YES**

Rationale: (Pamel J)

1. Although no formal inadmissibility was recorded and no formal removal order was issued against the applicant, it is clear that a decision was made regarding the applicant’s admissibility; it was a disguised decision to deny entry.
   * Officer insisted the applicant sign the form, told him he was inadmissible, and forcibly boarded him onto the plane.
     + The officer's notes indicate that he concluded the applicant was inadmissible because he "FAILED TO SATISFY THE OFFICER THAT HE WAS A BONA FIDE TRAVELLER AND THAT HE WOULD LEAVE AT THE END OF THE AUTHORIZED PERIOD."
   * The respondent’s definition of "decision" is too formalistic and based on an erroneous view of the facts.
     + An overly formalistic view of what constitutes a “decision” would undermine the rule of law in by creating areas of government activity that would be immune from judicial review and would encourage decision-makers to dispense with formal procedures in favour of disguised decisions.
2. The officer's actions constitute a clear breach of procedural fairness.
   * The officer skirted the process of withdrawing the application to unilaterally make a removal order.
     + The withdrawal of the application depends on the free and informed will of the applicant himself.
   * The officer failed to prepare a report under s. 44 of the Act, depriving the applicant of the right of review by the Minister.

Notes:

* Access to judicial review may be hard to come by for new arrivals to Canada, who may not be in Canada to be able to challenge an unfair decision.

### Access to Justice

* Access to justice is important for ensuring rule of law, which Mary Liston says requires a legal system that enables all to access processes to resolve complaints.

#### Access to Administrative Justice (Grant & Sossin)

##### Standing

* The question of who has standing before administrative tribunals must be determined by looking to the tribunal's governing statute or some other statutory authority.
  + Enabling statutes set parameters for access but may also provide discretion to determine who has standing.
* Another context where standing is relevant is where a party challenges an administrative decision in court.
  + Judicial review of administrative action is generally reserved for those who have a sufficient interest in the matter.
    - The test for standing is whether the applicant will suffer some peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public (*Oldman River*).
    - In practice, the general policy of courts is not to decide issues in the absence of the parties whose rights are most directly affected by the court’s decision.
  + A significant development in public law is *discretionary public interest standing*, which may allow a "test" applicant or NGO to launch judicial review proceedings on behalf of a broader group.
    - *Downtown Eastside* is the leading case on discretionary public issue standing.
      * In it, the SCC affirmed the test for determining public interest standing:
        1. Is the matter serious and justiciable?
        2. Is the party seeking standing genuinely interested in the matter?
        3. Is there any other reasonable and effective way for the matter to be adjudicated?
      * Cromwell J outlined several factors for determining public interest standing matters, including:
        + The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action.
        + Courts should consider that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons.
        + Public interest standing is not a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.
    - The benefits of public interest standing include:
      * It can provide a voice to individuals that are directly affected by the decisions but are unwilling to participate in litigation.
        + e.g., in *Canadian Doctors*, a trio of groups challenged changes to health care funding for certain categories of non-citizens. They adduced evidence that most of those directly affected by the changes were unwilling to participate in litigation. Some were too physically or mentally ill to participate. Others were facing removal from Canada.
      * Public interest groups have the capacity and resources to present the issues concretely in a well-developed setting, unlike many of those they may be representing (*Canadian Doctors*).
      * It avoids a multiplicity of challenges and unnecessary resource expenditure (*Canadian Doctors*).
      * It prevents the immunization of public acts from challenge (*Canadian Council of Churches*).
    - In *Finlay v Canada (Minister of Finance)*, the SCC affirmed that public interest standing would be available to challenge administrative actions and not simply legislation.

##### Hearings

* For some, access to a hearing might mean a ramp to the hearing room, access to materials for the visually impaired, and assistance for people with mental or cognitive disabilities (e.g., having a support person at the hearing).
* Other approaches to accessibility emphasize access for parties in remote areas or where physical presence in a hearing room would be prohibitively expensive.
  + e.g., the use of telephone or videoconferencing to conduct hearings, though these methods may increase the chance that the decision reached is the wrong one.

##### Guidelines

* Transparency with respect to the standards of decision-making represents an emerging aspect of access to justice.
  + It is important that guidelines are developed that set out these standards, and that the guidelines are publicized.
  + While guidelines may not be binding (see *Thamotharem*), they frequently represent a distillation, simplification, and operationalization of existing case law and legal principles.

##### Simplification

* The intelligibility of a process is vital to parties’ ability to access it.
  + Being provided with forms that are unduly complex or with guidelines that are inscrutable is equivalent to closing the doors to the tribunal.
* Many tribunals use plain language in their written and oral communications and use simple and user-friendly forms.
  + Some aid individuals in completing forms and understanding the basic process of the tribunal.
* In some contexts, NGOs can play an important role in helping to clarify legal processes (e.g., CPLEA).

##### Language

* The right to be heard implies a right to understand the case to be met, which in some cases will not be possible unless interpretation and translation services are available.
  + Section 14 of the Charter provides that a party who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.
  + In *Filgueira v Garfield Container Transport Inc*, the FC upheld the CHRT's ruling that fairness required that the complainant be provided with an interpreter, notwithstanding that the ruling would impact scarce resources.
    - The Court said that it was within the discretion of the Tribunal to determine whether its objectives can be fairly achieved in the absence of providing translation services to one or more of the parties.
  + Access to French-language tribunal services in English communities, and vice versa, is governed by statutory, and in some cases constitutional, entitlements.

##### Prior Decisions

* While tribunals are not bound by their earlier decisions, many tribunals aim for consistency and will treat previous decisions as strongly influential over similar disputes.
  + For this reason, making prior decisions available could help notify partis of the “case to meet.”
* Thus, absent circumstances justifying confidentiality, there is a good argument that all tribunal proceedings should be open to the public, and documents used in those proceedings should be available to the public.
  + The practice with respect to publishing decisions is not uniform.
    - Some tribunals publish all of their decisions in an easily searchable form.
    - Others publish anonymized versions of those decisions determined to be of general significance.
    - Others charge a fee for viewing decisions, which obviously presents a financial burden.

##### People

* Access to legal and institutional knowledge may not be enough to address the barriers that vulnerable parties face; it is equally important to focus on the people who make up the administrative justice system, including adjudicators and staff.
  + Sandra Nishikawa argued that the legitimacy enjoyed by tribunals depends on their appointments reflecting the demographic makeup of the communities they serve.
    - This is particularly salient in tribunals serving diverse communities, such as human rights tribunals.
  + The focus on people is also a focus on individuals' skills, capacity, and competencies; as such, cross-cultural competency is a key component of merit-based appointments in a host of administrative justice settings.

#### Example: BC Mental Health Review Board (Kulyk McDonald)

* Under BC's *Mental Health Act*, where a physician has concluded that a patient has a mental disorder and requires care, supervision, and control to protect them or others, the director of a provincial mental health facility may involuntarily detain the patient [s. 22].
* A person detained under s. 22 is entitled to a hearing in front of the Mental Health Review Board to determine if their detention should continue [s. 25(2)].
  + This tribunal is an alternative to filing a writ of *habeas corpus* in the BCSC that is more informal and less expensive.
    - That said, detainees retain the right to file a traditional court application seeking judicial review.
  + The tribunal consists of a lawyer, a doctor, and a community member with an interest in mental health issues.
    - The tribunal goes to the applicants, rather than the applicants having to go to the tribunal. The hearing usually takes place in a mental health facility in a regular meeting room.
      * Since COVID-19, the tribunal has now conducted hearings by teleconference.
    - McDonald speaks of the importance of showing respect to the applicant, witnesses, family members, professionals, etc.
  + The tribunal affords each applicant an oral hearing that runs a couple of hours; after the hearing, oral reasons are rendered, and within two weeks, written reasons are provided.
    - The tribunal does not publish their decisions; it deals with very personal details of one's life that may be identifying, even if the applicant's name is not included.
  + Applicants have the benefit of the Mental Health Law Program, which can provide them with an advocate, and they also have the benefit of an interpreter if required.

## Constitutional Procedural Obligations

### The Charter

*Charter*, 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.

*Canadian Bill of Rights*, s. 2(e): …no law of Canada shall be construed or applied so as to 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.

#### Procedural Fairness and the Charter (Fox-Decent & Press)

* In addition to the duty of fairness that applies at common law to a vast array of public entities, a duty of fairness may also be owed under the Charter.
  + Procedural obligations owed under the Charter cannot be ousted by statute.
  + Section 7 is the primary source of procedural safeguards in the Charter; in *Singh*, the SCC affirmed that the principles of fundamental justice included procedural fairness.
    - To access procedural safeguards under s. 7, complainants must first establish that their "life, liberty, or security" interests are impaired by the relevant decision (*Carter*).
      * The right to life means one's right to be free of state conduct that increases the risk of death.
      * The right to liberty implies at least two elements: freedom from physical restraint and freedom to make fundamental life choices.
      * The right to security of the person has both a physical and a psychological component:
        + The physical component is engaged where there is a threat of physical harm.
        + The psychological component is engaged only where the state imposes (or threatens to impose) severe psychological harm.
    - Then, the complainant must establish that the impairment of their interests failed to accord with the principles of fundamental justice in that they were denied procedural fairness.
* A source of quasi-constitutional procedural obligations is the *Canadian Bill of Rights*, which provides procedural safeguards which cannot be overridden "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*" [s. 2].
  + Unlike the Charter, the *Bill of Rights* does not require that a complainant show that life, liberty, or security of the person is at stake to obtain the relevant procedural protection.

#### *Gough v Canada (National Parole Board)* (1990), [1991] 2 FC 117

Facts:

* Section 17(5) of the *Parole Regulations* authorizes the National Parole Board ("the Board") not to disclose to a paroled inmate information on which it is basing a decision when, in the Board's opinion, disclosure of the information could reasonably threaten the safety of individuals or be injurious to the conduct of lawful investigations or reviews.
* Gough was on a non-restrictive form of parole for 5 1/2 years. As a result of complaints to the Correctional Service Office involving allegations of sexual assault and drug use, his parole was revoked. The Board, relying on s. 17(5) of the *Parole Regulations*, never revealed at Gough's post-suspension hearing the details of the dates and places of the alleged incidents or the names of the victims. Gough applied to have the revocation quashed on the basis that it violated his s. 7 rights.
  + The Board argued that the public interest in non-disclosure (which promotes reports to Correctional Service officers without fear of reprisal) must be weighed against the individual's interest in having sufficient information to answer the case against him. It also argued that Gough enjoyed only a conditional liberty, and that this reduced right to liberty justifies the refusal by the Board to make the information in question available.

Issues and holding:

1. Did the administrative decision violate Gough's s. 7 rights? **YES**
2. If yes, is this infringement justified under s. 1? **NO**

Analysis:

* At both common law and under s. 7 of the Charter, the principles of fundamental justice require that an individual know the case against him in a decision-making process which leads to a diminution of his liberty.
  + This is essential not only to prevent abuses by people making false accusations, but also give the person who has been accused the assurance that he or she is not being dealt with arbitrarily or capriciously.
* That said, the requirements of fundamental justice operate on a spectrum; the content of such requirements vary with the circumstances of the case and, particularly, the extent of the accused's liberty interest.

Rationale: (Reed J)

1. The failure to advise Gough of the case against him violated his liberty interest in a manner that fails to accord with the principles of fundamental justice.
   * While the appellant's liberty interest is "conditional," in the sense that it can be revoked without the requirement to prove criminal offences beyond a reasonable doubt and without all the procedural guarantees which pertain in a court of law, his liberty interest was as close to that of a free individual as one can be in the correctional system.
   * Given the accused's liberty interest, he was entitled to sufficient detail respecting the allegations to enable him to respond intelligently thereto.
2. The Board has not established that the infringement on s. 7 is demonstrably justified in a free and democratic society.
   * The Board did not adduce specific evidence to demonstrate that either the circumstances of the claimant's case justified the limitation which had been imposed, or that the operation of a parole system which authorizes the Parole Board to refuse disclosure of information is justifiable under s. 1.
   * The Board did not give any good reason why an *in camera* hearing where counsel for Gough undertakes not to disclose any confidential information to his client would not be acceptable.

Notes:

* Reed J quashed the Board's decision and issued an order of *mandamus* requiring a new hearing by a differently constituted panel of the Board.
* The right to know is a fundamental participatory right; it involves some indication of what's at stake, the legal issues to be decided, and what information the decision-maker has received from other parties.
  + This ensures decision-makers can make better quality decisions and are not acting arbitrarily.

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

Facts:

* In 1991, Suresh applied for landed immigrant status. In 1995, the Solicitor General of Canada and the Minister of Citizenship and Immigration filed a certificate with the Federal Court under s. 40.1 of the *Immigration Act* ("the Act") alleging that Suresh was inadmissible to Canada on security grounds. The certificate was based on the opinion of CSIS that Suresh was a member of the Liberation Tigers of Tamil Eelam (LTTE). In 1997, the Federal Court upheld the certificate, finding it "reasonable" under s. 40.1(4)(d) of the Act based on the evidence available. A deportation hearing followed, and the adjudicator accepted that Suresh should be deported on grounds of his membership in a terrorist organization. In September 1997, the Minister notified Suresh that it was considering declaring him a danger to Canada under s. 53(1)(b) of the Act, which permits the Minister to deport a refugee even where their "life or freedom" would be threatened by the return. In response, Suresh submitted written arguments and documentary evidence, including reports indicating the incidence of torture, disappearances, and killings of suspected members of the LTTE. Immigration Officer Gautier considered the submissions and recommended that the Minister declare Suresh a danger to Canada. Suresh was not provided with Gautier's memo and was not given an opportunity to respond to it. In 1998, the Minister declared that Suresh was a danger to Canada and should be deported. Suresh applied to the FC for judicial review, alleging, *inter alia*, that the procedures under the Act, which did not require an oral hearing or an independent decision-maker, violated s. 7.

Issues and holding:

1. Did the procedures followed violate Suresh's right to life, liberty, or security of the person in a manner that is not in accordance with the principles of fundamental justice? **YES**
2. If yes, can the infringement be justified under s. 1? **NO**
   * The case should be remanded to the Minister for reconsideration in accordance with the proper procedures.

Analysis:

* It is appropriate to look to the factors discussed in *Baker* in determining not only whether the common law duty of fairness has been met, but *also in deciding whether the procedural safeguards provided satisfy the demands of s. 7*.
  + The common law rules of procedural fairness are basic tenets of the legal system, and they have evolved in response to the same values and objectives as s. 7 (Hogg).
  + In *Singh*, Wilson J recognized that the principles of fundamental justice demand, at a minimum, compliance with the common law requirements of procedural fairness.

Rationale: (The Court)

1. * Weighing the *Baker* factors in this case, the procedural protections required by s. 7 in this case do not require a court-like process, but they do require more than Suresh received.
     + The nature of the decision to deport bears *some* resemblance to judicial proceedings, and thus militates neither in favour of particularly strong, nor particularly weak, procedural safeguards.
       - While the decision is of a serious nature and made by an individual based on evaluating and weighing risks, it is also a decision to which discretion must attach.
     + The nature of the statutory scheme suggests the need for strong procedural safeguards.
       - Elsewhere in the Act, Parliament has provided for fair and systematic procedures for similar measures, which suggests the need for greater procedural protections under s. 53(1)(b).
         * There is a lack of parity between the extensive procedures set up under s. 40.1 of the Act and the lack of protections under s. 53(1)(b).
       - Further, s. 53(1)(b) provides no appeal procedure, which also demands greater protections.
     + The importance of the right affected militates in favour of heightened procedural protections.
       - The appellant’s interest in remaining in Canada is highly significant because of his status as a refugee and the risk of torture he may face on return to Sri Lanka as a member of the LTTE.
       - Deportation from Canada engages serious personal, financial, and emotional consequences.
     + The *Convention against Torture*, which Canada has ratified and which prohibits the deportation of persons to states where there are “substantial grounds” for believing that the person would be “in danger of being subjected to torture,” raises the need for added procedural safeguards.
       - Namely, it raises a duty to afford an opportunity to demonstrate and defend those grounds.
     + The choice of procedures made by the agency must be owed considerable deference.
       - The Minister is free under the statute to choose whatever procedures she wishes in making a s. 53(1)(b) decision.
       - The Minister must be allowed considerable discretion in evaluating security concerns.
   * The minimum procedural requirements demanded by the principles of fundamental justice, which the Minister failed to meet, are as follows:
     1. The refugee must be informed of the case to be met by providing the refugee with all the relevant information and advice she intends to rely on, including the memorandum from Mr. Gautier.
     2. The refugee must be given the opportunity to address that evidence in writing and present evidence showing that his/her continued presence in Canada will not be detrimental to Canada.
     3. The Minister must provide written reasons for his/her decision that articulate and rationally sustain the conclusion reached, subject to privilege or valid legal reasons for not disclosing detailed information.
        + These reasons must emanate from the person making the decision, rather than take the form of advice or suggestion, such as the memorandum of Mr. Gautier.
     + These protections need not be invoked in every case, as not every case of deportation of a refugee under s. 53(1)(b) will involve risk to an individual's fundamental right to be protected from torture.
2. The lack of basic procedural protections provided to Suresh cannot be justified by s. 1.
   * A valid purpose for excepting some Convention refugees from the protection of s. 53(1) does not justify the failure of the Minister to provide fair procedures where this exception involves a risk of torture upon deportation.

Notes: (from textbook sections by Evan Fox-Decent & Alexander Press)

* In *New Brunswick (Minister of Health and Community Services) v G(J)* [*G(J)*], Lamer CJ noted that s. 7 infringements are not easily saved under s. 1 because the rights protected by s. 7 are very significant and because rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit.
  + Signals the remarkable extent to which the right to a fair hearing has in fact been constitutionalized.
* In *Baker*, the court treated a recommendation as the reasons for decision. In *Suresh*, where s. 7 was in issue, the reasons for the decision had to be written by the person who takes the decision.
* While *Suresh* imposed a duty upon the Minister to provide reasons, the SCC in *Newfoundland and Labrador Nurses' Union*, rejected the proposition that the inadequacy of reasons is a stand-alone basis for quashing a decision.
  + The net result of this is that if reasons are provided at all, it seems that the duty has been complied with, and that the adequacy of those reasons will be assessed together with the outcome in the substantive review.
* In certain instances, where a decision impairs a s. 7 interest, the state must provide the individual with legal counsel.
  + In *G(J)*, New Brunswick sought to extend a custody order over a complainant's young children. The SCC found that a forced separation between the complainant and their child would have a serious effect on the complainant's psychological integrity and stigmatize her, engaging her right to security of the person. Given the seriousness of the interest engaged, the complexity of the proceedings, and the limited capacities of the complainant, Lamer CJ found that the principles of fundamental justice required that the Crown provide legal aid to the parent.
* In *Blencoe*, the SCC acknowledged the possibility that an undue delay in resolving a human rights complaint could infringe the security of the person by causing stigmatization and impairing the psychological integrity of the alleged wrongdoer.
  + However, the threshold for undue delay appears to be high. In *Blencoe*, it took the BC Human Rights Commission 30 months to conduct its investigation. Bastarache J held that the state did not infringe Blencoe's s. 7 interests.
  + *Wareham* reveals a more liberal approach to issues of delay and abuse of process. In it, the ONCA found that the cumulative effect of the various steps in the Ontario Disability Support Program eligibility procedure was to cause such delay and hardship for applicants that the overall procedure infringed the principles of fundamental justice.
* In *Charkaoui*, the applicants were detained pending deportation after the federal government issued security certificates against them because of their involvement with terrorist organizations. During the review of the certificates, *ex parte* and *in camera* (closed-door) hearings were held. The judge provided the applicants with a summary of the evidence, but not its sources or any other details. If the judge deemed the certificate reasonable, there was no opportunity for further review.
  + The SCC held that the proceedings engaged the applicants' liberty and security interests. Further, it held that the review procedure violated fundamental justice by denying the named person a fair hearing. It deprived the applicants of knowing the case to be met and of the benefit of raising legal objections to the evidence.
  + To remedy these shortcomings, the Court suggested that a special advocate (an independent, security-cleared lawyer) could be appointed to represent the named person in *in camera* proceedings.
    - Parliament has since amended the *IRPA* to provide for a special advocate, though they face restrictions on communicating with the person they are representing without court authorization; this may prevent them from obtaining explanations for facts or events presented as grounds for detention.
* In *Harkat*, the SCC considered the communication restrictions placed on the special advocates provided under the *IRPA*.
  + The Court held that the communication restrictions did not violate s. 7, largely because of the designated judge’s responsibility to ensure that the person named in the security certificate receives sufficient disclosure.
* In *Charkaoui II*, the SCC reviewed CSIS’s policy of destroying operational notes, including notes relied on to issue a security certificate against Charkaoui.
  + The Court held that the Crown must retain such documents for assessment by the reviewing judge.
  + What these cases fail to answer is why it is fine if foreign nationals and permanent residents are incarcerated without the protection of fundamental criminal law principles (e.g., rules of evidence), the requirement of proof beyond a reasonable doubt, the proscription against double jeopardy, and the presumption of innocence.

#### *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177

Facts:

* Section 2(1) of the *Immigration Act* ("the Act") defines a "Convention refugee" as a person who is unable or unwilling to avail themselves of the protection of their country of nationality for fear of persecution. Under s. 45 of the Act, where someone claims that they are a Convention refugee, they shall be examined under oath by an immigration officer respecting the claim and the transcript shall be sent to the Minister. The Minister shall, after seeking the advice of the Refugee Status Advisory Committee ("the Committee"), determine whether the person is a Convention refugee and provide written reasons for the decision.
  + Therefore, the Act, which clearly set out the procedure that was to occur under s. 45, ousted the common law as a source of procedural obligations.
* The applicants applied for Convention refugee status. The Minister, on the advice of the Committee, determined that none of the applicants was a Convention refugee. The applicants claimed that the failure of the Act to provide for an opportunity for the claimant to be heard other than his claim and a transcript of his examination infringe their constitutional rights.

Issue and holding:

* Do the procedural provisions in the Act violate constitutional guarantees of procedural protection? **YES**

Rationale: (Wilson J, Dickson CJ and Lamer J concurring)

* The procedural provisions in the Act violate the applicants' s. 7 Charter rights in a manner that is not in accordance with the principles of fundamental justice.
  + To deprive the applicants of the avenues open to them to escape from a fear of persecution impairs their right to security of the person, which encompasses freedom from the threat of physical punishment.
  + The procedures provided for the determination of refugee status do not accord refugee claimants fundamental justice in the adjudication of those claims.
    - *Where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing*; written transcripts are not well-suited for determinations of credibility.
    - Under the Act, a refugee claimant may never have the opportunity to make an effective challenge to the information or policies which underlie the Minister's decision to reject his claim.
* The procedures followed in this case are not saved by s. 1; administrative convenience cannot override the need to adhere to principles of fundamental justice.
  + Charter rights would be illusory if they could be ignored when it was administratively convenient.
  + The basis of the justification for the limitation of s. 7 rights must be more compelling than this.

Rationale: (Beetz J, Estey and McIntyre JJ concurring)

* The procedures followed for the determination of Convention refugee status conflict with s. 2(e) of the *Bill of Rights*.
  + The process for determining the applicants' refugee claims involves the determination of rights and obligations for which the appellants have the right to a fair hearing in accordance with the principles of fundamental justice.
  + That said, the appellants were not afforded a fair hearing in accordance with the principles of fundamental justice.
    - They were heard by the one official who had no say in the matter, an immigration officer; they were not heard by the Committee, who could advise the Minister, or the Minister himself, who could make the ultimate decision.

Notes:

* Neither Wilson J nor Beetz J believed that the principles of fundamental justice would impose an oral hearing in all cases.
  + Thus, fundamental justice does not always require full "natural justice" (i.e., court-like procedural protections).
* Beetz J noted that the most important factors in determining the procedural content of fundamental justice are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned.

### Duty to Consult

#### Remedies for Reconciliation? (Promislow & Mettalic)

* + In *Haida Nation*, the Supreme Court established a Crown obligation to consult and, if appropriate, accommodate Aboriginal rights prior to the proof or settlement of those rights.
    - This duty aims to preserve Aboriginal and treaty rights while the processes to determine, recognize, and respect these rights continue to play out.
    - The duty requires "meaningful consultation" and good faith efforts on the part of the Crown and Indigenous parties to seek compromise and move further down the path of reconciliation (*Haida Nation*).
      * It does not require Indigenous consent to exploit a resource, except in clear title cases (*Tsilhqot'in Nation*).
* The source of the duty is the "honour of the Crown," an unwritten constitutional principle (*Haida Nation*; *Little Salmon*).
  + The principle arises from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people (*Haida Nation*).
  + It means that the Crown cannot run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof (*Haida Nation*).
    - * + Unilaterally exploiting a resource during the process of proving an Aboriginal claim to that resource may deprive the Aboriginal claimants of the benefit of the resource, which is not honourable (*Haida Nation*).
  + The principle gives rise to other obligations as well, such as the purposive interpretation of treaties (*Badger*), honourable Crown conduct in the negotiation and implementation of treaty commitments, and diligent efforts to fulfill constitutional obligations (*MMF*).
    - * + In some ways, the honour of the Crown resembles the rule of law; it assumes that the state will honour its obligations absent clear and express intent to abrogate those obligations (*Wells v Newfoundland*).
  + The duty to consult conditions the legality of government decisions in a manner that parallels the duty of procedural fairness and the procedural obligations embedded in s. 7 of the Charter (*Haida Nation*; *Little Salmon*).
    - The Crown can satisfy the duty through existing regulatory frameworks; the Crown does not need to develop special consultation measures to address First Nation concerns (*Taku River*).

#### Section 35 Procedural Obligations (Glover)

* + The particulars of the duty to consult are assessed by asking two questions:
    1. Is the duty to consult and accommodate triggered?
       - The duty is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal or treaty right that might be adversely affected by Crown conduct (*Haida Nation*).
       - More specifically, for the duty to be triggered, three distinct elements must be satisfied:
         1. The Crown must have knowledge, real or constructive, of a right or a claim.

Real knowledge exists when a claim is filed in court or indicated in negotiations.

Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may be reasonably anticipated (*Carrier Sekani*).

* + - * 1. The Crown must be contemplating action that may cause an adverse effect on Aboriginal rights or title, or a claimed right or title, whether in the present or future.

Crown conduct which would trigger the duty is not restricted to the exercise of statutory powers or the royal prerogative; it includes regulatory processes carried out by independent administrative agencies through which the Crown acts (*Clyde River*).

* + - * 1. 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.

This requirement is to be interpreted generously, but the impact must be more than speculative and affect the future exercise of the right (*Carrier Sekani*).

* + 1. If yes, what does the duty entail?
       - This question must be asked in light of the aspiration of reconciliation and in accordance with the principles of flexibility and contextuality.
       - The Crown is obligated to act in good faith and ensure meaningful consultation with the intention of substantially addressing Aboriginal concerns, though it is not required to adopt the positions of Indigenous groups (*Haida Nation*).
         * This means discharging the obligation to consult *before* the impugned government action takes place (*Tsilhqot'in Nation*).
         * This means doing more than just listen; the Crown must take steps to understand the concerns of Indigenous peoples whose rights are at stake and make real efforts to address those concerns.
       - The extent of consultation required exists across a spectrum from limited to deep consultation depending on (1) the severity of the potential impact of the government action on the claimed Aboriginal or treaty right, and (2) the strength of the Indigenous community’s claim to the right (*Haida Nation*).
         * On the lighter end of the spectrum, the Crown may only have to give notice, disclose information, and discuss any issues raised in response to the notice (*Haida Nation*).
         * Deep consultation may entail that Indigenous peoples are provided the opportunity to make submissions and present evidence, formal participation in the decision-making process and funding to support that participation, an oral hearing, access to material submitted by other parties (which accounts for barriers created by language and access to technology), and written reasons that show that concerns of Indigenous peoples were considered and disclose the impact of those concerns on the outcome (*Clyde River*).
       - A duty to accommodate has come to be associated with the higher end of the spectrum.
         * The duty to accommodate calls on the Crown to take steps or change its intended path to avoid irreparable harm or minimize the effects of government action on Aboriginal or rights.
         * Where accommodation is required, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right and with other societal interests.
       - The duty requires that the Crown regularly reassess its duties in light of the ideals of honour and reconciliation as it moves through the decision-making process.
    2. Did the process administrative officials used satisfy their duty to consult?
* In *Little Salmon*, the SCC said there is no "bright line" between the duty to consult and the duty of procedural fairness.
  + - In determining the content of the duty and in discharging the obligations, courts have held that the Crown may have regard to the procedural safeguards of natural justice mandated by administrative law (*Haida Nation*).

#### *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69

Facts:

* + The Mikisew Cree First Nation signatories to Treaty 8 in 1899, through which First Nations surrendered to the Crown 840,000 km2 of land in exchange for reserves and some other benefits, including the:

*right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered… subject to such regulations as may from time to time be made by the Government…and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes*.

In 2000, the Crown approved a winter road, which was to run through the Mikisew First Nation Reserve. After the Mikisew protested, the road alignment was changed to track the boundary of the reserve. The modified road traversed Mikisew traplines and would adversely affect Mikisew hunting grounds, which are important for the subsistence and culture of the remote northern community. Consultation consisted of the Minister holding open house sessions and providing the Mikisew with standard information in the same from as that distributed to the general public. The announcement of the project on the Parks Canada website made no mention of any obligations to the Mikisew. The Mikisew applied to set aside the Minister's approval on the grounds that consultation was inadequate. The Minister held that since Treaty 8 entitled the Crown to unilaterally "take up" lands, the Crown's consultations in 1899 were sufficient to discharge the duty to consult.

Issues and holding:

* 1. Is the winter road proposed by the Minister a permissible purpose for "taking up" Treaty 8 lands? **YES**
  2. Can the Crown *unilaterally* "take up" Treaty 8 lands? **NO**
  3. Did consultations in 1899 at the signing of Treaty 8 discharge the Crown's duty to consult? **NO**
  4. Was the Crown under a present duty to consult the Mikisew? **YES**
  5. What was the extent of the Crown's duty to consult with the Mikisew? **Minor**
  6. Did the Crown discharge is duty to consult? **NO**

Rationale: (Binnie J)

* 1. It is obvious that the listed purposes of “settlement, mining, lumbering” and “trading” all require suitable transportation; the treaty does not spell out permissible “other purposes,” but the term should not be read restrictively.
  2. The "this is surrendered land and we can do with it what we like" approach adopted by the Minister ignores the mutual promises of Treaty 8 and is the antithesis of reconciliation and mutual respect.
  3. The treaty itself does not constitute the accommodation of the Mikisew's interests; treaty-making is an important stage in the long process of reconciliation, but it is only a stage.
     + Therefore, the Crown's right to take up lands is subject to the duty to consult.
  4. The impacts of the proposed road were clear, established, and demonstrably adverse to the continued existence of the Mikisew's hunting and trapping rights over the lands in question.
     + Thus, the Crown is under the obligation to inform itself about the impact its project would have on the Mikisew's exercise of their treaty hunting, fishing, and trapping rights, communicate its findings to the Mikisew, and attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns.
  5. Given that the proposed road is fairly minor and Mikisew treaty rights are expressly subject to the taking-up limitation, the content of the Crown's duty of consultation lies at the lower end of the spectrum.
     + The Crown was required to give the Mikisew information about the project and address what might be its potential adverse impact on the Mikisew's interests. It was also required to solicit and listen carefully to the Mikisew's concerns and attempt to minimize adverse impacts on its treaty rights.
  6. The Crown failed to show an intention of substantially addressing Aboriginal concerns through meaningful consultation.
     + There is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government’s attempt to meet their concerns, and to try to reach some mutually satisfactory solution; but, in this case, consultation never reached that stage.

Notes:

* + The Court quashed the Minister's decision, remitted it back to the Minister, and stayed the road project until adequate consultation could take place.
  + This case shows that the duty to consult and accommodate is engaged when the Crown contemplates conduct that will impair the exercise of a treaty right.

#### *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40

Facts:

* + Clyde River is a hamlet on Baffin Island. Most of its residents are Inuit and have relied on marine mammals for generations. Under the *Nunavut Land Claims Agreement*, the Inuit of Clyde River ceded all Aboriginal rights claims in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to hunt marine animals.
  + In May 2011, the respondents applied to the NEB for an authorization under s. 5(1)(b) of *Canada Oil and Gas Operations Act* (“*COGOA*”) to conduct offshore seismic testing for oil and gas resources in Nunavut, which could negatively affect marine life. Clyde River filed a petition against the seismic testing. The NEB launched an environmental assessment of the project. It held meetings in communities that would be affected by the testing, including Clyde River. At these meetings, the respondents were unable to offer satisfying answers to basic questions about the impacts of the testing. The respondents later purported to answer some of the questions in a 3,926 page document posted on the NEB website. In 2014, the NEB granted the authorization. It concluded that the seismic testing was unlikely to cause significant environmental effects. Clyde River applied to the FCA for judicial review of the NEB's decision to grant the authorization.

Issues and holding:

* 1. Can an NEB approval process trigger the duty to consult? **YES**
  2. Can the Crown rely on the NEB’s process to fulfill the duty to consult? **YES**
  3. Is the NEB authorized to assess the adequacy of the consultation prior to authorizing the testing? **YES**
  4. Was the consultation adequate in this case? **NO**

Analysis:

* + The duty to consult seeks to protect Aboriginal and treaty rights while furthering Crown–Indigenous reconciliation.
    - It is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct.
    - The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim and the seriousness of the potential impact on the right.
      * Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light.
    - Any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation may be quashed.
      * While judicial review may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable.
  + The ultimate responsibility for ensuring the adequacy of consultation remains with the Crown; however, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult, in whole or in part.
    - The substance of the duty does not change when a regulatory agency holds final decision-making authority.
    - Whether the Crown is capable of relying on steps undertaken by a regulatory agency *depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the circumstances*.
    - Where the regulatory process relied upon does not achieve adequate consultation, the Crown must take further measures to meet its duty (whether by filling gaps on a case-by-case basis or through legislative amendments).
      * This may require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement to carry out further consultation.
    - Where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying.
      * Guidance about the form of the consultation process should be provided to facilitate Indigenous peoples’ effective participation and permit them to raise concerns with the proposed form of the consultations.

Rationale: (Karakatsanis and Brown JJ)

* 1. The NEB's approval process triggered the duty to consult.
     + The NEB is neither "the Crown" nor an agent of the Crown — it operates independently of the Crown.
     + However, as a statutory body holding responsibility under the *COGOA*, the NEB acts on behalf of the Crown when making a decision on a project application.
       - Once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away; in this context, the NEB is the vehicle through which the Crown acts.
       - It does not matter whether the final decision maker on a resource project is Cabinet or the NEB; in either case, the decision constitutes Crown action that may trigger the duty to consult.
  2. The NEB has procedural powers necessary to implement consultation and remedial powers to accommodate affected Aboriginal claims; its processes can therefore be relied on by the Crown to fulfill the Crown's duty to consult.
     + Under *COGOA*, the NEB may conduct hearings, elicit information, require studies to be undertaken, impose preconditions for approval, conduct environmental assessments, and establish participant funding programs.
     + *COGOA* grants the NEB broad powers to accommodate Indigenous concerns where necessary; it can attach any conditions it sees fit to an authorization and can make such authorization contingent on their performance.
     + The NEB has also developed considerable institutional expertise in conducting consultations and assessing the environmental impacts of proposed projects.
  3. The NEB has broad powers to hear and determine all relevant matters of fact and law and there has been no withdrawal of the constitutional jurisdiction; hence, it is authorized to determine whether the Crown's duty to consult has been fulfilled.
  4. The consultation in this case failed to live up to the level of consultation required.
     + The level of consultation required in this case was deep, falling at the highest end of the spectrum.
       - The appellants have *established* treaty rights to hunt and harvest marine mammals.
       - These treaty rights are extremely important to the appellants for their economic, cultural, and spiritual well-being.
         * Marine mammals provide a nutritious source of food in a place where food is otherwise prohibitively expensive; it also provides a source of traditional clothing.
         * Hunting marine mammals and sharing the "country food" produced from them is a cultural tradition in Inuit communities and is fundamental to being Inuk.
       - The risks posed by the proposed testing to these treaty rights are also high.
         * The project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes.
     + In light of the high level of consultation required, the consultation that occurred here fell short in several respects.
       - The inquiry was misdirected; no consideration was given in the NEB’s environmental assessment to the impact of the proposed testing on the appellants' rights to hunt marine mammals.
         * While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, the consultative inquiry is not properly into environmental effects *per se*, but rather into the impact on the *right*.
       - It was not made clear to the appellants that the Crown was relying on NEB processes to fulfill its duty.
         * The significance of the process was not adequately explained to them.
       - The process provided by the NEB did not fulfill the Crown’s duty to conduct deep consultation.
         * Limited opportunities for participation and consultation were made available to the appellants.

There were no oral hearings.

Although the appellants submitted scientific evidence to the NEB, this was done without participant funding.

Although the appellants had the opportunity to question the proponents about the project during NEB meetings, they were unable to answer basic questions.

While the respondents did respond to the questions of the appellants, they did so in an inaccessible 3,926-page document submitted to the NEB.

This was posted online, but the slow Internet speed in Nunavut meant that it was too large to open.

Only a fraction of this document was translated into Inuktitut.

* + - * + The concessions made by the proponents were insignificant in light of the potential impairment of the Inuit's treaty rights.

Notes:

* Promislow and Mettalic note that, under *Clyde River*, the Crown must correct any flaws in the consultation process but need not change legislative schemes to ensure a process designed with the duty to consult in mind.
  + - There is a preference for policy solutions over legislative frameworks that institutionalize Indigenous interests.

#### *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34

Background:

* + In 2016, the Governor in Council approved the Trans Mountain Pipeline Expansion (TMEX) Project pursuant to s. 54 of the *National Energy Board Act* ("*NEB Act*"). Several applicants applied for judicial review of the decision. The FCA agreed that, in approving the project, the Crown failed to fulfill its duty to consult.
  + After the matter was remitted to the Governor in Council, Crown officials did not contact Coldwater First Nation for 6 months. On June 7, 2019, the Chief of Coldwater got an email from a government lawyer advising him of a new approach to determining where the pipeline route would be located. The Crown gave the Chief five days (three business days) to respond to the proposal. However, the Crown provided few details about the proposed process.

Facts:

* + On or around June 18, 2019, the Governor in Council announced that it had approved the TMEX project for a second time, concluding that the flaws identified in the FCA decision were adequately remedied by the renewed consultation process. It provided its reasons in the form of an explanatory note. Several parties sought to challenge the second approval on the grounds that the Crown again failed to meaningfully discharge its duty to consult. Several applicants were granted leave to appeal to the FCA on the duty to consult issue. The existence and depth of the duty to consult were not in issue. All parties agreed that deep consultation was required.

Issues and holding:

* 1. What is the appropriate standard of review? **Reasonableness**
  2. From the date of the FCA decision to the date of the Governor in Council’s decision, was the consultation adequate to address the shortcomings in the earlier consultation process? **YES**

Analysis:

* The cases on the duty to consult point out that consultation need not be perfect; the Governor in Council was entitled to give state actors leeway in assessing whether their efforts complied with the duty.
* To satisfy the duty to consult, consultation must be "reasonable"; the Crown must grapple with the real concerns of Indigenous applicants with an open mind to explore possible accommodation of those concerns in good faith.
  + The controlling question as to what constitutes "reasonable" or "meaningful" consultation is what is required to effect reconciliation, which will vary with the circumstances.
    - Reconciliation connotes a relationship where Indigenous and non-Indigenous peoples work to advance our joint welfare with mutual respect and understanding, recognizing that while majorities will sometimes prevail, concerns will be considered and rejected only after informed reflection and for good reason.
  + Reconciliation does not demand that the Indigenous interests prevail; it does not dictate any substantive outcome.
    - Similarly, while Indigenous peoples can assert their opposition to a project, they cannot hamstring discussions to frustrate the Crown's consultation efforts, as this would amount to an effective veto.

Rationale: (The Court)

* 1. In *Vavilov*, the SCC held that the presumptive standard of review for statutory judicial review is reasonableness; none of the exceptions to reasonableness review identified in *Vavilov* apply.
     + In *Vavilov*, the SCC held that questions as to “the scope of Aboriginal and treaty rights under s. 35 … require a final and determinate answer from the courts” and, thus, must be reviewed for correctness. But, the scope of the duty to consult under section 35 is not in issue.
  2. The Governor in Council's decision is acceptable and defensible in light of both the outcome reached on the facts and the law and the justification offered in support.
     + It showed a genuine effort to ascertain the key concerns of the applicants, consider them, engage in two-way communication, and sometimes agreeing to accommodations, all consistent with the goal of reconciliation.
       - The NEB reinitiated a meaningful two-way dialogue with affected Indigenous groups, with a focus on responding to and remedying the concerns raised by the FCA decision.
       - The Governor in Council considered the evidence before it and offered an explanation for its decision that shows a chain of reasoning progressing from reasonable views of the evidence before it to plausible conclusions well within the bounds of the governing legislation.
         * The explanation also demonstrated that it understood the legal content of the duty to consult and that it understood the shortcomings in the earlier process.
       - The consultation process invited the participation of 129 Indigenous groups potentially impacted by the Project and, in the end, more than 120 either support it or do not oppose it.
         * The Governor in Council was entitled to take this broad consensus into account in concluding that the Project was in the public interest.
     + The process used by the Governor in Council was anything but a rubber-stamping exercise. While the applicants were not satisfied about the outcome, that is not what the law requires.

Notes:

* + The background details regarding the email exchange between the Crown and the Chief of Coldwater First Nation, which suggest a rushed and unsatisfying consultation process between the parties, were not featured in the FCA decision, even though they are relevant for the adequacy of the consultation procedure.
  + There were concerns about this case about bias, seeing as how the Governor in Council was the one making the approval decision even though the government owned the pipeline and therefore had a financial stake in the outcome.
  + The FCA used the *Vavilov* framework and a reasonableness standard; this is controversial because:
    - The SCC in *Vavilov* does not mention the duty to consult. All it tells us is that when courts are making decisions about substance on constitutional issues, then courts should be using a correctness standard.
      * It is not certain whether the adequacy of consultation processes are constitutional issues. Coldwater sought leave to appeal to the SCC to get an answer on this, but their application was denied.
    - *Vavilov* applies to judicial review of the *substance* of administrative decisions, but the FCA was not asked to review the substance of this decision; the duty to consult arguments centre on the process used in consultation.
  + Consultation matters not just because the inherent value of fairness dictates that Indigenous groups should be heard, but also because the nature of the consultation process will likely impact the substance of the decision.

#### Saanich Law and the TMX (Yalkatte Clifford)

* + Yalkatte Clifford (a member of the Tsawout First Nation, which is one of the five bands that compromise the W̱SÁNEĆ nation) testified before the NEB as it assessed the TMX Project, basing his testimony on W̱SÁNEĆ law.
    - He did so because, in W̱SÁNEĆ law, they have a positive obligation to protect their homelands.
    - He opened with a prayer song, meant to shape the way we relate to each other, to open hearts and minds, and to honour and respect the relationships that are all around us.
    - He invited the NEB panel to listen with an open heart and open mind to understand Indigenous laws including the obligations they create, the worldview from which they flow, and their relevance and legitimacy on these lands.
      * In the worldview from which they flow, the Creator created islands by throwing ancestors of the W̱SÁNEĆ into the ocean. The Creator turned to the islands and said "You will look after the W̱SÁNEĆ people," and then looked to the W̱SÁNEĆ and said "You, too, will look after your Relatives of the Deep." This creates a reciprocal relationship of care between the W̱SÁNEĆ and the islands that includes protecting the islands from harm by others.
      * Further, the way W̱SÁNEĆ see water is informed by their belief that the first W̱SÁNEĆ man came to Earth in the form of rain and helped form the world, carving lakes and rivers. This orientation structures W̱SÁNEĆ law; it is why they see water as sacred and needing to be protected.
      * Yalkatte Clifford explains that short-sighted thinking (burning fossil fuels, depleting salmon stocks, etc.) is foreign in W̱SÁNEĆ law.
  + From a W̱SÁNEĆ perspective, the NEB cannot provide a meaningful and just determination of the issues when divorced from any type of intimate relationship with the lands, water, and other beings over which it claims to preside.
    - *Note*: in my view, Yalkatte Clifford’s reflections suggest that, in duty to consult cases, Indigenous laws (and the worldview that informs them) should be a factual and legal constraint on administrators, and that any departure from these perspectives should require reasoned justification.

#### Indigenous-Led Assessment Processes (Morales)

* + To date, most Canadian Indigenous groups have not had a meaningful voice in impact assessment; even more rarely has any Indigenous group been able to exercise decision-making on major development projects.
    - When Indigenous groups are included in regulatory processes, other parties severely limit their involvement, requesting only baseline traditional knowledge and traditional use information, without any meaningful input into or control over the process or project itself.
      * As a result, Indigenous culture, spirituality, laws, rights, and title have not been considered in the Crown-led and proponent-driven environmental assessment processes.
  + Morales argues that the UNDRIP principle of free, prior, and informed consent (FPIC), which derives from the right of self-determination, can meaningfully inform the duty to consult and the environmental assessment processes in Canada.
    - FPIC is required whenever state action pertains to lands that Indigenous people occupy or otherwise use, whether or not they hold title to those lands.
    - The principle of FPIC requires that the consultation procedure itself is a product of consensus.
    - States must ensure that Indigenous peoples have the financial, technical, and other assistance they need to address the imbalance of power.
    - The consultation procedure must fully respect Indigenous peoples' own institutions of decision-making.
    - Indigenous participants must be provided with fully and objective information about all aspects of the project that will affect them, including the impact of the project on their individual lives and the environment.
  + Morales cites the example of the Squamish Nation Process which, through the Squamish Nation Environmental Assessment Agreement, the Squamish Nation has imposed 13 conditions on Woodfibre LNG Limited (WLNG).
    - Under the agreement, Squamish Nation has significant decision-making powers specifically related to the choice of cooling technology and the approval of management plans.
    - The agreement is legally binding and includes remedies to ensure that WLNG complies with its commitments.
    - If WLNG does not meet its commitments, the agreement empowers the Squamish Nation to revoke the environmental certificate, terminate the agreement, or enforce compliance through the dispute resolution process under the agreement, which includes going to court.
  + The Tsleil-Waututh Nation similarly issued its own environmental assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal (TMEX).
    - As part of their assessment, the Tsleil-Waututh commissioned five expert reports, concluding that the TMEX proposal does not represent the best use of Tsleil-Waututh territory and its water, land, air and resources to satisfy the needs of current and future generations.
  + Indigenous-led assessment processes put Indigenous laws and norms at the centre of the process and uphold the right to self-determination of First Nations.
    - While they will not resolve every conflict between Indigenous peoples, government, and industry proponents, they do offer a way forward that respects Indigenous laws, international law, and Canadian common law.

# Bias/Independence

* Bias connects to fairness, because it is not fair to allow parties to appear before decision-makers that have an attitudinal disposition towards the outcome.
  + However, bias also bears directly on the substance of a decision, which is why it is often discussed *between* procedural fairness and substantive review.

## Reasonable Apprehension of Bias Test (Jacobs)

* The rule against bias serves to prevent decision-makers from making decisions based on irrelevant factors.
  + The rule is informed by central principles of natural justice: *nemo judex in sua causa* (no one can be the judge in his/her own cause) and *audi alteram partem* (the decision-maker must hear the other side).
* To have a decision quashed, the question is *whether an informed person, viewing the matter realistically, and having thought the matter through, would conclude that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly* (*Committee for Justice*).
  + Whether bias *actually* exists in a decision-making context is not the question.
  + A real likelihood that bias exists must be demonstrated; mere suspicion of bias is insufficient.
  + This test is used to assess both individual bias and institutional bias.
  + What will give rise to a RAB in one administrative context may not do so in another; the nature and context of the decision-making process determines what constitutes impartiality.
    - e.g., in *Committee for Justice*, the chair of a panel of the NEB's previous involvement in decisions leading up to a party's application was enough to suggest that he might be biased in his adjudicative capacity.
    - e.g., in *Imperial Oil Ltd v Quebec (Minister of the Environment)*, the Minister's prior involvement in decontaminating a site did not cause him to be in a conflict of interest when he later exercised statutory authority to order a company to remedy the contamination. His work did not require him to act in an adjudicative capacity; his work was of a political nature and in the public interest.
    - Determining the required degree of independence and impartiality is a matter of balancing several factors including the nature of the decision, the statutory scheme, and the agency’s choice of procedure.
  + It may be a formidable task to successfully establish a RAB; the common law maintains a strong presumption of impartiality for adjudicators and protects deliberative secrecy.

## Individual Bias

* The case law has established four situations in which a RAB may arise vis-à-vis an individual decision-maker:
  1. A pecuniary or material interest in the outcome of the matter being decided.
     1. Pecuniary interest
        + Would the decision-maker stand to gain money by deciding a certain way?
          - Pecuniary interest may be held not to give rise to a RAB if the decision-maker's gain is no more than that of an average person in a widespread group of benefit recipients.
        + Only direct and certain financial interest can constitute pecuniary bias.
          - e.g., in *Energy Probe*, Energy Probe contested a decision to renew Ontario Hydro's license on the grounds that a part-time member of the Atomic Energy Control Board was also the president of a company that supplied cables to nuclear power plants and had previously been a director and shareholder in Ontario Hydro. The FCA held that a RAB was not established. The member did not currently have a contract with Ontario Hydro, he was not a shareholder at the time of the hearings, and there was no certainty that he would sell cables to Ontario Hydro in the future.
        + Statutory authorization may allow for indirect pecuniary benefit in contexts such as the regulation of egg marketing (*Burnbrae Farms*) and for some self-regulated discipline committees (*Pearlman*).
     2. Non-pecuniary material interest
        + Besides pecuniary interest, other forms of material interest have also led to disqualification.
          - e.g., the decision of a band council to evict a band member so that a larger family could move in was set aside because an intended resident of the home was a councillors.
     + *Note*: statutes may allow decision-makers (e.g., municipal councillors) to have financial interests in the matters they are deciding upon.
  2. Personal relationships with those involved in the dispute (e.g., parties, counsel, witnesses).
     + Key factors to consider are whether the relationship presents a significant and current enough to pose a threat to impartiality.
       - e.g., in *In re Pinochet*, Amnesty International was an intervener arguing in support of extraditing former Chilean dictator Augusto Pinochet. The matter was quashed for RAB because a member of the HL was a director of Amnesty International and his wife also did work for them.
     + There are several contextual factors that may diminish an apprehension of bias:
       - The amount of time that has passed between the member’s active association with the person involved in the dispute and the member’s appointment to the tribunal.
       - Necessity—which sometimes arises in smaller jurisdictions where members of a very small bar may be required to fill legislated roles.
       - Other conceptions of fairness.
         * e.g., some Indigenous communities consider decisions fair when rendered by non-strangers whom they know and trust.
         * e.g., in labour law, connections are common between practicing lawyers and labour- and management-side members of labour arbitration panels. However, nominees are chosen *because* of their sympathy to the interests of one side out of a legislative desire to have representative experts populate decision-making panels.
     + Connections with others on social media can be problematic when they suggest a personal relationship that may influence the adjudicator in that person’s favour.
  3. Prior involvement in or knowledge about the matter in dispute.
     + In deciding whether a RAB exists because of a decision-maker’s prior involvement with a matter, tribunals and courts will focus on the nature and extent of the previous involvement.
       - e.g., in *Wewaykum Indian Band v Canada*, which involved a property dispute involving two First Nations Bands, the bands sought to set aside the SCC's unanimous judgment on the matter on the grounds that Binnie J, as associate deputy minister of justice from 1982 to 1986, had been involved in developing the Crown's litigation strategy against the bands. The SCC held that since Binnie J was never counsel of record and played no active role in the dispute after the claim was filed, the allegations of bias were unsubstantiated.
     + Issues surrounding prior knowledge may arise when a tribunal adjudicator is asked to hear an appeal or a subsequent proceeding of a matter that they originally decided.
  4. An attitudinal predisposition toward an outcome.
     + Predispositions giving rise to a reasonable apprehension of bias have been gleaned from decision-makers’ comments and attitudes in both the course of the hearing and outside the proceedings.
       - During the hearing, antagonism toward litigants and irrelevant or vexatious comments have all given rise to a RAB.
       - A RAB may also be based on an adjudicator or other member of the tribunal taking an unauthorized role as an advocate in the proceeding before it.
         * The effect of interventions by a tribunal on the appearance of fairness must be assessed in relation to the unique facts and circumstances of the hearing (*Cengarle*).
       - *Ex parte* communications have also given rise to a RAB where they show a pre-disposition toward an outcome in a specific case.
         * Decisions made by a decision-maker in previous unrelated cases will generally not give rise to a RAB.
         * Central to whether comments expressed outside the hearing room about an on-going case ground a RAB is whether the comments show a mind so closed that any submission by the parties will be futile.
       - It is not yet settled whether public advocacy, such as academic publications, which take a specific view on an issue or area of law, gives rise to a RAB.
     + The degree to which a court will accept a prior, fixed view on the part of a decision-maker is determined by the nature and function of the decision-making process.
       - e.g., in *Old St Boniface*, the SCC said that when dealing with bodies that conduct policy functions (e.g., municipal councils), a decision-maker can only be disqualified for bias if it can be established *in fact* that a councillor had such a closed mind on a matter that any representations made would be futile (the closed-minded test).
       - e.g., in *Gitxaala Nation*, the Gitxaala Nation challenged a decision by the Governor in Council to approve a pipeline on the grounds that the previous Minister of Natural Resources said that the project was in the public interest. The FCA rejected this argument, taking into account that the work of a Minister involves balancing many different, and often conflicting considerations, over highly charged political issues.
     + Online comments can be problematic when they suggest a predisposition toward a party or cause; posts that do not reveal a state of mind of the adjudicator are permissible.
       - e.g., in *Hirsch v Ontario (Environment and Climate Change)*, a member of the Environmental Review Tribunal, who was also a professor, had posted a link regarding the Ontario government's climate change plan on her Twitter account. In response to an allegation of a RAB, the tribunal held that the post was informational, and did not express an opinion of the adjudicator.

### *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

Facts:

* Ms. Baker's application to remain in Canada on H&C grounds was denied. Upon her request, she was provided with notes relied on by the immigration officer who made the ultimate decision in her case. The notes suggested that Baker would be a strain on the social system, emphasizing the number of children she has, her training as a domestic worker, and her mental illness. The notes also showed frustration about how someone like Baker could remain in Canada for so long. Ms. Baker argued that the notes of Officer Lorenz showed a reasonable apprehension of bias.

Issue and holding:

* Was there a reasonable apprehension of bias in the making of this decision? **YES**

Analysis:

* Decisions must be made free from a reasonable apprehension of bias (RAB), by an impartial decision-maker; this applies to all those who play a significant role in the making of decisions.
  + There will be a RAB if a reasonable, informed person would think that, on a balance of probabilities, the decision-maker, whether consciously or unconsciously, would not decide fairly.
  + The standards for reasonable apprehension may vary depending on the context and the type of function performed by the administrative decision-maker involved.

Rationale: (L'Heureux-Dubé J)

* The well-informed member of the community would perceive bias when reading Officer Lorenz's comments.
  + His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes.
    - He seemed to rely on her mental illness, her training as a domestic worker, and the fact that she has several children to conclude that she would be a strain on our social welfare system.
      * This conclusion was reached despite a psychiatrist's letter stating that, with treatment, Ms. Baker could return to being a productive member of society.
    - It would also appear that his own frustration with the "system" interfered with his ability to consider impartially whether the appellant's admission should be facilitated.
  + Because they relate to people of diverse backgrounds, immigration decisions demand a recognition of diversity, an understanding of others, and an openness to difference by those making them.

### *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623

Facts:

* In 1985, Andy Wells was appointed as a Commissioner to the Board of Commissioners of Public Utilities ("the Board"). Earlier, while a municipal councillor, Wells acted as an advocate for consumers' rights. When appointed to the Board, he said that he would be a champion of consumers' rights.
* Acting in accordance with the *Public Utilities Act*, the Board commissioned an independent accounting firm to provide an analysis of the costs and accounts of Newfoundland Telephone Company between 1981 and 1987. In light of the investigation, the Board commenced a public hearing on December 19, 1988 before five commissioners, including Wells. Before the hearing and in the period before the Board issued its final decision, Wells made comments to the press about how the pay and benefits package of Newfoundland Telephone's executives were extravagant, and that rate-payers should not have to finance them. Then, on August 3, 1989, the Board issued an order disallowing the cost of an enhanced pension plan for senior executive officers of Newfoundland Telephone as an expense for rate-making purposes.

Issues and holding:

1. What was the standard for bias at each state of the decision-making process? *(see below)*
2. Did Wells' statements demonstrate bias? **YES**
3. What is the appropriate remedy? **Voiding the decision**

Analysis:

* The composition of boards can, and often should, reflect all aspects of society; there should not be undue concern that a board which draws its membership from a wide spectrum will act unfairly.
  + There is no reason why consumer advocates should not be board members; even if they have spoken out about practices which they consider unfair to the consumer, they can be expected to strive for fairness and a just result.
  + Boards need not be limited solely to experts or to bureaucrats.
* Boards that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts; i.e., the conduct of its members should not create a RAB with regard to their decision.
  + Adjudicative decision-makers apply abstract legal principles to resolve disputes between parties.
* On the other hand, the standard that applies to boards that deal with matters of policy is more lenient; i.e., in order to disqualify board 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*.
  + For these bodies, a strict application of the RAB standard might undermine the very role which has been entrusted to them by the legislature.
  + A member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing.
    - In the end, commissioners must base their decision on the evidence before them; although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.

Rationale: (Cory J)

1. At the investigative stage, the "closed mind" test was applicable, but once matters proceeded to a hearing, a higher standard applied: members had to conduct themselves so that there could be no RAB.
   * *Note*: investigative work is does not attract the highest degree of procedural fairness because the impact on the individual is not binding (Jacobs).
   * The RAB test need not be as strict for the Board as it would be for a board acting in an adjudicative capacity; in determining whether the charges were reasonable, the Board was dealing not with legal questions but policy questions.
2. The statements made prior to the hearing (in the investigative stage) did not indicate that the councillor had a closed mind. The statements at issue, when taken together, indicated not only a reasonable apprehension of bias but also a closed mind on the commissioner's part on the subject.
   * For example, Wells stated, "No justification whatsoever to expect the consumers of telephone services in this Province to be paying the full cost of salary levels for these people," and "Very clearly, very clearly there is a significant level of executive overcompensation and very clearly the board has to deal with that."
3. The 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 (*Cardinal*).
   * The right to a fair hearing must be regarded as an independent, unqualified right justified by the procedural justice which any person affected by an administrative decision is entitled to have (*Cardinal*).

Notes:

* If any bias is sensed, the applicant will be expected to raise the issue with the decision-maker right away.
  + This allows the decision-maker to address the issue immediately, which more efficient than applying for judicial review after-the-fact.
* Filing a judicial review application to confront the bias of a decision-maker should be done *after* the decision is rendered.
  + A court may refuse to hear a judicial review application made before the decision is reached on the grounds that the application is pre-mature.
* The RAB will shift depending on what stage of the hearing the decision-maker is in.

### *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170

Facts:

* In light of the recommendations of the Finance Committee, the Community Committee, and the Planning and Community Services Committee, the Winnipeg City Council determined that the land in Old St. Boniface be rezoned to permit the erection of two condo towers. Prior to public hearings before the Community Committee on the application for rezoning, a municipal councillor had been personally involved in the planning of the proposed development and had appeared as advocate in support of the application at private meetings of the Finance Committee. An election intervened during the period between public meetings in which the councillor took part and he was re-elected, in part because of his views on development. At the public meetings, he did not disclose his earlier involvement with the application.

Issue and holding:

* Is the municipal councillor disqualified by reason of bias from participating in the proceedings of the Community Committee? **NO**

Analysis:

* The rules which require a tribunal to maintain an open mind and be free of bias, actual or perceived, are part of the *audi alteram partem* principle which applies to decision-makers.
* It makes sense to distinguish between pre-judgment and personal interest.
  + A party alleging pre-judgment in this context must establish that there is a pre-judgment of the matter to the extent that any representations at variance with the view would be futile.
    - The legislature could not have intended that the RAB standard would apply to municipal councillors with the same force as with tribunals whose character more closely resembles those of a court—some degree of pre-judgment is inherent in the role of a councillor.
      * Councillors will have fought an election in which the matter to be decided upon may have been debated and on which the would-be councillors may have taken a stand.
      * Numerous committees are involved in the enactment of bylaws at which councillors are expected to vote before being called upon to hear representations and decide the question.
      * In the preparation of a development, a municipal councillor is often involved in assisting parties supporting and opposing the development with respect to their presentations.
  + A party alleging personal interest must establish not only that the decision-maker has an interest beyond that which they share with other citizens, but also that a reasonably well-informed person would conclude that the interest might influence their decision.
    - There is nothing inherent in the hybrid functions of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal interest.

Rationale: (Sopinka J)

* In this case, no personal interest exists or was found and it is purely a pre-judgment case.
* The councillor had not pre-judged the case to the extent that he was disqualified.
  + The fact that he had appeared before the Finance Committee to speak on behalf of the developer does not necessarily lead to the conclusion that his mind could not be changed.

## Tribunal Independence

* Independence helps prevent apprehensions of bias.

### Development of the Law of Tribunal Independence (Jacobs)

* Judicial independence is a means of ensuring that judges act free from any actual or apparent influence from any outsider, be it government, pressure groups, an individual, or even another judge (*Beauregard*).
  + The purpose of judicial independence is to boost public confidence in the justice system, which helps ensure that people accept the law as binding.
  + From *Valente*, three structural conditions have been identified as necessary to guarantee judicial independence:
    1. **Security of tenure**: the state cannot remove a judge for rendering decisions that do not meet its approval.
       - s. 99 of *the Constitution Act, 1867* provides that judges shall hold office during good behaviour or until they reach the age of 75.
    2. **Financial security**: judges are guaranteed a fixed salary under s. 100 of the *Constitution Act, 1867*, and they are paid well enough to keep them from seeking alternative means of supplementing their income.
       - Compensation commissions have been set up to facilitate negotiations in judges' pay and pay-related matters, such as pensions.
    3. **Administrative control**: concerned with making sure judges are not put in compromising situations where they make decisions to protect their own employment and interests, rather than on their legal judgment.
       - Deals with the manner in which the affairs of the court are administered—from budgetary allocations for buildings and equipment to the assignment of cases.
         * e.g., in the federal courts, issues regarding government allocation of resources are addressed through the use of a negotiating office called the Federal Commissioner of Judicial Affairs, which ensures that judges are not soliciting funds from the government.

#### From Judicial Independence to Tribunal Independence (Jacobs)

* Over time, the criteria guaranteeing independence of the judiciary have served as a foundation from which courts have determined whether administrative tribunals are also sufficiently independent.
* The test for adequate tribunal independence has developed to be *whether a reasonable, well-informed person having thought the matter through would conclude that an administrative decision-maker is sufficiently free of factors that could interfere with his or her ability to make impartial judgments*.
  + The standard for tribunal independence is not as strict as it is for judicial independence; the guarantee of tribunal independence is applied in a flexible way to account for the functions performed by the tribunal under scrutiny.
    - The requisite level of institutional independence (i.e., security of tenure, financial security, and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office (*Matsqui*).
    - *Note*: administrative officials are often chosen by the legislature to achieve policy goals.
      * They might be appointed because they have different types of expertise.
      * They might be appointed because thy have connections to different professional communities.
      * They might have a role in actually creating government policy, which suggests that their main aim should be to satisfy the legislature's goals.
  + *Note*: the *Valente* factors are only used where the governing statute has gaps in setting out how decision-makers are appointed, how they are to be paid, the relationships they are to have with the executive branch, and so on.
    - If a statutory regime clearly sets out a close relationship between an administrative decision-maker and members of the executive, then that statute trumps the common law, and that close relationship will not be used to quash a decision made by that decision-maker.

#### Parliamentary Supremacy vs. Warding Off Interference (Jacobs)

* In *Ocean Port*, 2001 SCC 52, BC's Liquor Control and Licensing Branch suspended Ocean Port's liquor license for two-days. The Liquor Appeal Board held a *de novo* hearing and confirmed the suspension. On appeal to the BCCA, Ocean Port argued that the Liquor Appeal Board lacked sufficient independence, because the *Liquor Control and Licensing Act* indicated that members of the Board were to serve "at the pleasure of the Lieutenant Governor in Council."
  + Ocean Port argued that the constitutional principle of judicial independence should extend to tribunals.
  + The SCC held that *there is no freestanding constitutional guarantee of administrative tribunal independence*.
    - It noted that tribunals are created for the purpose of implementing the policies of the executive branch; for this reason, the degree of their independence is a question most appropriately determined by Parliament or legislature.
      * Constitutional guarantees of independence serve primarily to protect the judiciary from executive interference, but they cannot protect tribunals from the branch of government of which they are a part.
    - It held that tribunal independence was a common law principle of natural justice, and as such, it could be ousted by express statutory language or necessary statutory implication.
* In *McKenzie*, a residential tenancy arbitrator whose appointment was rescinded mid-term argued that the unwritten constitutional guarantees of independence should be expanded to apply to residential tenancy arbitrators because of the highly adjudicative and court-like nature of residential tenancy tribunals.
  + The BCSC agreed with the arbitrator's argument, holding that judicial independence should apply to residential tenancy arbitrators.
    - The court noted that the unwritten constitutional principle of judicial independence identified in the *PEI Reference* was extended to justices of the peace in *Ell v Alberta* (SCC) and to deputy judges in *Ontario Deputy Judges Association* (ONCA).
    - The court also noted that the jurisdiction of residential tenancy arbitrators had been taken directly from the courts of civil jurisdiction; as such, the same matter would have been decided by decision-makers endowed with greater independence if landlord and tenant cases had not been carved out of the courts.
  + Cases after *McKenzie*, however, (e.g., *Saskatchewan Federation of Labour* (SKCA)) have declined to apply *McKenzie*, opting instead to adhere to the more restrictive interpretation put forward in *Ocean Port*.
    - Thus, one wonders what implications have flowed from the interpretation put forward by *McKenzie*.

### *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3

Facts:

* In 1988, amendments to the Indian Act enabled Indian bands to establish their own bylaws for levying taxes against real property on their reserve lands. Pursuant to these amendments, the appellant Indian bands developed taxation and assessment bylaws in 1992. Under the bylaws, the appellants sought to tax Canadian Pacific (CP) in respect of a strip of land running through the reserves over which CP had laid railway tracks. The appellant Matsqui band also sought to tax the second respondent, Unitel Communications, which had laid fibreoptic cables on the CP land. The respondents requested that the assessments be set aside. They argued that, under s. 83(1) of the *Indian Act*, the bands only had the authority to tax land which is "in the reserve," and that the land in question is vested in CP. The appellants brought a motion asking that the respondents' application for judicial review be struck out.

Procedural history:

* Joyal J of the FC held that the assessment bylaws provided for an adequate alternative remedy, namely, a right to an appeal procedure established by the appellant bands. The respondents appealed, holding that the statutory appeal procedures were not adequate alternatives to judicial review *because they gave rise to a RAB*. The two sources of bias alleged were:
  1. Members of the bands may be appointed to the appeal tribunals; they will enjoy the benefits of taxes spent on the reserve and thus have a personal interest in the highest possible assessments (i.e., they are not *impartial*).
  2. Non-Indian members will be concerned about rendering decisions adverse to the interests of the band because they do not have security of tenure or financial security (i.e., they are not *independent*).

Issue and holding:

* Is there a RAB in the appeal tribunals which would evidence the inadequacy of the statutory appeal procedures? **NO**

Analysis: (Lamer CJ)

* Principles of natural justice apply to the bands' tribunals as they would apply to any tribunal performing similar functions.
  + The fact that the tribunals have been constituted within the context of a federal policy promoting Aboriginal self-government does not, in itself, dilute natural justice.
* Judicial independence is a long-standing principle of our constitutional law which is also part of the rules of natural justice.
  + The test for institutional independence is whether a reasonable and right-minded person, viewing the whole procedure as set out in the assessment by-laws, would have a reasonable apprehension that the members of the appeal tribunals are not independent.
  + The principles for judicial independence apply in the case of a tribunal functioning as an adjudicative body, but a strict application of the principles for judicial independence is not always warranted.
    - The test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue; the requisite level of institutional independence depends on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.

Dissent: (Lamer CJ … Cory J concurring)

* While there is no indication of impartiality, the appeal tribunals were not sufficiently independent.
  + Being a member of the band and having a stake in the economic health of the community did not make tribunal members partial against the respondents; any such allegation is speculative.
    - It is appropriate to have band members sit on appeal tribunals to reflect community interests.
    - A pecuniary interest that members of a tribunal might be alleged to have, such as an interest in increasing taxes to maximize band revenue, is far too attenuated to give rise to a RAB at a structural level.
  + However, even a flexible application of the *Valente* principles leads to the inevitable conclusion that a reasonable and right-minded person, viewing the whole procedure in the assessment by-laws, would have a reasonable apprehension that members of the appeal tribunals are not sufficiently independent.
    1. There is a complete absence of financial security for members of the tribunals.
    2. Security of tenure is either completely absent or ambiguous and therefore inadequate.
    3. The tribunals, whose members are appointed by the Band Chiefs and Councils, are asked to adjudicate a dispute pitting the interests of the bands against outside interests.
       - Effectively, the tribunal members must determine the interests of the very people (the bands) to whom they owe their appointments.
    - The allegations surrounding institutional independence were not premature.
      * Institutional independence focuses on an objective assessment of the *legal structure* of the tribunals, of which the bylaws are conclusive evidence; it is separate from the question of institutional independence in fact.

Majority: (Sopinka J … L'Heureux-Dubé, Gonthier, and Iacobucci JJ concurring)

* The lack of institutional independence cited by Lamer CJ should not be a ground for finding that Joyal J erred in exercising his discretion to refuse judicial review.
  + The conditions of institutional independence must consider their operational context; this context includes that the band taxation scheme was part of a *nascent* attempt to foster Aboriginal self-government.
  + Before concluding that the bylaws in question deprive the band taxation tribunals of institutional independence, *they should be interpreted in the context of the fullest knowledge of how they are applied in practice*.
    - Case law has tended to consider the institutional bias question after the tribunal has been appointed and/or actually rendered judgment.
    - The reasonable person, before deciding whether they have a RAB, should have the benefit of knowing how the tribunal operates in actual practice.
      * It is not safe to form conclusions as to the workings of the institution on the wording of the bylaws alone.
    - i.e., the test should be deferred until the tribunals had actually been up and running in order to have the benefit of knowing how they operated in practice (Jacobs).

Notes:

* As Lamer CJ noted, the respondents were not alleging actual bias, but a RAB flowing from the *institutional* *structure* of the tax assessment appeal tribunals. Further, they were not questioning the individual independence of members of the tribunal, but rather that *institutional* independence of the tribunal.
* Lamer CJ states that the impartiality inquiry focuses on what the members of a tribunal think, while the independence inquiry focuses on an objective assessment of the actual structure of the tribunal.
* As Lamer CJ argued, it was appropriate for Joyal J to consider that the purpose of the tax assessment scheme was to further the aims of self-government in determining how his discretion should be exercised.

## Institutional Bias

* Institutional bias describes a situation where there is institutional pressure on individual decision-makers such that a reasonable person would conclude that they cannot decide freely.

### Perceptions of Institutional Bias (Jacobs)

* Consistency in the decisions of administrative bodies forms a non-binding guideline that tribunal users can refer to in deciding how to manage their affairs in the sector regulated by the tribunal, promoting trust in the administrative state.
* The methods used by tribunals to promote consistency in their decision-making have given rise to allegations of bias, as they appear to infringe on the adjudicative independence of individual tribunal decision-makers.
  + In a trilogy of cases (*IWA v Consolidated-Bathurst Packaging Ltd*, *Tremblay v Quebec (Commission des affaires sociales)*, and *Ellis-Don Ltd v Ontario (Labour Relations Board)*), the SCC set out guidelines that tribunals should follow so members can collaborate to promote consistency of outcome without compromising the adjudicative independence of any one decision-maker to the parties.

### *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282

Facts:

* A three-member panel of the Ontario Labour Relations Board ("the Board") was tasked with deciding whether the appellant failed to bargain in good faith by not disclosing that it planned to close a plant during negotiations for a collective agreement. The main issue was whether the Board’s 1980 *Westinghouse* decision regarding good faith negotiations had to be reconsidered. This issue had important implications for labour law in Ontario. As such, a full board meeting was called to discuss the policy implications of its decision when it was still in the draft stage. The parties were neither notified of nor invited to participate in this meeting. The Board panel ultimately decided that the test from *Westinghouse* should be confirmed (with a dissenting opinion) and that the appellant failed to bargain in good faith. When counsel for the appellant became aware of the full board meeting, they filed an application for a reconsideration of the initial decision on the basis that the practice of holding full board meetings is illegal.

Issue and holding:

* Given the importance of the policy issue at stake and the necessity of maintaining a high degree of quality and coherence in Board decisions, do the rules of natural justice allow a full board meeting to take place? **YES**

Analysis:

* The rules of natural justice must consider the institutional constraints faced by a tribunal.
  + In any case, the requirements of natural justice will depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth.

Rationale: (Gonthier J)

* Given the context in which it operates, it is unrealistic to expect the Board to abide strictly by the rules applicable to courts.
  + Given the Board's large caseload and the practical issues involved, it would not be reasonable to expect that, every time an important policy issue arises, the Board would hold a hearing in front of the full board at which the parties could attend and answer the arguments made at the meeting.
  + The Board's enabling legislation confers on it a wide jurisdiction to solve labour disputes, as it is best able, in light of its experience, to provide satisfactory solutions.
    - Full board meetings are important for this objective, as they allow each panel to benefit from the acquired experience of all members.
    - The rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members.
  + The Board is justified in taking steps to minimize conflicting results in similar cases.
    - The outcome of disputes should not depend on the identity of the panelists; this result would be difficult to reconcile with the notion of equality before the law as a corollary of the rule of law.
    - The fact that Board decisions are protected by a privative clause under the *Labour Relations Act* makes it even more imperative to take measures to avoid conflicting results.
* The full board meeting would not be perceived by an informed person viewing the matter realistically and practically — and having thought the matter through — as having breached his right to a decision reached by an independent tribunal thereby infringing this principle of natural justice.
  + Discussions with colleagues do not, in themselves, infringe panel members' capacity to decide the issues independently in accordance with his own conscience and opinions.
    - The issue is not whether full board meetings can cause panel members to change their minds but whether this practice impinges on panel members’ abilities to decide according to their conscience and opinions.
      * That said, the danger that full board meetings may fetter the judicial independence of panel members is not sufficiently present to give rise to a RAB or lack of independence.
        + A full board meeting is not imposed; it is called at the request of the hearing panel or any of its members.
        + The meeting is carefully designed to foster discussion without trying to verify whether a consensus has been reached: no minutes are kept, no votes are taken, attendance is voluntary and presence at the full board meeting is not recorded.
        + The vote split suggests no lack of independence.
  + The assessment of factual issues, which is a delicate task, should only be performed by the adjudicators who had heard all of the evidence; policy issues, however, must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties.
    - Since these issues involve the consideration of statutes, past decisions, and perceived social needs, the impact of a policy decision by the Board is, to a certain extent, independent from the immediate interests of the parties even though it has an effect on the outcome of the complaint.
  + The parties must be informed of any new ground on which they have not made any representations; in such a case, the parties must be given a reasonable opportunity to respond.
    - But this is not a case where a new policy undisclosed or unknown to the parties was introduced or applied; there is no evidence that anything other than the test set out in *Westinghouse* was discussed, which the parties had every opportunity to address.

Ratio:

* To protect adjudicative independence, full board meetings cannot (1) impinge on the ability of panel members to decide according to their conscience and opinions, (2) assess factual issues, which should only be done by those who have heard all the evidence, or (3) raise any new issue on which the parties have not made any representations.

Notes: (with commentary by Jacobs)

* In *Tremblay*, decided a few years after *Consolidated-Bathurst*, the SCC clarified that the imposition of consultation meetings by a member of the board who was not on the panel could amount to an inappropriate constraint.
  + In that case, the consultation process was optional in theory, but the practice at the tribunal made consultation compulsory when a decision was contrary to previous decisions.
    - Since the tribunal could refer a matter before another member for plenary discussion, a decision-maker may feel as though they are not free to refuse to submit a question to the consultation process.
  + At the plenary meetings, the tribunal took attendance, voted by a show of hands, kept minutes of the meeting, and aimed to reach consensus; these aspects helped create an appearance of systemic pressure.
* The use of *lead cases* is another practice used to achieve consistency, develop policy, and address efficiency, but that might infringe decision-makers’ abilities to come to their own conclusions.
  + In *Geza*, the IRB instituted a procedure through which it attempted to select one of several similar refugee claims to create a full evidentiary record for all. The purpose was to enable the board to have one case in which there were informed findings of fact and a relatively thorough analysis of the relevant legal issues. The initiative was attempting to deal efficiently with a large influx of Hungarian Roma. The claim chosen was to be representative of the issues that typically recurred when the Hungarian Roma were seeking refugee status.
    - The FCA held that a reasonable person would conclude that the lead case initiative was designed not only to generate consistency but also to reduce the number of positive decisions that might be rendered in favour of the 15,000 Roma claimants and to deter future claims.
* In *Communications, Energy and Paperworkers Union of Canada, Local 707 v The Alberta Labour Relations Board*, the ALRB was consulted for its knowledge of the field by the executive branch to help the government implement a new policy.
  + As a result, the board faced a legal battle in which it was said to lack independence and impartiality with respect to any matter it had to deal with touching on the labour law policy.
* Where a tribunal performs a multiplicity of functions, a common complaint centres on the perception that one aspect of the tribunal’s work has had an inappropriate interference with another aspect of its work, causing a RAB.
  + Overlapping functions are generally not a problem so long as sanctioned by a statute.
  + In *Currie v Edmonton Remand Centre*, the court found institutional bias from the overlapping functions of the prison guards and the disciplinary board members.
    - In that case, disciplinary hearings were used to determine whether prisoners had committed breaches of acceptable standards of conduct within the prison and the appropriate punishment. However, those who were responsible for maintaining order in the institution were also placed on the disciplinary panels.
    - The ABQB held that there was a breach of s. 7 of the Charter, finding that none of the traditional guarantees of independence existed in this case.

### *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142

Facts:

* The *Cowessess Indian Reserve Elections Act* ("the Act"), along with other non-codified customs and traditions, governs elections for Band Chief and Councillors of the Cowessess Band. In April 1992, an election was held in which the applicant, Ken Sparvier, was the successful candidate. One of the unsuccessful candidates, Terry Lavallée, appealed the election to an Appeal Tribunal established pursuant to the Act on the grounds that two of the five candidates in the election (not Sparvier or himself) were non-residents and were therefore ineligible candidates. The Appeal Tribunal conducted a hearing on May 5, 1992, and decided to call a new election which was held on May 22, 1992. In the second election Terry Lavallée was the successful candidate. The applicant filed an application for judicial review of the Appeal Tribunal decision in the Federal Court. He alleged that Clifford Lerat, a member of the Appeal Tribunal who did not participate in the vote, made disparaging remarks about him. He also alleged that another member of the tribunal rented farmland to Terry Lavallée. These factors, in his view, created a RAB.

Issue and holding:

* Was there a RAB in the decision of the Appeal Tribunal? **YES**

Analysis:

* While autonomous processes for electing band governments in accordance with Band custom are important, members of bands are entitled to fairness in procedures of tribunals that affect them; what fairness requires is an unbiased tribunal.
  + The test for bias is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would hold a RAB.
  + The application of the test for RAB will depend on the nature of the tribunal in question.
    - Tribunals that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts; i.e., the conduct of the members of the board should be such that there could be no RAB with regard to their decision.
    - On the other hand, when dealing with tribunals with popularly elected members or that deal with matters of policy, the standard will be much more lenient.
      * To disqualify members of such a tribunal, a challenging party must establish that there has been a pre-judgement of the matter to such an extent that any representations to the contrary would be futile.
* If a person disqualified by bias is present at a hearing and sits or retires with the tribunal, the decision may be set aside notwithstanding that that person took no part in the decision and did not actually influence it.

Rationale: (Rothstein J)

* The function of the Appeal Tribunal is adjudicative; its duty is to decide appeals based on contraventions of the Act or illegal or corrupt practices on the part of candidates, and its members are not popularly elected.
  + As such, a more rigorous rather than a less strict application of the RAB test is desirable.
* Lerat's remarks demonstrated more than a RAB; they demonstrated that he was actually biased.
  + That he did not participate in the vote does not resolve the matter; *a RAB in one member of a tribunal is sufficient to disqualify the whole tribunal, even though that member merely sat at the hearing without taking an active role in either it or subsequent deliberations*.

*Obiter dicta*:

* Therefore, it is unnecessary to decide the allegation by the applicant that the presence of Muriel Lavallée on the Appeal Tribunal also provided a RAB. However, it should be noted that it is not realistic to expect members of the Appeal Tribunal to be completely without social, family, or business contacts with a candidate in an election.
  + If a rigorous test for RAB were applied, the membership of tribunals in small bands, would constantly be challenged because of connections that a member of the tribunal had with the potential candidates.
    - While these difficulties could be avoided by selecting for the Appeal Tribunal people outside the of the Reservation, this could be unsuitable in the context of an autonomous Indian band.

# Substantive Review

## Foundations

### Introduction (Macklin)

* There are overlapping categories of judicial review on substantive grounds:
  1. *Questions of law*: usually concern the interpretation of statutory provisions or common law rules that can be abstracted from the factual context (e.g., is a bicycle a "vehicle" under the *Traffic Safety Act*?)
  2. *Questions of fact*: relate to the evidence in a particular case and the inferences made from it.
     + e.g., “the applicant is not a full-time university student because they work part-time” would be a faulty inference from the facts.
  3. *Questions of mixed fact/law*: relate to the application of facts to law.
     + e.g., determining whether a particular individual's condition renders them incapable of consenting to treatment, which requires considering the individual's condition and applying it to the law of consent.
  4. *Questions of discretion*: questions concerning a grant of authority to choose from a range of options.
* Where a court is called upon to review the interpretation or application of a statutory provision by an administrative decision-maker, the inquiry proceeds in two steps:
  1. Should the court defer? (i.e., What is the applicable standard of review? Deference, or no deference?)
     + If the court decides it ought to defer, it will only set aside the original decision if it is unreasonable.
       - Courts will usually (but not always) determine that the decision made by the tribunal assigned primary responsibility to do so under the statute merits deference from the reviewing court.
     + If a court decides it need not defer, then it will judge the administrative decision on the basis of its *correctness* and will set it aside if it disagrees with the decision-maker.
  2. If yes, how does the court defer?
* Deference describes a situation where courts temper the exercise of their supervisory authority and adopt a respectful attitude to those over whom they exercise that power.
  + It connotes an attitude of humility or modesty, wherein a court regards the knowledge and experience of a tribunal as warranting respect.
    - It recognizes that weight should be attached to the fact that the administrative actor was delegated the initial task by the legislator and/or may be better qualified than a court to perform the task.
  + It involves a method of scrutiny that is distinct from simply asking what outcome it would have reached had it been charged with making the original decision.
  + The weight attached to a decision will not necessarily prevail over other considerations, but it counts in an important way.

### The Prequel: Privative Clauses (Macklin)

* In the 20th century, ideological conflict between the expanding administrative state and the courts led governments to withdraw certain tasks from courts and allocate them to specialized agencies.
  + Reasons included efficiency concerns, the lack of judicial expertise, and a concern that conservative courts were using judicial review to thwart the progressive and redistributive aims of social programs and policies.
    - e.g., in labour law, traditional common law doctrines of freedom of contract, protection of private property, privity, and prohibition on restraints of trade thwarted legislation to protect workers.
* Privative clauses were thus designed to prevent courts from interfering with substantive outcomes of administrative action.
  + Privative clauses had judges conflicted between their commitments to the rule of law and legislative supremacy.
    - One the one hand, the rule of law relies on the right of citizens to access courts to ensure that decision-makers don't exceed or abuse their powers.
    - On the other hand, parliamentary supremacy dictates that the legislator enacts the law, and the court must interpret and apply the law in accordance with the legislature's intent.
* Judges resisted privative clauses by retaining their authority to police administrative actions that exceed their jurisdiction.
  + The reasoning is that a purported decision that the Board had no jurisdiction to make is not a *genuine* decision, but rather a nullity; so, it is not protected by a privative clause.
    - According to this line of reasoning, a privative clause only protects decisions made within jurisdiction.
    - The SCC in *Crevier* (1981) endowed the right to judicial review with constitutional protection under s. 96.
  + Jurisdiction refers to statutory authority over the parties, the subject matter, and the remedy.
  + When courts determined they were dealing with a jurisdictional question, the standard was correctness.
    - Therefore, either the issue was a jurisdictional question, and the courts dealt with it like they would an issue on appeal, or it was virtually immunized from judicial oversight.
* The courts deployed two techniques to designate an issue as jurisdictional, and thus warranting strict judicial scrutiny:
  1. "Preliminary” or “collateral” question doctrine: characterized as jurisdictional those questions that were preliminary to the question ultimately at issue (e.g., to what premises the *Residential Tenancies Act* applies).
  2. “Asking the wrong question” doctrine: characterized as jurisdictional those questions that the tribunal was not entitled to answer.
  + Commentators derided these doctrines for failing to construct a coherent, principled means of distinguishing reviewable questions from those insulated by a privative clause.
    - Courts inclined to disagree with a decision could, with little effort, transform any issue into a jurisdictional one by characterizing it as a preliminary question or depicting the tribunal as asking the wrong question.
* The SCC's decision in *CUPE v NB Liquor Commission* represents an attempt to break with the past.

#### CUPE v NB Liquor Corporation, [1979] 2 SCR 227

Facts:

* The Canadian Union of Public Employees (CUPE), a public sector union, went on strike. Section 102(3)(a) of New Brunswick’s *Public Service Labour Relations Act* ("the Act") provided that: “the employer shall not replace the striking employees or fill their position with any other employee.” The union complained that the employer was filling striking employees' positions with management personnel contrary to s. 102(3)(a). The employer argued that management personnel were not "other employee[s]" as defined by the Act, and therefore s. 102(3)(a) could not be breached by using management personnel to replace employees on strike. The employer also argued that the objective of s. 102(3)(a) was just to preserve the positions of the employees once the strike was over.

Procedural history:

* The NB Public Service Labour Relations Board ("the Board") upheld the union's complaint and ordered the employer to stop using management personnel to do work ordinarily performed by bargaining unit employees. This decision was protected by a full privative clause. The employer sought judicial review of the Board's order against it.

Issues and holding:

* Should the Board's decision with respect to the interpretation of s. 102(3) be overturned? **NO**

Analysis:

* Courts should not be alert to brand as jurisdictional, and subject to broader curial review, that which may be doubtfully so.

Rationale: (Dickson J)

* The interpretation of s. 102(3) lies logically at the heart of the jurisdiction confided to the Board.
  + The issue then becomes whether the board did something which takes the exercise of its powers outside the protection of the privative or preclusive clause.
* While a jurisdictional question should be assessed on a standard of “correctness,” questions *within* jurisdiction should be evaluated against a standard of “patent unreasonableness” (i.e., a court should only interfere if an interpretation of the provision cannot be rationally supported by the relevant legislation).
  + There are several justifications for deference in the review of questions within a board's jurisdiction:
    - Courts should recognize and respect the fact that the legislature has given these specialized decision-makers primary responsibility for implementing their statutory mandate.
    - Administrative decision-makers are often chosen because of their expertise and may better understand suited to the interpretive task than the generalist judge.
      * They may understand the consequences of different interpretations of their home statute.
    - Because the provision in dispute is ambiguous, no single interpretation can lay claim to being “correct.”

Notes: (with commentary by Macklin)

* This decision replaced the old way of doing things; the court signalled that it would review not only jurisdictional questions, but questions that fell within the jurisdiction of a decision-making body.
  + The decision also introduced the very deferential standard of "patent unreasonableness," which applied whenever a court was reviewing a question within the decision-maker's jurisdiction.
* Dickson J articulated a new vision in which courts are not the sole guardians of the rule of law but are rather in partnership with administrative actors in a joint project of furthering the rule of law in the administrative state.
  + His decision recognized that administrators are specialized bodies that possess a legislative mandate to apply their expertise and experience to matters that they may be better suited to address than an “ordinary court.”

### The Advance: Expertise (Macklin)

* Over the next 40 years, the jurisprudence shifted away from relying on privative clauses as the trigger for deference; instead, the *expertise* of decision-makers relative to courts to being the dominant factor in determining whether a court should defer to an agency's decision.
  + The determination of whether a court should defer came to turn on a balancing of multiple factors that was meant to reveal who enjoyed greater relative expertise.
  + Privative clauses were demoted from a prerequisite to deference to one of a several considerations.
* In *Bibeault* (1988), the SCC tried to develop a "pragmatic and functional" approach to distinguishing a jurisdictional question (subject to correctness) and those falling within a tribunal's jurisdiction (subject to patent unreasonableness).
  + For Beetz J, the question was not whether a question was preliminary or collateral, but whether the legislator *intended* the question to be within the jurisdiction conferred on the tribunal.
* In *Pezim* (1994), the SCC made the question of "should the court defer" one to be asked not only where statutes contain privative clauses, but also where statutes leave the option of judicial review or even provide a right of appeal to courts.
  + Iacobucci J stated that the central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the tribunal considering its role and the existence of a privative clause.
* In *Southam* (1997), the SCC recognized the "reasonableness *simpliciter*" standard, which sits between correctness and patent unreasonableness; this was likely done because relative expertise does not map easily onto a dichotomy.
  + The Court explained that an unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination.
    - If a decision looks okay at a distance, it is reasonable, even if a more careful examination reveals flaws.
* In *Pushpanathan* (1998), the SCC summarized the factors to be considered in determining the right standard of review.
  + The Court reformulated *Bibeault*’s pragmatic and functional question “Did the legislator intend this to be within the tribunal’s jurisdiction?” into “Did the legislator intend this question to attract judicial deference?”
  + The Court organized the factors relevant to discerning this legislative intent into four categories: (1) privative clause, (2) expertise (3) purpose of the act as a whole and of the provision in particular, and (4) nature of the problem (question of law, fact, or fact/law).
    - These can be organized into two ingredients:
      1. The legislature's pronouncements about judicial supervision (e.g., privative clause).
      2. The reviewing court’s assessment of the agency’s relative expertise.
    - Under this approach, the presence of a privative clause weighed in favour of curial deference, but never played a determinative role.
    - Regarding expertise, the Court sought to evaluate it by: (1) characterizing the expertise of the tribunal, (2) considering the court's expertise relative to it, and (3) identifying the nature of the specific issue before the decision-maker relative to this expertise.
      * Where the tribunal has “broad relative expertise,” the court would show considerable deference.
  + Engaging in a weighing of numerous factors in order to determine the applicable standard of review (akin to the *Baker* approach to procedural fairness) was very unpredictable.

#### Assessing Expertise (Macklin)

* Bodies that deal with economic, financial, or technical matters seem to sit at the apex of the court’s estimation of expertise.
  + e.g., in *Corn Growers*, L’Heureux-Dubé J said that courts may not be as well-equipped as administrators in dealing with issues of labour relations, telecommunications, financial markets, and international economic relations.
* Courts have resisted deferring to human rights tribunals, as its tasks that so closely resemble those of a court.
* Surprisingly, courts have deferred to the expertise of professional discipline committees composed of lawyers and judges.
  + In *Ryan*, the Court explained that practising lawyers may be more intimately acquainted with professional standards in the everyday practice of law than judges who no longer take part in the solicitor–client relationship.
    - It also accepted that the layperson on the committee was in a better position to understand how particular forms of conduct and choice of sanctions would affect the public’s perception of the profession.
* Bodies staffed by elected officials have proven problematic subjects for the evaluation of expertise.
  + In *Chamberlain v Surrey School District No 36*, the SCC recognized that an elected school board was expert in balancing the interests of different groups and acknowledged that, as locally elected representatives, the board is better placed to understand community concerns than the court.
    - However, the decision had a human rights dimension in which the SCC believed that courts are more expert than administrative bodies.

### *Dunsmuir v New Brunswick*, 2008 SCC 9

Background:

* Commentators complained about the impracticability, unpredictability, and confusion generated by three standards of review and the so-called "pragmatic and functional approach."

Facts:

* Dunsmuir was employed by the NB Department of Justice. In August 2004, the employer decided that Dunsmuir was not right for the job and terminated his employment. The employer did not allege cause and gave Dunsmuir four months' pay in lieu of notice. Dunsmuir commenced a grievance process under the *Public Service Labour Relations Act* ("the Act"), claiming that he was owed a duty of fairness prior to termination and that the length of the notice period was inadequate. His grievance was denied by the employer. He then referred the grievance to adjudication under the Act.

Procedural history:

* The adjudicator held that he *could* determine whether Dunsmuir was discharged for cause, but went on to find that dismissal was, on the facts, not for cause. NB applied for judicial review of the adjudicator's decision.

Issue and holding:

* What was the appropriate standard of review for the question of law concerning the adjudicator's authority to inquire into the reasons for dismissal? **Reasonableness**

Analysis:

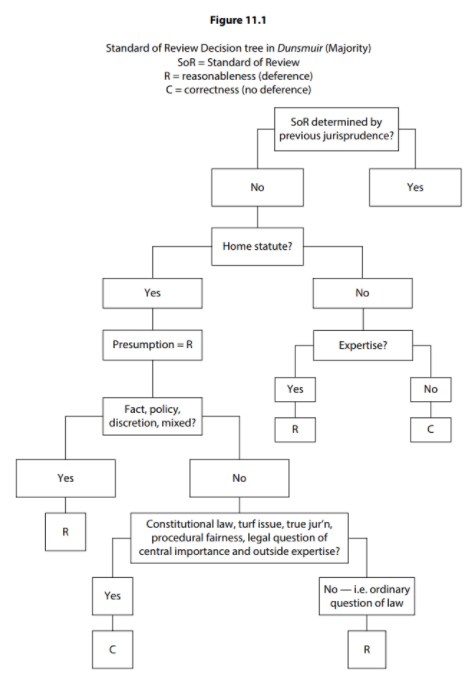
* Judicial review seeks to address an underlying tension between the rule of law and legislative supremacy.
  + The rule of law demands that all exercises of public authority find their source in law; a decision-maker may not exercise authority not specifically assigned to him or her.
  + Legislative supremacy demands that the legislature be able to create various administrative bodies and endow them with broad powers.
* The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.
  + The operation of three standards of review has not been without difficulties or criticism.
    - It is difficult to distinguish between reasonableness *simpliciter* and patent unreasonableness.
      * Irrationality either exists or does not exist; there cannot be differing shades of irrationality.
    - Applying patent unreasonableness may require parties to accept an irrational decision just because its irrationality is not clear enough; it is inconsistent with the rule of law to retain an irrational decision.
  + The two variants of reasonableness review should be collapsed into a single form of "reasonableness" review, resulting in a system comprising two standards: *correctness* and *reasonableness*.
    - Reasonableness is a deferential standard that describes decisions that falls within a range of possible, acceptable outcomes which employ a line of reasoning that is justified, transparent, and intelligible and which are defensible in respect of the facts and the law.
      * Deference in the context of the reasonableness standard implies that courts will give due consideration to the determinations of decision-makers. It recognizes that, in many instances, those who implement complex administrative schemes have a considerable degree of expertise or sensitivity to the imperatives and nuances of the legislative regime.
    - Correctness is a standard that involves no deference to the decision-maker's reasoning process.
      * A correctness 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.
* The standard of review analysis proceeds in two steps:
  1. Courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.
  2. If not, courts must proceed to an analysis of the factors to identify the proper standard of review.
     + Deference will normally result where a tribunal is interpreting its home statute or statutes closely connected to is function, with which it will have particular familiarity.
       - Deference may also be warranted where an administrator has developed particular expertise in applying a general common law rule in a specific statutory context.
     + The existence of a privative clause gives rise to a strong indication of reasonableness review.
       - However, the existence of a privative clause is not determinative; neither Parliament nor any legislature can completely remove the courts’ power to review the actions of administrators.
     + 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 legal and factual issues are intertwined and cannot be readily separated.
     + A standard of correctness would apply to:
       1. 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.
          - Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers.
          - *Note*: even if a question is considered to be of central importance, but it falls within the specialized expertise of the decision-maker, then the exception may not apply (Macklin).
       2. Constitutional questions, which involve the interpretation of the supreme law of Canada (e.g., questions regarding the division of powers between Parliament and the provinces).
       3. Questions regarding the jurisdictional lines between two or more specialized tribunals.
       4. "True" questions of jurisdiction (i.e., those where a tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter).
          - *Note*: but, in *Alberta Teachers' Association*, the SCC admitted that they wouldn't even know how to recognize such a question; Binnie J even suggested getting rid of the idea.

Rationale: (Bastarache and LeBel JJ)

* The Act contained a full privative clause stating that "every order, award, direction, decision, declaration, or ruling of … an adjudicator … shall not be … reviewed in any court"; this creates a strong indication that reasonableness review will apply.
* The SCC has recognized the relative expertise of labour arbitrators in the interpretation of collective agreements and counselled that the review of their decisions should be approached with deference.
* The adjudicator was interpreting his enabling statute, and he could be presumed to hold relative expertise in the interpretation of that statute; this also invites a reasonableness standard of review.
* The purpose of the Act is to provide a timely and binding settlement of disputes; this implies reasonableness review.
* The nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator; this also suggests that reasonableness should apply.

Notes: (with commentary by Macklin)

* In *Dunsmuir*, the SCC sought to simplify the decision about when to defer and to provide guidance on how to defer; it did two things to streamline the choice of standard of review (Macklin):
  1. It reverted back from two standards of deference (i.e., patent unreasonableness and reasonableness *simpliciter*) to a single deferential standard of reasonableness.
  2. It reformulated the method for selecting the standard of review from a contextual balancing of factors to a "decision tree" approach; the dominant rendition of this decision true is as follows:



* Under the "pragmatic and functional" approach, relative expertise was *the* thing that the test sought to determine; in *Dunsmuir*, expertise became the dominant presumption.
  + A few years later, in *Edmonton East*, the SCC held that decision-makers were deemed to possess the expertise to fulfill the statutory mandate delegated to it by the legislature. In other words, expertise became *irrebuttable*.
* *Dunsmuir* did not cure substantive review; there remained much confusion around the application of reasonableness.
  + Where reasons did not display a line of reasoning that was justified, transparent, and rational, a court could look behind them to the record to find a defensible basis for the outcome.
    - This led some to accuse judges of illegitimately retrofitting poorly reasoned decisions with judicially-crafted justifications of the outcome.
  + In some cases, critics complained of judicial abdication: judges using reasonableness as a cover for inadequate judicial scrutiny for poor administrative decisions.
  + In other cases, critics alleged that while courts claimed to apply a reasonableness standard, they actually applied a correctness standard that disregarded the decision-maker's analysis (i.e., a "disguised correctness" standard).

### *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2

Facts:

* Catalyst Paper operates a paper mill in the District of North Cowichan on the southeastern shore of Vancouver Island. In response to rapid population growth, and in an attempt to avoid unacceptable tax increases on residents, the District kept residential property taxes low and increased the relative tax rate on Catalyst's property. As such, the ratio between residential property and major industrial property tax rates was about 1:20, which is dramatically higher than the 1:3.4 ratio once prescribed by regulation in BC. This upset Catalyst. They were paying a disproportionate share of taxes, obtained little in return (as they had their own sewer and water systems), and were losing money. Catalyst did get the District to reduce tax rates on major industrial properties, but the gradual approach was too slow. It sought judicial review of the District's taxation bylaws. It agreed that the standard of review was reasonableness but argued that the bylaws were unreasonable.

Issue and holding:

* Does the bylaw fall within a range of possible reasonable outcomes? **YES**

Analysis:

* It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law; the corollary is that courts may prohibit exercises of state power that fall outside the scope of what the legislature contemplated.
  + It is assumed that the legislature does not intend delegated power to be exercised unreasonably or, in some cases, incorrectly.
* A court conducting substantive review of the exercise of delegated powers must first determine the appropriate standard of review: *reasonableness* or *correctness*.
  + If the standard is reasonableness, the court requires that the decision fall within a reasonable range of alternatives in light of the legislative scheme and contextual factors relevant to the exercise of the power.
* In this case, the bylaw will only be unreasonable *if it is one that no reasonable body could make*; it will not be overturned merely because judges may think that it goes further than necessary.
  + Elected representatives are expected to consider an array of broad social, economic, political, and other non-legal considerations in passing bylaws that serve the people they represent.
    - BC's *Community Charter* gives municipalities a broad and virtually unfettered legislative discretion to establish property tax rates in respect of each of the property classes in the municipality and imposes no direction that property taxes are to be limited by the level of service consumed.
  + Municipal councils cannot act for improper purposes and must adhere to appropriate processes, which vary with the context and nature of the decision-making process.
    - Formal reasons may be required for adjudicative decisions, but not the passing of municipal bylaws.
      * To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is inappropriate.
      * The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and statements of policy that give rise to the bylaw.
    - Municipal councils have extensive latitude in what factors they consider in passing a bylaw.
      * They may consider objective factors directly relating to consumption of services but may also consider broader social, economic, and political factors relevant to the electorate.

Rationale: (McLachlin CJ)

* The bylaw is reasonable in terms of both process and content.
  + Catalyst argues that District’s process is flawed because it provided neither formal reasons for the bylaw, nor a rational basis for its decision; this contention cannot succeed.
    - Municipal councils are not required to give formal reasons or lay out a rational basis for bylaws.
    - In any event, the reasons for the bylaw were clear; the District’s policy had been laid out in a five-year plan that left little doubt as to the reasons for the bylaw.
      * The trial judge found that the District considered all relevant factors in making its decision.
  + While the impact of the bylaw on Catalyst is harsh, the Council was entitled to consider the impact on long-term fixed-income residents that a precipitous hike in residential property taxes might produce.
    - Acknowledging that the rates from Class 4 are higher than they should be, the Council is working over a period of years toward the goal of more equitable sharing of the tax burden.

Notes:

* It appears that the Court is inserting a new "patent unreasonableness" standard under the heading of reasonableness.

## *Vavilov* Framework

* The framework set out in *Vavilov* applies whenever an administrative decision-maker makes a substantive decision, whether that decision-maker is a municipal council or an adjudicative body.

### *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

Analysis: (Wagner CJ and Moldaver, Gascon, Côté, Brown, Rowe, and Martin JJ)

* Certain aspects of the current standard of review framework are unclear and unduly complex, resulting in costly debates surrounding the appropriate standard that distract from the merits of a case and undermine access to justice.
* The revised framework for determining the standard of review for administrative decisions starts with a presumption that reasonableness is the applicable standard for all aspects of the decision.
  + This default position is justified by the principle of legislative supremacy and the choice made to delegate decision-making to a tribunal, rather than the courts.
* The presumption of reasonableness can be rebutted in two types of situations:
  + 1. *Where the legislature has indicated that it intends a different standard to apply*, which occurs when:
       - 1. The legislature explicitly prescribes the applicable standard of review.

Courts must respect clear statutory language that prescribes the applicable standard of review.

* + - * 1. The legislature has provided a statutory appeal mechanism from a decision to a court, with or without a leave requirement.

Where a legislature has provided a statutory appeal mechanism, it has signalled that it expects the court to scrutinize decisions on an appellate basis.

If the same standards applied to statutory appeals and applications for judicial review, appeal provisions would be redundant.

There is no reason to presume that legislatures mean something different when they use the word “appeal” in an administrative law statute.

Where the legislature has provided an appeal mechanism, *a reviewing court is to apply appellate standards* to the decision, which depend on the nature of the question to be decided.

For questions of law (including questions of statutory interpretation and the scope of a decision-maker's authority), the standard is *correctness*.

For questions of fact, and mixed questions of fact and law, the standard is *palpable and overriding error*.

Should the legislature indicate that a different standard of review is to apply in a statutory appeal, the courts should respect that.

Provisions simply recognizing that decisions are subject to judicial review do not authorize the application of appellate standards.

* + 1. *Where the rule of law requires that the standard of correctness be applied*; the judiciary gets the last word on questions for which the rule of law requires consistency and for which a final answer is necessary, including:
       - 1. Constitutional questions.

Includes questions regarding the division of powers, the relationship between the branches of government, the scope of Aboriginal and treaty rights.

The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

* + - * 1. General questions of law of central importance to the legal system as a whole.

These general questions require uniform and consistent answers as a result of their impact on the administration of justice as a whole.

The mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category, nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue.

Examples where the courts have considered questions to be of central importance to the legal system as a whole:

When an administrative proceeding will be barred by *res judicata* and abuse of process (*Toronto (City)*)

The scope of the state’s duty of religious neutrality (*Saguenay*).

The appropriateness of limits on solicitor-client privilege (*University of Calgary*).

The scope of parliamentary privilege (*Chagnon*).

Examples where the courts have not considered questions to be of central importance to the legal system as a whole:

Whether a certain tribunal can grant a particular type of compensation (*Mowat*).

When estoppel may be applied as an arbitral remedy (*Nor-Man Regional*).

The interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*).

The scope of a management rights clause in a collective agreement (*Irving Pulp*).

Whether a limitation period had been triggered under securities legislation (*McLean*).

Whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway*).

The scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec*).

* + - * 1. Questions related to the jurisdictional boundaries between two or more administrative bodies.

The rule of law cannot tolerate conflicting orders and proceedings pulling a party in two incompatible directions; the public must know where to turn to resolve a dispute.

* + While the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness is not foreclosed, the recognition for any new basis for correctness review would be exceptional.
    - * Any new category warranting derogation on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons.
      * Any new category warranting derogation on the basis of the rule of law would be justified only where failure to apply correctness review would undermine the rule of law in a manner analogous to the three situations described in these reasons.

Concurring: (Abella and Karakatsanis JJ)

* + The majority’s framework rests on a flawed and incomplete conceptual account of judicial review that unjustifiably ignores the specialized expertise of administrative decision-makers, contrary to the Court's past administrative law jurisprudence.
    - In the majority’s framework, deference gives way whenever the “rule of law” demands it; but, the majority’s approach flows from a court-centric conception of the rule of law.
      * It loses sight of the fact that courts are not the sole guardians of the rule of law; central to the rule of law is access to a fair and efficient dispute resolution process.
      * It permits courts to substitute their opinions for administrative decision-makers on “questions of central importance to the legal system as a whole,” even if those questions fall squarely within the mandate and expertise of the administrative decision-maker.
    - The reasons mean that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review.

Notes:

* Where a court reviews the merits of an administrative decision, the standard it applies must reflect the legislature’s intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law.
* The majority closes the door on a contextual analysis to determine the applicable standard, in hopes that this will get parties away from arguing about the tests and back to arguing about the substantive merits of their case.
* By recognizing *delegated authority* as the rationale for deference, the Court broke away from earlier decisions which saw *relative expertise* as the primary rationale; the Court now accepts that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature.
  + While expertise may provide one rationale for a legislature's decision to delegate authority, other rationales include the decision maker’s proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly, and efficiently, and ability to provide simplified and streamlined proceedings to promote access to justice.
  + Further, as Macklin notes, there are times when some decision-makers explicitly disavow their competence to conduct statutory interpretation.
    - Nevertheless, the Court in *Vavilov* believed that such decision-makers would be entitled to deference because the legislator delegated them the job of interpreting their statutes.
* The Court euthanized "true" questions of jurisdiction as a stand-alone basis for correctness review.
  + Judges have questioned the necessity of this category of questions, struggled to articulate its scope, and expressed serious reservations about whether such questions can be distinguished as a separate category of questions.
    - In theory, any challenge to an administrative decision can be characterized as “jurisdictional” in the sense that it calls into question whether the decision maker had the authority to act as it did.
    - There are no clear markers to distinguish "true" jurisdictional questions from other questions related to the interpretation of an administrative decision maker’s enabling statute.
* The Court resisted requests to apply correctness to legal questions regarding which there is persistent disagreement within an administrative body, leading to legal incoherence.
  + The Court cited *Domtar*, where the SCC held that a lack of unanimity in a tribunal is the price to pay for the decision-making freedom and independence given to the members of these tribunals.
* Given that correctness review applies to questions of law brought to the courts under statutory rights of appeal, it is likely that we will see more correctness review post-*Vavilov*.

## Correctness

* Where a correctness standard is imposed, the court may undertake its own reasoning process to arrive at the result it judges correct (*Ryan*).
  + Judges will not show deference to the decision-maker's reasoning or justification process and asks, from the outset, whether the decision was correct (Wildeman).
  + While the court will take the decision-maker's reasoning into account — and indeed, it may find it persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question (*Vavilov*).
* The correctness standard reflects the rule-of-law concern for stability in legal ordering and for impartial and even-handed justice, particularly in matters of general legal significance (Wildeman).

### *Barrie Public Utilities v Canadian Cable Television Assn*, 2003 SCC 28

Facts:

* Barrie Public Utilities ("BPU") is a provincially regulated power. The Canadian Cable Television Association ("CCTA") provides cable television services throughout Canada. To avoid erecting its own poles, it rents space on the BPU's transmission lines, which otherwise carry telephone and power poles. In 1996, the parties began negotiating a new rental agreement to replace the one that would soon expire. BPU demanded an increase in the rental rate from $10.42 per pole to $40.92 per pole. The CCTA refused and the existing rental agreement expired. The CCTA applied to the CRTC for relief.
* Under s. 43 of the federal *Telecommunications Act* ("the Act"):

(5) *Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access* to the supporting structure for the purpose of providing such services…

The Act defines "distribution undertaking" as "an undertaking for the reception of broadcasting and the retransmission thereof…" "Canadian carrier" is defined as "a telecommunications common carrier that is subject to the legislative authority of Parliament." The Act also defines "transmission facility" as any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of *intelligence* between network termination points…" [emphasis added].

Procedural history:

* The CRTC held that the phrase "the supporting structure of a transmission line" in s. 43(5) was broad enough to include the BPU's power poles. It hence concluded that it had authority over the BPU's power poles and ordered the BPU to grant the CCTA access to their poles at an annual rate of $15.89 per pole. The BPU exercised a right of appeal under s. 64(1) of the *Telecommunications Act*.

Issues and holding:

* What is the appropriate standard of review? **Correctness**
* Did the CRTC err in interpreting s. 43(5) as being broad enough to include the BPU's power poles? **YES**

Analysis:

* Under the modern approach to statutory interpretation, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Rationale: (Gonthier J)

1. Deference to the decision maker is called for only when it is in some way more expert than the court and the question under consideration is one that falls within the scope of its greater expertise; this is not such a case.
   * The question before the Court is whether the phrase “the supporting structure of a transmission line” in s. 43(5) includes the Utilities’ power poles; the phrase has no technical meaning beyond the ken of a reviewing court.
2. The plain meaning of s. 43(5), s. 43 generally, and the Act as a whole reveal that s. 43(5) cannot bear the broad meaning given to it by the CRTC.
   * A literal and isolated reading of s. 43(5) raises doubt about the correctness of the CRTC's decision.
     + The phrase "constructed on a highway or other public place" that qualifies "transmission line" suggests that the CRTC may not grant access to transmission lines situated on private land.
       - However, the BPU's power poles (to which the CCTA seeks access) are located on both public *and private land*; Parliament must be taken to have known this.
     + While the provision specifies "transmission lines," the CCTA seeks access to "distribution lines," which carry electricity over shorter distances.
       - Parliament must be taken to have known of this distinction; had it intended to submit the BPU's power poles to the jurisdiction of the CRTC, it would have used the phrase "distribution line."
   * The rest of s. 43 and the Act raise further doubts as to the correctness of the CRTC's decision.
     + ss. 43(1) to (4) are concerned with telecommunications matters and not at all concerned with other supporting structures such as power poles.
       - For s. 43(5) to encompass power poles would be a surprising departure from the otherwise harmonious meaning of the section as a whole.
     + A "transmission facility" is a facility for the transmission of “intelligence”; the BPU's power poles do not serve to transmit intelligence, but rather electricity.
       - While "transmission facility" does not appear in s. 43(5), the term "transmission" (which does appear in the provision) must be read harmoniously with this definition.
   * The CRTC’s decision relied heavily on the Act's purpose of encouraging the development of a reliable, affordable, and efficient telecommunications infrastructure. Thus, it was anxious to avoid an interpretation of s. 43(5) that would require the CCTA to construct its own supporting structures.
     + But it is not clear that the erection of a duplicate infrastructure of television poles is the necessary or even likely result of finding that the CRTC lacks jurisdiction over power poles.
       - The CCTA merely sought access to the BPU's power poles by contract, and when it could not reach favourable terms, it opted to try the CRTC regulatory solution.
     + In any event, the CRTC can't rely on policy objectives to set aside Parliament's discernable intent.

Dissent: (Bastarache J)

* A deferential standard of reasonableness should be applied to the CRTC's interpretation of s. 43(5).
  + The meaning of “supporting structure of a transmission line” is not one on which judges would have any opinions.
  + The conclusion that a court’s residual expertise at statutory interpretation trumps a specialized agency’s interpretation of a provision that is entirely technical and context-specific squares badly with the reluctance courts should feel in interfering in decisions of tribunals.
    - Since intervention occurs in circumstances where the legislature has determined that the CRTC is in the best position to rule on the disputed decision, it risks thwarting the original intention of the legislature.
* The CRTC's interpretation of s. 43(5) was reasonable; its decision was supported by reasons that stand up to a somewhat probing examination.

Notes: (with commentary from Wildeman)

* Bastarache J's thesis that statutory interpretation is not an exact science has gained increasing acceptance.
  + If one is prepared to recognize that administrators are uniquely attuned to the sectors in which they carry out their mandates, then it does not make sense to dismiss administrative reasoning as superfluous to legal interpretation.
* Application of the correctness standard does not necessarily mean that there is an obvious answer to the dispute.
  + In *Pushpanathan*, the IRB determined that a provision of the *Immigration Act* excluding from refugee status persons who have been "guilty of acts contrary to the purposes and principles of the [UN]" functioned to exclude persons convicted of drug trafficking. The SCC applied correctness review.
    - The majority and dissent differed fundamentally on how to assemble and prioritize the evidence and arguments concerning whether drug trafficking was contrary to the purposes and principles of the UN.
* In *Wilson*, Abella J suggested that the correctness standard should be retired in favour of a single reasonableness standard.
  + She advanced two primary rationales: (1) courts continue to spend too much time disagreeing over the standard of review and (2) correctness can live comfortably under a more broadly conceived understanding of reasonableness.
    - That is, reasonableness has the ability to continue to protect both deference and the possibility of a single answer where the rule of law demands it.
  + The dangers of such a proposal are two-fold: (1) it may weaken fundamental legal protections and (2) may weaken deference through intensified incursions of correctness-style reasoning into a more sharply “contextualized” reasonableness review.

### *Bell Canada v Canada (Attorney General)*, 2019 SCC 66

Facts:

* The Super Bowl had long been broadcast in Canada in accordance with the "simultaneous substitution" regime, which meant that the US broadcast of the event — featuring American commercials — was unavailable to Canadian viewers. This benefitted Canadian broadcasters by allowing them to fully monetize their programming rights. In 2013, the CRTC held a public hearing seeking comments on simultaneous substitution, through which Canadians expressed frustration over their inability to see American Super Bowl ads. In August 2016, the CRTC issued an order prohibiting simultaneous substitution for the Super Bowl, meaning that Canadians would be free to view American Super Bowl ads. The order was made pursuant to s. 9(1)(h) of the *Broadcasting Act* (“the Act”), which states that the CRTC may, in furtherance of its objects, “require any licensee who is authorized to carry on a distribution undertaking *to carry, on such terms and conditions as the [CRTC] deems appropriate, programming services specified by the [CRTC]*.” Bell Canada and the NFL brought a statutory appeal to the FCA under s. 31(2) of the Act. They argued that that s. 9(1)(h) did not allow the CRTC to issue the order.

Issues and holding:

* What is the appropriate standard of review? **Correctness**
* Does the CRTC have the statutory authority, under s. 9(1)(h), to prohibit simultaneous substitution for the Super Bowl? **NO**

Analysis:

* The modern approach to statutory interpretation requires that the words of the statute be read in their entire context and in their grammatical and ordinary sense harmonious with the scheme of the Act, the object of the Act, and the intention of Parliament.

Rationale: (Wagner CJ and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ)

1. Bell and NFL challenge the CRTC's Order by means of a statutory appeal mechanism under s. 31(2) of the Act, which allows appeals "on a question of law or a question of jurisdiction"; therefore, appellate standards apply.
   * Given that this appeal is about the limits of the CRTC's statutory grant of power, the applicable standard of review is correctness (*Housen v Nikolaisen*).
2. The CRTC’s authority under s. 9(1)(h) — interpreted in accordance with the provision’s text, context, and purpose — is limited to issuing orders that require television service providers to carry specific channels as part of their service offerings and attaching terms and conditions to such mandatory carriage orders.
   * Because the CRTC did not mandate the carriage of any particular programming services, but instead sought to add a condition that must be fulfilled *should* a television service provider carry a Canadian station that broadcasts the Super Bowl, its Order was not within the scope of its power under s. 9(1)(h).
   * The text of the provision indicates that the primary power delegated to the CRTC is *to mandate that television service providers carry specific programming services*, and that the secondary power relates to the imposition of terms and conditions on such mandatory carriage orders.
     + As the FCA concluded in *Bell Canada v 7262591 Canada Ltd*, this provision does not encompass a general power to regulate the terms and conditions of carriage.
   * The context surrounding s. 9(1)(h) also supports this view as to its scope.
     + Other powers contained in s. 9(1) grant the CRTC *specific* powers; this weighs against reading s. 9(1)(h) as conferring a general power to impose terms and conditions on any carriage of programming services.
     + s. 10 of theAct confers on the CRTC the power to make regulations in respect of various aspects of broadcasting, including "standards of programs and the allocation of broadcasting time" (s. 10(1)(c)).
       - The extent of the CRTC’s powers under this section means that a narrow reading of s. 9(1)(h) will not hamper its efforts to regulate broadcasting in accordance with its statutory objectives.
     + The *Distribution Regulations* refer to “the … services of a programming undertaking that the [CRTC] has required, under paragraph 9(1)(h) of the Act, to be distributed as part of [a television service provider’s] basic service.”
       - Offers further indication that s. 9(1)(h) extends only to the issuance of mandatory carriage orders on specified terms and conditions.
   * This interpretation is confirmed by the purpose for which s. 9(1)(h) was enacted.
     + s. 9(1)(h) was enacted to provide an important means for the CRTC to ensure carriage of important Canadian services which market forces might not otherwise dictate be carried, thereby enriching the cultural, political, social, and economic fabric of Canada.
   * The CRTC has only *ever* validly exercised its power under s. 9(1)(h) for the issuance of mandatory carriage orders.

Dissent: (Abella and Karakatsanis JJ)

* The applicable standard of review is reasonableness; mandating a correctness review in all statutory appeals disregards the significance of specialized expertise.
  + That said, the CRTC’s specialized expertise is well-settled; extensive statutory powers have been granted to it, and an exceptionally specialized mandate requires the CRTC to consider and balance complex public interest considerations in regulating an entire industry.
* The CRTC's decision was reasonable in concluding that s. 9(1)(h) provided a legal basis to prohibit simultaneous substitution during the Super Bowl.
  + The reasons provided by the CRTC set out a rational and persuasive line of reasoning which clearly outlines the consequences, operational implications, and challenges that motivated its decision.
    - The Order arose from nearly three years of consultation to balance support for Canadian programming with a response to the frustrations of viewers and other objectives of the Act.
    - In the CRTC’s view, s. 9(1)(h) was enacted to clarify the Commission’s broad power to regulate the cable industry and impose any conditions necessary to do so.
      * The opening clause of s. 9(1) couches the CRTC’s authority to make orders “in furtherance of its objects,” and thus, in the purposes of the Act.
    - The CRTC responded to the NFL’s argument that s. 9(1)(h) could only be used to make orders concerning the entire output of a programming service rather than an individual program.
      * In the CRTC’s view, the wording of the Order — "directed at a programming service" — was sufficient to indicate that this was in fact what was being done.

## Reasonableness

### *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

Facts:

* + Vavilov was born in Toronto to two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Until he was 16, Vavilov did not know that his parents were not who they claimed to be. In 2010, Vavilov's parents were arrested in the US and charged with espionage. They pled guilty, admitted they were spies, and were returned to Russia in a "spy swap" on July 8, 2010. From October 2010 to July 2013, Vavilov unsuccessfully attempted to renew his Canadian passport. On July 18, 2013, the Canadian Registrar of Citizenship sent Vavilov a letter advising him that he was not a citizen of Canada pursuant to s. 3 of the *Citizenship Act*, the relevant parts of which specify that:

3(1) Subject to this Act, a person is a citizen if

(a) the person was born in Canada after February 14, 1977;

…

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

…

(c) an officer or employee … of [an] … international organization to whom there are granted … diplomatic privileges and immunities … equivalent to those granted to a person or persons referred to in paragraph (a).

* + In a letter on August 15, 2014, the Registrar informed Vavilov that she was cancelling his certificate of Canadian citizenship pursuant to s. 26(3) of the *Citizenship Regulations*. The letter did not offer any analysis or interpretation of s. 3(2)(a). However, it appears that the Registrar relied on a 12-page report prepared by a junior analyst. The report acknowledged that Vavilov's parents lacked diplomatic privileges but concluded that they were nonetheless “unofficial employees or representatives” of Russia at the time of Vavilov’s birth. Vavilov sought judicial review of the Registrar's decision.

Issues and holding:

* + What is the applicable standard of review? **Reasonableness**
  + Was the Registrar's decision reasonable? **NO**
  + Should the decision be remitted back to the Registrar? **NO**

Analysis:

* + *(See discussion of* Vavilov *framework for discussion on how to choose the right standard of review)*
  + The focus of reasonableness review is whether the impugned decision — including both the outcome and the process of reasoning that led to it — was unreasonable.
    - Reasonableness review finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers.
    - This is not a “rubber-stamping” process or a means of sheltering administrative decision makers from accountability; it remains a robust form of review.
    - Courts should not ask what decision it would have made, attempt to ascertain the “range” of reasonable conclusions, conduct a *de novo* analysis, or seek to determine the “correct” solution.
* Under reasonableness review, a court must pay "respectful attention" to the reasons offered for the decision and consider whether a decision is transparent, intelligible, and justified; a decision will meet this standard when it:
  + - 1. Employs an *internally coherent* reasoning process that is both rational and logical, and
         * An otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

It is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome.

* + - * + A decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or reveal that the decision was based on an irrational chain of analysis.

Reasons that simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion will rarely assist a reviewing court.

The rationality of a decision may be questioned if the reasons exhibit *clear* logical fallacies, such as circular reasoning, unfounded generalizations, or absurd premises.

* + - * + While reasonableness review is not a line-by-line treasure hunt for error, there must be a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.
      1. Is justified in light of the relevant facts and legal constraints that bear on it.
         * A non-exhaustive list of elements that *may or may not* be relevant in evaluating whether a given decision is reasonable include:

The governing statutory scheme (likely the most salient aspect of the legal context).

Decisions must ultimately comply with the rationale and purview of the statutory scheme under which it is adopted.

Where the legislature describes the scope of a decision-maker's discretion using broad, open-ended language — for example, “in the public interest” — it clearly contemplates that the decision-maker is to have greater flexibility.

*Note*: e.g., *Roncarelli v Duplessis*: "The Commission may cancel any permit at its discretion."

*Note*: in *Catalyst*, the SCC interpreted the elected nature of a municipal council as confirming their broad discretion (Wildeman).

*Note*: e.g., in *Pastion*, the FC relied on the principle of Aboriginal self-government as a basis for affording broad interpretive leeway to a First Nations Elections Appeal Board (Wildeman).

Where the legislature uses precise and narrow language to delineate the scope of the decision-maker's power — using, for example, statutory definitions, principles or formulas — then the decision must comport with these constraints.

*Note*: e.g., "Applications made on a weekend will be processed on the next business day."

Other relevant statutory or common law.

Both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide.

Decision-makers cannot adopt interpretations that are inconsistent with applicable common law principles.

Where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will be consistent with the established understanding of that standard.

A decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent.

In some cases, international treaties, even those not implemented domestically, can help inform whether a decision was reasonable.

*Note*: the Charter is another potential constraint on administrative authority (Wildeman).

Administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts.

In fact, a failure to adapt a common law or equitable doctrine to its administrative context may actually make a decision unreasonable.

The principles of statutory interpretation.

The decision-maker must interpret the words of a contested provision in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the legislative intent.

Where the words used are “precise and unequivocal,” their ordinary meaning will play a more significant role in the interpretive exercise.

An administrator cannot adopt an interpretation it knows to be inferior merely because the interpretation in question is expedient.

An omission to consider all aspects of the provision's text, context, or purpose will not necessarily undermine the interpretation; the question is whether the omission causes the court to lose confidence in the outcome.

Interpretations should accord with statutory rules that explicitly govern the interpretation of statutes and regulations (e.g., interpretation acts).

Sometimes, it may become clear that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision.

The evidence before the decision maker and facts of which they may take notice.

The decision maker must assess the evidence before it and, absent exceptional circumstances, a reviewing court will not interfere with its factual findings.

This is justified by the need for judicial efficiency and the relatively advantageous position of the first instance decision-maker.

The reasonableness of a decision may be jeopardized where the decision-maker fundamentally misapprehends or fails to account for the evidence before it.

The submissions of the parties.

An administrative decision maker’s reasons must meaningfully account for the *central* issues and concerns raised by the parties.

It is not always necessary to respond to every argument.

The past practices and decisions of the administrative body.

Whether a particular decision is consistent with the administrative body’s past decisions is also a constraint that the reviewing court should consider when determining whether a decision is reasonable.

While decision-makers are not bound by their previous decisions in the manner that courts are, arbitrariness in public decision-making would undermine public confidence in the administrative state.

Where a decision does depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons.

Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns:

Access to past reasons and summaries of past reasons.

Standards, policy directives, and internal legal opinions.

Plenary meetings of a tribunal’s members.

The development of training materials, checklists, and templates.

The potential impact of the decision on the individual to whom it applies.

If a decision has harsh consequences for the affected individual (e.g., those that threaten an individual's life, liberty, dignity, or livelihood), these consequences should be noted, and the decision-maker must explain why its decision best reflects the legislature’s intention.

* + - * + Some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning.
* The places to which a court will look to ascertain reasonableness review depends on whether written reasons are provided and whether the record and context shed light on the basis for the decision.
  + Where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable.
  + Where formal reasons are not required, it may be possible for the record and context to reveal the basis on which a decision was made.
    - * + e.g., the reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw (*Catalyst*).
  + Where neither the record nor the larger context sheds light on the basis for the decision, the reviewing court must examine the decision in light of the relevant factual and legal constraints.
    - * + It is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker’s reasoning process.
  + Where the reasonableness standard is applied in conducting judicial review, the choice of remedy must be guided by (1) the fact that the legislature has entrusted the matter to the administrative decision-maker, not the court, and (2) the need to ensure access to justice through expedient and cost-effective decision-making.
    - Generally, it will be appropriate to remit the decision back to the original decision-maker with the benefit of the court's reasons *unless* it is evidence that a particular outcome is inevitable.
    - Concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, costs to the parties, and the efficient use of public resources may influence the decision to remit the matter.

Rationale: (Wagner CJ and Moldaver, Gascon, Côté, Brown, Rowe, and Martin JJ)

* + Reasonableness is the presumed standard of review, and there is no basis for departing from that presumption in this case.
    - The Registrar's decision came before the courts by way of judicial review, not a statutory appeal mechanism.
    - Parliament has not prescribed the standard to be applied on judicial review of the decision at issue.
    - The Registrar’s decision does not give rise to any constitutional questions, general questions of law of central importance, or questions regarding turf conflicts between administrative agencies.
  + It was not reasonable for the Registrar to find that Vavilov's parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a); the relevant factors strongly suggest that s. 3(2)(a) was not intended to apply to children of foreign government employees who have not been granted diplomatic privileges.
    - If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from diplomatic privileges, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c).
    - The analyst did not refer to the relevant international law, did not inquire into Parliament’s purpose in enacting s. 3(2) and did not respond to Mr. Vavilov’s submissions on this issue.
      * Parliamentary debates that preceded the enactment of the *Citizenship Act* describe s. 3(2) as "[conforming] to international custom" and as having been drafted with the intention of "[excluding] children born in Canada to diplomats from becoming Canadian citizens."
      * Established principles of international law specify that rules conferring birthright citizenship shall not apply to children born to persons *enjoying diplomatic immunities in the country where birth occurs*.
    - It was a significant omission to ignore the relevant cases — *Al-Ghamdi*, *Lee*, and *Hitti* — which suggest that s. 3(2)(a) was intended to apply only to those whose parents have been granted diplomatic privileges.
      * In *Al-Ghamdi*, the FC noted that it is because of the privileges accorded to diplomats and their families, which are inconsistent with the obligations of citizenship, that those with diplomatic status cannot acquire citizenship.
    - There is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges.
      * The Registrar’s interpretation would deprive of citizenship the children of, for example, a businessperson who represents a foreign state-owned corporation in Canada.
      * The Registrar’s decision had the same effect as a revocation of citizenship — described as “a kind of ‘political death’” — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada.
  + There is overwhelming support for the conclusion that Parliament did not intend s. 3(2)(a) of the to apply to children of those who have not been granted diplomatic privileges. Thus, since it is undisputed that Vavilov's parents were not granted such privileges, it would serve no purpose to remit the matter to the Registrar.
    - Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, he is a Canadian citizen under s. 3(1)(a) of the *Citizenship Act*.

Concurring: (Abella and Karakatsanis JJ)

* + The majority’s framework unjustifiably ignores the specialized expertise of administrative decision-makers, contrary to the Court's past administrative law jurisprudence.
    - Decision-makers have institutional expertise that comes from administering a particular statute daily.
    - There is no reason to believe that a judge who reads a statute once in his life can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of various alternate interpretations.
  + Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue but instead evaluates whether the decision-maker acted reasonably.
    - Courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned, and the institutional context chosen by the legislator.
      * They should be hesitant to second-guess operational implications, practical challenges and on-the-ground knowledge used to justify an administrative decision.
      * *Note*: the majority reasserts judicial supremacy in the name of reasonableness (Wildeman).
    - When resolving challenges, courts must also consider the *materiality* of any alleged errors in reasoning.
      * An error peripheral to the decision-maker’s reasoning process or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review.

Notes:

* + Does this decision set too high a bar for administrative decision-makers? Do decision-makers need training to know how to properly justify their decisions?
  + In *Reyes*, Grammond J of the FC offered a roadmap regarding which precedents are binding on administrators, and how an administrator can justify non-conformity (Wildeman).
    - The Court must assess the degree of legal constraint imposed by the precedent, which involves:
      * The position of the author of the precedent in the judicial or administrative hierarchy;
      * The degree of consensus about the alleged precedent;
      * If the precedent pronounces unreasonableness only, and thus does not preclude other reasonable decisions and interpretations; and
      * Whether application of the precedent requires weighing various factors, which is a mark of discretion.
    - The Court must then determine whether the impugned decision is reasonable in its treatment of the precedent, which may raise the following questions:
      * If the decision maker explicitly disregarded the precedent, did they give adequate reasons?
      * Taken as a whole, is the decision incompatible with the alleged precedent?
  + In *Bell ExpressVu*, the SCC held that presumed legislative compliance with the Charter may aid statutory interpretation only where there is ambiguity in the text (Wildeman).
    - The rationale for this view is the desire to protect legislative intent from undisciplined Charter challenges.
    - A counterpoint was raised in *Clarke* (SCC) and *Taylor-Baptiste* (ONCA), where the courts held that administrative decisions must always adhere to the values underlying the grant of discretion, including constitutional values and international law principles.
      * The courts held that *Bell ExpressVu*'s precondition of ambiguity does not apply when an administrative decision interprets a grant of authority.
      * Wildeman believes that the best way forward is to overturn *Bell ExpressVu* in favour of an understanding of statutory interpretation that is grounded in constitutional and international law values and principles.

### Reasonableness Review (Wildeman)

* + Reasonableness review is based on a commitment to deference.
    - *Vavilov* makes clear that deference does *not* provide a decision-maker with a margin of error, which would centre the court’s view of the right answer.
    - Deference also does *not* mean that administrators have the right to be wrong within the protected boundaries of their jurisdiction; this is because:
      * This implies a prejudging of what constitutes an error, contrary to deference as respectful engagement with tribunal reasoning.
      * Allowing a decision-maker to be wrong implies a tolerance of irrationality in the application of law, which is contrary to the rule of law.
  + In *Vavilov*, the SCC suggests that there are two sides to reasonableness review.
    - On the one hand, courts must recognize the legitimacy and authority of administrators, which is derived from the fact that legislators chose administrators rather than courts to make the decisions in issue.
    - On the other hand, to deserve respect in each case, administrators must adopt a "culture of justification" and demonstrate that their exercise of delegated power can be justified to citizens in terms of rationality and fairness.
  + The *Vavilov* court claims that a court conducting reasonableness review does not ask what decision it would have made or attempt to set out a range of reasonable options; it must consider only whether the decision, including both rationale and outcome, was unreasonable.
  + Deference means respectful attention to administrative reasons.
    - Reasons may reveal that an outcome that might appear counterintuitive on its face nevertheless accords with the purposes and practical realities of the administrative regime.
    - The reviewing court must read the decision-maker's reasons in light of the history and context of the proceedings in which they were rendered.
      * This includes the evidence before the decision-maker, the submissions of the parties, publicly available policies or guidelines that inform the decision-maker's work, and past decisions of the relevant body.
    - Where there are no reasons, there may be ways to ascertain from the record the reasons relied upon.
      * e.g., in *Catalyst*, McLachlin CJ said that the reasons for bylaws are typically deduced from debates, deliberations, and policy made in preparation of the bylaws.
      * Absent reasons, the court's focus may necessarily be more on the conclusion of the administrator.
        + Incentivizes express reasoning to ensure that reviewing courts grasp the administrator's perspective on the issues, including the relative weight given to competing considerations.
    - If reasons are so sparse that one cannot understand how the decision was arrived at, that is unreasonable.

## Discretion

### Administrative Discretion (Macklin)

* *Discretion* is the power to choose a course of action where there is no determinate right or wrong answer.
  + While discretion is a normal, everyday part of governance (e.g., deciding whether to require another document from an applicant), we are going to be focusing on discretion that is granted by statute.
  + One can identify a statutory grant of discretion through:
    1. Use of the word 'may' as opposed to shall/will/must.
       - e.g., "The Commission *may* cancel any permit at its discretion.
    2. Power granted through broad and vague language.
       - e.g., "The municipality shall provide for the *good rule and government* of the city." In this case, the terms "good rule and government" import significant discretion into their application.
    3. Use of both permissive and broad language.
       - e.g., "The Minister *may* grant permanent resident status if the Minister is of the opinion that it is justified by *humanitarian and compassionate* considerations."
  + We may contrast between subjective and objective grants of discretion:
    1. *Objective*: require a decision-maker to make a judgment call but could be reviewed objectively.
       - e.g., "The Board may make such regulations *as are necessary* in the circumstances."
    2. *Subjective*: require administrators to make a judgment informed by their own personal views or opinions.
       - e.g., "The Board must take into account evidence that is relevant *in its opinion*."
  + When a legislator grants discretion, it may leave it to the decision-maker to figure out how to exercise discretion, or it may structure discretion by providing a list of relevant factors that the decision-maker should consider.
    - Administrative bodies may seek to structure their own discretion even if the legislator does not through guidelines, policies, or other "soft law" instruments.
  + *Roncarelli v Duplessis* provides guiding principles about legal discretion; Rand J explained that discretion is always limited by the parameters of the statute that grants discretion.
    - Discretion is never completely unbounded, even if a very wide grant of discretion is given in the statute.
* Before *Baker*, discretion was seen as a lawless space within which power could be exercised without accountability precisely because there are no 'right answers' against which to measure it. Therefore, discretionary decisions could only be reviewed on a series of "nominate grounds":
  + 1. *Bad faith*: overlaps with the reasonable apprehension of bias doctrine.
    2. *Improper purposes*: e.g., in *Roncarelli*, using liquor licensing legislation to punish a religious minority.
    3. *Taking irrelevant considerations into account*: e.g., denying an access to information request on the grounds that the documents might reveal politically embarrassing information.
    4. *Fettering*: occurs when decision-makers refuse to treat a statutory grant of discretion as conveying a choice and behaving instead as if bound by a rule.
    5. *Dictation*: when someone dictates to the decision-maker how to exercise discretion (e.g., *Roncarelli*).
    6. *Improper delegation*: occurs when legislation confines discretionary authority to a specific actor, but that actor in turn delegates the power to an unauthorized actor.
    - However, discretionary decisions were difficult to challenge without reasons, and reasons were generally not a requirement for decision-makers pre-*Baker*.
* *Baker* brought the judicial review of discretion under the rubric of substantive review, explaining that law and discretion should not be thought of as dichotomous.
  + There is more discretion in law, and more law in discretion, than the traditional approach suggests.
  + As L'Heureux-Dubé J explained, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed by statute, the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.
* In *Suresh*, the SCC insisted that reviewing courts cannot set aside a discretionary decision just because it would have weighed the factors differently than the original decision-maker.
  + They may only intervene if the decision is not supported by the evidence or fails to consider appropriate factors.
* In *CUPE v Ontario (Minister of Labour)*, in a labour dispute, the Minister of Labour was given the discretion to appoint to an arbitration panel someone who, in their opinion, is qualified to act. Past practice was to choose that arbitrator from a standing list of arbitrators who were known to be mutually acceptable to labour and management. However, the Minister in this case decided to appoint retired judges. This disappointed the union, which sought judicial review of the decision.
  + At the SCC, the majority found that the Minister's exercise of discretion was unreasonable. While the Minister enjoyed broad discretion, the majority found that expertise in labour relations and credibility to the parties were such important factors that to exclude them would be to undermine the purposes of the legislation.
  + The dissent thought that courts should defer to the decision-maker's evaluation of what is relevant, and what the proper purposes of the statute are.
    - In its view, the Minister simply gave more weight to the independence and experience at judicially resolving disputes that judges enjoy than the experience and expertise that arbitrators enjoy.
* *Forest Ethics* concerned an application to the NEB for pipeline approval. It was clear that the NEB had to consider the environmental impacts of the project, but some asked the court to consider the decision’s effects on climate change.
  + The NEB had subjective discretion to consider any relevant public interest that may be affected by the approval.
  + Ultimately, the NEB concluded that the climate change impacts of pipeline construction were relevant factors in determining whether construction of the pipeline served the public interest.
    - The FCA determined that this decision was a reasonable exercise of the NEB's discretion.
* While neither *Vavilov* nor *Bell Canada* are about discretion, it is apparent that the reformulation of reasonableness review will apply to exercises of discretion.
  + It seems plausible that in a case about the exercise of discretion, the nominate grounds for abuse of discretion would take the place of the principles of statutory interpretation in the assessment of legal and factual constraints.

### *Khosa*, [2004] IADD No 1268 (IRB)

Facts:

* Khosa was born in India and immigrated to Canada in 1996 at the age of 14. He has landed immigrant status. In November 2000, he and a friend drove their respective cars at over 100 km/h through a residential and commercial area of Vancouver. Khosa struck and killed an innocent pedestrian on the sidewalk. He was convicted of criminal negligence causing death. The trial judge concluded he was street racing, but Khosa denies this. He claims that he was driving at excessive speeds when his tire popped, and he lost control of his vehicle. Khosa received a conditional sentence of two years less a day.
* The Immigration Division of the Immigration and Refugee Board ("the Board") declared Khosa inadmissible for serious criminality and ordered him to be removed from Canada pursuant to s. 36(1)(a) of the *Immigration and Refugee Protection Act* ("the Act"). Khosa sought relief from the Immigration Appeal Division, which, pursuant to s. 67(1)(c) of the Act, has the discretion to set aside a deportation order on the basis of humanitarian and compassionate (“H&C”) considerations.

Issue and holding:

* Do sufficient H&C considerations warrant special relief in light of all the circumstances of the case? **NO**

Analysis:

* From *Ribic*, a non-exhaustive list of relevant factors, the weight of which may vary according to the circumstances, include:
  1. The seriousness of the offence leading to the removal order.
  2. The possibility of rehabilitation.
  3. The length of time spent, and the degree to which the appellant is established, in Canada.
  4. The family and community support available to the appellant.
  5. The family in Canada and the dislocation to the family that removal would cause.
  6. The degree of hardship that would be caused to the appellant by his return to his country of nationality.
* The Appeal Division must have regard to the objectives of the Act, including the objective "to protect the health and safety of Canadians and to maintain the security of Canadian society."

Rationale: (Kim Workun, John Munro concurring)

* The things that weigh against allowing Khosa's appeal include:
  + The offence leading to the removal order is serious, involving the death of an innocent pedestrian as a consequence of the appellant's driving behaviour, which was reckless, irresponsible, and mindless of the consequences that could ensue in total disregard for others.
  + The appellant did show some remorse for his excessive speed in public, but he lacks insight into his conduct by continuing to deny the full extent of his culpability.
    - While the appellant takes responsibility for his excessive speed, he does not acknowledge or take responsibility for his specific reckless conduct involving street-racing on a public roadway.
* The things that weigh in favour of allowing Khosa's appeal, to differing extents, include:
  + The length of time he has spent in Canada, and the fact that he was 14 and dependent on his parents at the time he became a permanent resident.
  + He is established in Canada, but this is not a very compelling factor.
    - He is a reliable and capable employee and has hopes of attending post-secondary, he has few assets, lacks community involvement, and is not currently enrolled in post-secondary.
  + The appellant's immediate family resides in Canada, though his family continues to own a home and agricultural land in India, and his father spends much of the year in India.
    - While Khosa's father intends to sell the family property in India and move to Canada permanently, it remains open to the family to revisit that plan.
  + Khosa provides for his parents in Canada, though the evidence establishes that his financial contribution to the home in Canada is not essential to the viability of his family.
  + There would be a degree of upset to Khosa's family by reason of his removal from Canada, though there is no evidence that establishes a present particular hardship to the family by reason of his removal.
    - The father resides in India for much of the year, his parents are in good health, there is family property in India at which the family can reside during visits, and Khosa's family is able to visit India for long periods.
  + Khosa is married, and the separation of the couple will cause emotional hardship to the couple.
    - But, the couple was married in the months before this hearing fully apprised that Khosa was under a removal order, and it is curious that Khosa's wife does not even intend to visit Khosa in India.
    - Plus, there is no evidence that Khosa's wife will be left destitute.
  + Khosa will face hardship from the removal, but it is not unmanageable in the circumstances.
    - He has some skills, including automotive and mechanical skills, he speaks English and Punjabi, he has familiarity with the life and the customs in India, he has family in India to whom he might look for support, and he can stay in touch with loved ones in Candia through visits and by telephone.

Dissent: (Sherry D. Wiebe)

* While Khosa committed a reckless act with grievous consequences, he poses little risk, if any, to the public.
  + Khosa's crime was not one of intent but was one of reckless error by an 18-year-old that was not pre-planned.
  + He otherwise has no history of antisocial behaviour, and there is no evidence of criminal propensity.
  + He has been remorseful, and from early on has accepted responsibility for his actions.
  + He has been devastated by these events and is not likely to forget the trauma he has experienced and caused.
  + The public has the added protection of the conditions and monitoring by the criminal justice system.
* There are sufficient H&C considerations to warrant special relief.
  + Khosa has been in Canada since he was 14 and his immediate family lives here.
  + He is married to a Canadian with whom he has been in a relationship for 4 years and who does not intend to return to India with him.
  + He is an only son in a culture that reveres sons.
  + Since his trial, he has relied heavily on his family for support, and they have become very close.
  + His family requires his income because they have limited ability to pay for rent and other necessities.
  + He is established in Canada; he worked as an unskilled labourer, took a mechanics course, and is a good employee.
  + While his father travels to India regularly, the main reason for that was Khosa's grandfather, who has recently died.

Notes:

* At the SCC, the majority said it was not the job of reviewing courts to re-weigh the relevant factors, which, in this case, included whether the denial of street-racing made Khosa a poor candidate for rehabilitation.
  + The dissent said that it was an irrational to infer a risk of future criminality from a denial of street-racing, especially when all the other evidence pointed in the other direction.

### Legal Frameworks Not Designed By, For, or With Us (Metallic)

* The principle of deference tends to place Indigenous peoples at a disadvantage in judicial review proceedings.
  + Reviewing judges are accustomed to review based on a decision-maker’s adherence to their enabling statute, but few laws expressly require decision-makers to weigh Indigenous interests.
    - Although reconciliation as a value could inform the concept of “public interest” as including Indigenous interests or could inform a decision-maker's interpretation of a statute, on a deferential standard of reasonableness, it is hard to argue that a failure to do so falls outside the range of reasonable outcomes.
  + The situation is arguably worse when there is no legislative framework, and the government instead exercises its jurisdiction through policy manuals.
    - When disputes arise, the government often argues that the discretionary nature of non-legislated activities demand a heightened level of deference, giving them an undeserved advantage.
* Administrative law’s call for deference needs to be questioned when they unfairly advantage settler interests above those of Indigenous people.
  + Other potential solutions could be amendments to interpretation acts to read in a requirement that all decision-makers must balance their statutory duties with the requirement to achieve reconciliation.

### *Attawapiskat First Nation v Canada*, 2012 FC 948

Facts:

* Aboriginal Affairs and Northern Development Canada (AANDC) provides transfer payments to First Nations by way of a Comprehensive Funding Agreement (CFA). In March 2011, the Attawapiskat First Nation (AFN) signed a CFA with AANDC which contained the following provisions:

9.1 The Council will be in default of this Agreement in the event:

…

1. in the opinion of the Minister … the health, safety or welfare of Members or Recipients is at risk of being compromised.

10.2.1 In the event the Council is in default under this Agreement, Canada may take one or more of the following actions as may reasonably be necessary, having regard to the nature and extent of the default:

…

1. appoint, upon providing notice to the Council, a Third Party Funding Agreement Manager;

The CFA defined a Third Party Manager (TPM) as a third party that administers funding otherwise payable to the Council.

* The AFN has 300 housing units, most of which have reached the end of their life. As a result, the AFN experienced a serious housing crisis, with many AFN members living in overcrowded and unsafe conditions. On November 12, 2011, the AFN issued a declaration of emergency with respect to the crisis. It sought operational assistance from AANDC, never suggesting that it could not manage the problem. On November 20, 2011, the Senior Assistant Deputy Minister (ADM) of AANDC notified the AFN that it was in default under s. 9.1(d) of the CFA and that a TPM had been appointed under s. 10.2.1(c). The TPM had no experience relevant to the handling of the housing crisis. The mandate of the TPM was one of financial control (approval of invoices and similar matters) in a situation where financial management was not an issue. In December 2011, the AFN sought judicial review of the Minister's decision, arguing that the ADM erred in appointing a TPM as a remedy.
  + The respondent argues that judicial review is not available because the dispute is fundamentally contractual in nature, despite the fact that a public authority is involved. They also say that appointing a TPM was reasonable due to the AFN's admitted inability to deal with the housing crisis.

Issues and holding:

1. Is judicial review available? **YES**
2. If yes, what is the standard of review? **Reasonableness**
3. Did the Minister err in appointing a TPM? **YES**

Rationale: (Phelan J)

1. Applying the factors from *Air Canada*, it is clear that the present dispute is far from private in nature:
   * The character of the matter in issue is broader than simply commercial.
     + The CFA was an agreement for funding for essential services for a First Nation; this is clearly distinct from contracts for the purchase of goods for government operations, for instance.
   * The nature of the decision-maker is as the delegate of the Minister carrying out responsibilities of a public nature owed to a group of First Nations people.
   * The provision at issue speaks to “health, safety or welfare” and, as such, it is not a commercial enterprise.
   * The relationship between the government and a First Nation is unique and cannot be analogized to the relationship between the government and a company bidding on a government contract.
   * There is no issue that the decision-maker is an agent of the federal government.
   * Public law remedies such as declaration, injunction, and *certiorari* would adequately address the challenge.
   * The AFN are in a compulsory relationship with the Crown by virtue of the constitution and legislation. This is not a consensual submission to jurisdiction.
   * There is no doubt that given the public profile of the housing crisis, this matter has a serious public dimension.
2. On the choice of remedy issue, the parties agreed that the applicable standard is reasonableness.
3. While the AFN were having trouble addressing the housing crisis, what they lacked was not the ability to manage their finances (in which case a TPM may have been appropriate), but the material means to do so.
   * Throughout this process, AANDC did not express any concern with the AFN’s financial management.
   * Although courts must show deference to the Minister’s choice of remedy, where the remedy chosen does not respond to the problem, it is not reasonable.