**Preliminary**

**Standing**

**General:** if your private rights were at stake or you were specially affected the issue

Does the applicant have a **sufficient personal interest?** - **public interest standing**

* **Finlay v Canada** test ish - ultimately court has discretion - NOT a rigid checklist (**Downtown Eastside Sex Workers**)
  + **(1) is the matter justiciable**
    - Concern about the proper role of the courts
    - Q - is this an issue the court ought to involved themselves in
    - Matters of policy are NOT
  + **(2) sufficient interest = not a mere busybody**
    - Is there a serious interest of the part of the applicant to adjudicate it
    - Concern about allocation of scarce judicial resources
    - **Downtown Eastside Sex Workers**: should have “**real stake**” or **be genuinely “engaged with the issues”**
  + **(3) is there no other Reasonable and effective Means to adjudicate**
    - Change from **Downtown Eastside Sex Workers - finlay** was any way
    - If no - more likely to be granted PIS
    - Concern about the benefit of the contending points of view
    - **Downtown Eastside**: consider (1) plaintiffs ability (incl $$) to take he case all the way to get the answer (2) re public interest: does it go **beyond the individuals** who would normally have standing (3) are there realistic alternatives/more effective use of judicial resources to deal with it and (4) what is the potential **impact of the proposed proceedings on the rights of others who are effecte**d

Does the applicant have standing **in relation to all issues?**

* **UAlberta Pro-Life v U of A**
  + You can only have standing to appeal/review parts of a decision
  + For complaints under a disciplinary scheme/code (maybe?) you

**Justiciable**

Is the issue justiciable?

* **Highwood Congregation v Wall TEST:**
  + Must be **(a) exercise of state authority** (look for statute)
  + and **(b) sufficiently public character**
    - Factors from Eksteen: (1) Nature of the decision maker and his responsibility (2) bodies relationship to other statutory schemes or bodies of gov’t (3) etc see big can for all of them
* **Highwood Congregation v Wall**;
  + No freestanding right to PF: Disputes between individuals or corporations must meet the test to be justiciable
  + Theology definitely isn’t
  + Negatively affecting your business/losing your job/any adverse impact doesn’t count
* **Eksteen;** 
  + Expanded factors for public charac
* Air Canada;
* Dunsmuir v Ontario

Has the applicant **exhausted other remedies**? Exceptional or special circumstances?

* **Spruce Grove Gun Club v Parkland**
  + **where there is another admin process/statutory scheme where it can be addressed the court will decline even when they have the competence/jurisdiction EXCEPT in exceptional circumstances.** 
    - Intent of the legislature/Point of these statutory bodies and appeals is to avoid recourse to the courts
    - Where admin appeal exists courts should be reluctant to assume jurisdiction to avoid further appeals, expenses and delays

**Procedure**

Is the application **timely?**

* **Alberta Rules of Court, r 3.15(2);**
* **Baker v Drouin** (timeline cannot be extended)  **IF YOU SEE DATES**
  + Must be served within **6 MONTHS** of the date of the decision or act
  + NO VARIATIONS strictly applied

Have **service** requirements been met?

* **Alberta Rules of Court, r 3.15(3);** 
  + Originating application must be served on (a) **the person or body in respect of whose act or omission a remedy is sought**
  + The Min of Just + solicitor general/attorney General AND
  + Every person or body directly affected by the application
* home statute? -

Is the applicant suing the right court?

* Canada v Telezone;

**Evidence**

Certified record of proceeding

* **Alberta Rules of Court, r 3.19** 
  + Once you’ve commenced the action and you’ve served the statutory body they have to create a certified record of proceedings with the subject of the decision subject to the review. Can include written decision, submitted evidence or other relevant records

Limitations on additional evidence

* Alberta Rules of Court, rr 3.21, 3.22;
  + **3.21-** can’t question witnesses w/o courts permission
  + **3.22** - NO NEW EVIDENCE - reviewing the decision not making the decision BUT
* **Alberta College of Pharmacists v Sobeys West - 3 exceptions**
  + **(1) Evidence to establish breach of natural justice not apparent on the record/face (i.e. bias)**
  + **(2) Background Evidence mainly to adduce standing**
  + **(3) Where no transcript was made for quasi judicial decisions**

Procedural Fairness

3 ways procedural fairness could apply

**Natural Justice - statutes that limit common law rights**

* STATUTE OVERRIDES COMMON LAW RULES
* Does the statute require it
* Look at APJA, home statute and common law to determine if it applies

Common Law - (discused further down) = **Procedural Fairness or Rule against Bias**

**Charter - PFJ**

* Does the decision raise section 7 rights to life, liberty or security of the person?
  + Is the deprivation in accordance with the principles of fundamental justice, including procedural fairness
* **Charkaoui v Canada;** 
  + **PFJ Fair hearing requires** (1) independent and impartial magistrate (2) right to know the case against you (**Harkat** - “reasonably informed) (3) the right to anser
* **Canada v Harkat;**
  + Re certificate of inadmissibility to detain/remove foreign nationals suspected of terrorism via statute. Didn’t meet PFJ fair hearing reqs - didn’t know the case to meet
  + Example of dialogue theory - they made amendments after Charkaoui
* **Gallant v Canada;**
  + Duty of fairness can be **limited by context:** here it was **safety**. Also mentioned immediacy and confidentiality
  + It will still be a breach of s.7 but saved by s.1
* **Howard v Stony Mountain Institution**
  + How much information you are entitled to - just relevant information - summary is enough
  + DO NOT need to release everything you used to make the decision or didn’t use - crim standard doesn’t apply
  + If you cannot disclose for safety reasons - DO have to disclose to the judge
* **Charter right to counsel: (also Howard v Stony Mountain Inst.)**
  + **complexity of issue and capacity of applicant considered**
  + If you can present you case adequately then it might be considered
  + **TEST** from **New Brunswick v G(J)** - **Balance 1+2 against 3** 
    - (1) seriousness of the case
    - (2) How complex it is
    - (3) the capabilities of the claimant (in custody hearings this is the most important)

**Aboriginal Right - Duty to Consult**

Duty arises from the honor of the Crown (**Guerin - Indian act etc is subject to those requs**)

Scope depends on the strength of the claim and the degree of the adverse impact

* **Haida Nation v BC; Test for the trigger**
  + (1) arises when they have real or constructive knowledge of a potential claim
  + (2) AND a n adverse impact is contemplated
  + DtC cannot be delegated to admin/regulatory body
  + Extent of duty = a question of law - reviewed on correctness
  + Process is reviewed on reasonableness
* **Clyde River v Geo-Services**
  + DTC not limited to exercise of statutory powers or exercise of prerogative powers
  + They can rely on advice from others, but crown is ultimately responsible
  + Reasons usually required
  + Crown = executive or regulatory agency exercising executive power

Does not apply to legislative process (Parliamentary sovereignty)

**Procedural Fairness**

Audi alteram partem ("hear the other side")

* Entitled to receive notice about issue, its context/info and to meaningfully participate
* Includes Right to Disclosure, make submissions, right to counsel, lead your own evidence and cross other party’s evidence.
* Degree of fairness varies - APPLY BAKER

**Highwood Congregation v Wall**

* **Purely private disputes are not subject to judicial review**
* **there is no free standing right to procedural fairness**

Grounded in the rule of law; equality of treatment, right to participate

**Sources**: Statute of general application (APJA), home statute, common law

**Does the duty of PF apply?**

**Cooper v Wandsworth Band of Works; (UK)**

* **Fairness is an underlying common law rule** even when not set out in statute

**Nicholson v Haldmind-Norfolk Police;**

* Recognition of Cooper and **general duty of fairness** in Canada

**Cardinal v Kent Institution**

* Context matters: if the decision has a **SERIOUS EFFECT on the individual** - PF is necessary

Does the issue involve **the rights, privileges or interests** - if yes - PF def required

* **Webb v Ontario Housing Corporation;** 
  + Removal of a benefit once granted triggers a duty of PF (no right to a benny)
    - Specifically right to know case against you and answer here
* **Re Abel and Advisory Review Board**
  + Duty of fairness can be reqd in processes resulting in recommendations is there is a nexus/proximity

**Exceptions to the Duty**

Does an **exception** to the duty of fairness apply?

* **Knight v Indian Head School Division** 
  + The more general the more likely there will be fewer procedural fairness aspects required
  + **Decisions of preliminary nature will NOT trigger the duty to act fairly**

**Legislative vs regulatory/adjudicative**

* **Canada v Inuit Tapirisat of Canada;** 
  + Duty of F does NOT apply to Cabinet decisions
    - BUT they can be judicially reviewed in some cases
  + General application = no - more legislative
  + Individual impact = yes
* **Mikisew Cree FN v Canada;** 
  + **Duty of fairness does not apply to legislative process**
  + No duty of consult for passage of legislation - parliamentary sovereignty
* **Canadian Assn of Importers v Canada**
  + **General and legislative = no duty of fairness**
  + Impact on business due to a policy is not enough for PF

**Municipal bylaws of general application**

* **Homex Realty v Wyoming**
  + Where action is specific (inter partes) notice requirements are not excluded
  + When statute is incompatible with notice, courts will not imply it
  + In general municipalities have been exempt from PF requirements, buts its all contextual.

**Preliminary / investigative?**

* **Dairy Producers Co-op v Saskatchewan** 
  + prelim/investigative doesn’t attract the same level of PF as final stages. \
  + If its a final decision that will affect the rights of one of the parties - yes

**Proximity to final decision likely makes duty apply**

* Re Abel
  + Duty of fairness CAN apply to processes resulting in recommendations IF there is a nexus/proximity between recommendation and decision

**Exceptions to Dunsmuir Exception:** Where o**therwise private employment matter with a public entity** involves (a) no employment agreement, (b) no contractual protections, or (c) involves a statutory process, duty of fairness may apply (here had to notify and provide reasons in writing, right to be heard and have a rep)

**Content of the Duty**

Duty of fairness is highly contextual

* **Cardinal v Kent Institution -** Context is important on determining the scope of the duty of procedural fairness
  + i.e. consider things seriousness of affect on individual and things like cost or impact of implementing
* **Napoli v BC** - baker factors do not all weigh the same in each case
  + **CIBA-GEIGY v Canada:** with corporations and financial issues 1 and 3 are heaviest and they’ll see little sympathy from courts

What is the content of the duty of fairness : Baker v Canada

**Baker Factors:**

1. **The nature of the decision being made and the process followed making it**
   1. **Knight v Indian Head:** Prelim + General decisions = **less**
   2. **Inuit Tapirisat:** legislative decisions of general application do NOT
      1. Individual decisions (more adjudicative) = YES
   3. **Canadian Assoc of Importers v Canada - gen and leg = no.** 
      1. Business affected by policy is not enough
   4. **Mikisew cree -** doesn’t apply to passage of legislation
   5. **Dairy Producers:** PF may not apply to investigative/prelim steps. But yes to (a) final decision that (b) will affect the rights of one of the parties
   6. **Re Abel**: must be a **nexus/proximity** between recommendation and decision for duty of fairness to apply to recommendations (here it was disclosure of relevant docs)
   7. **Cardinal v Kent institutions:** Where **disregarding recommendations**, but must do so fairly, provide notice, consider submissions
2. **The nature of the statutory scheme and the terms of the enabling legislation**
   1. **Homex**: if statute is incompatible with a duty of fairness courts will not imply it
3. **The importance of the decision to the individuals affected by the decision**
   1. **Webb v housing** - the loss of a benefit they depend on - **more** (case to meet and respond)
   2. **Cardinal v Kent:** if the decision has a serious effect on the individual = **more (not full trial but something**
      1. **Can be limited by cost of implementing PF - $$ and time**
   3. **Khan: i**f you’re accused of wrongdoing the jeopardy is higher
4. **The legitimate expectations of the person challenging the decision**
   1. Legit expectations DO NOT create a substantive right in Canada
      1. Does not apply to legislative process
      2. May create a right to make representations (**reference re Canada assistance plan**)
   2. **Canada v Mavi**: Representations must be "clear, unambiguous and unqualified" to give rise to legitimate expectations
      1. Made by a decision-maker or authorized agent
   3. **Reference re Canada Assistance Plan:** legit expectations do NOT create a substantive right.
   4. **Apotex Canada v Canada** (not law in Canada) LEgit expectations does not apply to legislative decisions. Decision must be made by the decision maker
5. **Deference to the procedural choices may be the decision maker**
   1. If the statute specifies that the decision maker has broad discretionary powers- go with that
   2. If we are dealing with specific expertise
   3. Khan: is important in situations where there is a back log of cases or where expediency needs to be prioritized, or in answering substantive questions
   4. **Stony Mountain Institution**: balance financial burdens and expediency with the seriousness of the issue at hand.

**And any other relevant circumstance.**

Is credibility in issue

* If so, may require oral hearing and cross-examination
* **Khan v University of Ottawa**
  + Credibility issues require an oral hearing
* **Napoli**: Issues of credibility = higher expectation of disclosure and proceedings/ an oral hearing

**Notice**

(1) what kind f notice is reqd (written/oral) (2) how is notice effected (personal service, registered mail online posting) (4) how much time (5) whats included

All depends on context

* **Canada v Canada;**
  + **Follow legislation:** it overrides common law principles
* Cardinal v Kent Institution;
* **Canada v Mavi** (notice and submissions); re govt enforcing debts - notice is require
* **APJA, s 3** - adequate notice is required (not defined) and varies according to context, gaps in leg filled in by common law principles

**Discovery/Disclosure**

Amount of disclosure / discovery depends on context and seriousness of the issue

**Re Abel;**

* You do have the right to know the case to meet via disclosure

**Napoli v BC;**

* Issues of credibility = higher expectation of disclosure

**CIBA-Giegy v Canada**;

* Balance the need for disclosure with maintaining integrity of internal process.
* Notice and records to be relied on

**Mission Institution v Khela;**

* Only have to give them what you used in the decision itself. Summary is fine

**APJA s 4**

* About evidence and representations
* Codifies right to furnish evidence to the authority,
* Provide disclosure in usfficient detail that they understand the facts/allegations and have a chance to get cross evidence and let them respond to the case against the,

**Cross-examine**

-Disputes about facts, particularly credibility, may require cross-exam

**Napoli v BC**;

* Issues of credibility require a higher expectation of disclosure and an oral hearing

**Djakovic v BC;**

* Where credibility is an issue cross examination should happen
* Weigh the benefits and burden of hearing cross (imposing an undue financial burden)

**Khan v U Ottawa;**

* Issues of credibility require oral hearings and cross examinations

**APJA s 5;**

* Codifies cross rights

**Innisfil v Vespra**

* Cross is a vital element of adversarial system. Where a hearing is contemplated cross is part of that

**Counsel**

**Howard v Stony Mountain Institution;**

* There is no right to counsel. S. 7 can trigger a right to be determined
* All that is reqd is they can present their case adequately
* not a discretion to grant, but a right to be considered

**New Brunswick v G(J);** **TEST** for when s.7 demand representation - weigh 1+2 against 3

* How serious it is
* The complexity of the issue
* an d capability of the claimant (can they represent themselves)

**APJA s 6;**

**Hearing**

**Webb v Ontario Housing Corp**; have to let them know and give opp to respond, not necessarily full hearing re removal of a benny

**Khan v U Ottawa:** oral hearing reqd for credibility issue = weigh benny’s with imposing financial burden

**Reasons**

* **Canada v Mavi;**
  + Not required in every case
* **Baker v Canada;**
  + Pre banker there was no duty. Baker says yes in some cases
* **Canada v Vavilov**; - Required when:
  + (1) process gives a party participatory rights
  + (2) adverse decision would have a significant impact on an individual or
  + (3) right of appeal is set out
* **APJA s 7** - Preliminary "decisions" may not require reasons -
* **Wall v Independent Policy Review**
  + Preliminary or screening decisions don’t require reasons
  + Reasons can’t just recite facts, submissions and offer a conclusion

**Rule Against Bias**

Nemo judex in sua causa ("cannot be a judge in your own cause")

Decision-makers must be fair and impartial

Exception where contemplated by statute

**Process: look for whether or not**

1. You have an issue re bias
2. Any facts that might identify multiple roles
3. Pay attention to statutory provisions that make that okay and
4. Look at institutional or structural problems that might lead to an issue of bias

* **Brosseau v Alberta; 2747-3174 - impartiality from a structural perspective** 
  + If decision maker **only performs statutory duties** - no issue of bias
  + Court will look at factual record to see what they actually did and if that is in accordance with statutory roles
  + If the statute doesn’t explicitly say something, but if it **can be implie**d (necessarily implied) from the nature of the role/organization can be considered same as statutory duties
  + Context matters: roles and what is permitted is interpreted with regard to the protection of the public.
* **Quebec v Quebec; - independence + multiple hats**
  + The same lawyer making arguments before decision maker and then advising decision maker IS bad and may give rise to reasonable apprehension of bias
    - BUT statute allowing for someone to wear multiple hats is fine
  + Must be likely in a substantial number of cases OR demonstrate in a particular case
  + Consider any protections to mitigate bias
* **Ocean Port Hotel v BC**
  + Statute can limit the independence of a tribunal member (i.e. may be ousted by government) explicitly or necessary implication
  + If statute doesn’t provide for independence you can’t imply it from common law
  + Tribunal decision makers do not have the same constitutional obligations as judges

**Institutional consultations**

* **WA v Consolidated Bathurst;**
  + not prohibited unless (a) requirement to consult is imposed from above; (b) consultation does not deal with facts (only policies issues etc); (c) members not truly free to decide despite consultation.
* **Tremblay v Quebec;**
  + Influence is okay - constraining the individual’s ability to decide based on their own mind is NOT. people who decide must be able to freely decide
  + No legislative intent for it here (always check)
* **Ellis-Don v Ontario**;
  + Must prove an actual breach occurred; apprehension of breach of natural justice is not sufficient.
* Shuttleworth v Ontario
  + Power of the executive chair was an important factor – involvement in reappointment meant more apparent control. No procedural safeguards

**Reasonable Apprehension of Bias**

* Focus is on the impact on a reasonable person - not the mind of the decision maker

**Committee for Justice and Liberty v National Energy Board -** **TEST**

* ‘**what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.**’”
* Breaks into 4 overlapping categories
  + “Antagonism during a hearing by a decision-maker towards a party”
  + “An association between one of the parties and a decision-maker”
  + “An involvement by a decision-maker in a preliminary stage of the decision”
  + “An attitude of a decision-maker toward the outcome”

**Pelletier v Canada**

* He made comments that suggested he’d made a pre-judgement before the evidence was heard and the comments suggested he was looking for evidence to justify an outcome
* Assurances of impartiality are largely irrelevant

**Open Mind**

**Old St Boniface v Winnipeg;**

* **Test: is the decision-maker’s mind open to persuasion?**

**Seanic v St Johns**

* Test doesn’t require that the decision maker remains in a “state of uncertainty” you can take a position, don’t need facade of open mind until it's been decided.

**Investigative stage;Legislative or policy decisions - closed mind**

**Newfoundland Telephone v Newfoundland**

* At the investigative/legislative fucntions side it’s a lower standard: closed mind (not open to persuasion
* At a hearing stage the usual test/higher standard applies

**Substantive Review**

**Presumption of Reasonableness**

There is a presumption of reasonableness review of administrative decisions - **Canada v Vavilov**

**Constitutional Considerations**

Where a person's Charter rights or values are implication by an administrative decision, decision-maker must not disproportionately limit such Charter right or value.

Must balance the pressing and substantial objective with the Charter right or value

**Dore v Barreau du Quebec**

* Administrative law - not Oakes - is the applicable test re rights protections
* SoR is reasonableness
* **If the decision maker has disproportionately limited a charter right it is unreasonable**
* Balance pressing and substantial objective of the enabling statute with the infringement of the charter right

**Law Society of BC v TWU - Dore +**

* Q: **whether the decision reflects a proportionate balancing between statutory objectives and Charter protections**
* "Balancing" is not enough: **must consider less restrictive alternatives**. Same "justificatory muscles" being used as in Oakes test

**Saguenay**

* Balancing charter rights
* Admin bodies must be neutral in relation to religious matters
* Statute, regulation and bylaw are invalis if the purpose is religious

**Reasonableness Review** - **Vavilov**

* "A **reasonable decision** is one that is based on an internally **coherent and rational chain of analysis** and that is **justified** in relation to the facts and law that constrain the decision maker"
* Importance of reasons
  + NOT assessed against a standard of perfection
  + Primary mechanism for should decision as reasonable
  + Shields against arbitrariness (baker)
  + Shows them their arguments were considered
  + Rule of law - public justification
    - So people understand how justice is done
  + Important to facilitate meaningful judicial review (baker) and statutory appeal
  + Court can consider (1) evidence before decision-maker (b) submissions © publicly available policies and procedures (d) past decisions
  + If its an area with a lot of expertise involved reasons may be sparse
* Must demonstrate **"justification, transparency and intelligibility** (you can understand it)" (**Dunsmuir**)
  + Look here when deciding if judgment was reasonable enough
* A **single standard** that "**accounts for context**" - reasonableness review considers all relevant circumstances
  + The standard of review is unmodulated by elements of context BUT contextual constraints will dictate the “limits and contours of the space in which the decision maker may act and the types of solutions it may adopt
* **Starting point** = judicial restraint and respect for the role of administrative decision-makers
* Decision must be **justified, not merely justifiable**
  + Show the reasoning process was reasonable
  + **Courts should NOT** (1) ask what they would have decided - this is correctness (2) attempt to determine the range of possible conclusion sopen to decision maker (3) conduct a de novo analysis (4) seek to determine the correct solution to the problem
* Burden is on the party seeking to overturn the decision
* **Flaws** must be **more than merely superficial or peripheral** 
  + Must be sufficiently central or significant to impair the justification, transparency and intelligibility of the decision
* Where **no reasons required,** focus is still on the reasoning process and must look at the record as a whole; where no assistance in the record, court must review "constraints" to see if outcome was reasonable

**Two fundamental flaws that render a decision unreasonable:**

1. **Internal Coherence**

* "Failure of rationality internal to the reasoning process"
* **Must show [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**
* Unreasonable if reasons exhibit “clear logical fallacies” like circular reasoning, false dilemmas, unfounded generalizations or absurd premises.
  + (1) it fails to reveal a rational chain of analysis or is based on an irrational chain of analysis (2) conclusion cannot follow from the analysis undertaken or (3) reasons read in conjunction with the record do not make it possible to understand the reasoning on a critical point
* Not searching for one tiny error - must be substantially central or significant enough to impair the justification, transparency and intelligibility of the decision

1. **Justified based on constraints -** "Untenable in light of the relevant factual and legal constraints"

* **Governing statutory scheme \*one of most important\***
  + Decisions must comply with the statute incl definitions, scope (come questions may have only one reasonable answer) and purpose
  + **Can’t be reasonable to take on powers not granted to the decision-maker**
  + Look for problems re jurisdiction
* **Other relevant statutory or common law** 
  + Must be consistent with common law on **exercise of statutory powers and generally recognized interpretations of common principles**
  + **Precedents will act as constraints;**
  + Common law principles must be adapted to admin context
  + Intl law may be a constraint
* **Principles of statutory interpretation**
  + Not a de novo analysis - courts cannot “second guess” the interpretation
  + Must be “resolved by an analysis that has regard to the **text, context and purpose” of the legislation**
  + Decision maker must be “alive to essential elements” of interpretation
  + Cannot adopt an interpretation which is plausible and expeditious, but **inferior**
  + In some cases there may be one clear answer
* **Evidence and “judicial” notice**
  + Avoid re-weighing of evidence, BUT **decision must be justified in light of the facts**
  + Unreasonable if “**fundamentally misapprehended or failed to account for the evidence”**
* **Submissions of the parties**
  + Need to see **responsive reasoning**: that they “**meaningfully account** for the central issue and concerns raised by the parties
  + Its unreasonable if the decision shows a “failure to meaningfully grapple with key issues or central arguments raised by the parties”
  + If something is absent - make sure the other party did not concede that issue
* **Past practice and precedent**
  + Rule of law demands consistency: past decisions are a constraint
  + **Departures** from practice or precedent **must be justified in the reasons**
  + **If there is internal discord:**
    - Persistent internal disagreement may result in difficulty in justification of decisions that “preserve the discord” so if there isn’t enough justification from one of the parties it may result in an unreasonable decision
* I**mpact on the individuals affected (another context factor)**
  + Where the impact of a decision on an individual’s rights and interests is **severe,** the **reasons provided** to that individual must **reflect the stakes**”
  + A failure by a decision-maker to “grapple” with severe impacts of the decision may make decision unreasonable
  + Reasons must “demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law”

**Exceptions to the Presumption**

Where an exception to the presumption of reasonableness applies, the standard of review is **correctness.**

**Legislative Intention**

* **Right of Appeal**
  + Where **legislation refers to an appeal**, presumption is rebutted and the appellation standards of review applies = CORRECTNESS.
  + **Bell Canada v Canada;** if it has a right of appeal it meets the exception. Reasonableness doesn’t matter.
  + **Zuk v ADA+C:** if you see the word “ appeal” that signals legislative intent
  + Correctness for issues of law; palpable and overriding error for issues of fact, mixed fact and law; and discretionary decisions
    - SoR for mised q’s is reasonableness
  + Housen v Nikolaisen -
  + See **Pezim v BC (pre-Vavilov)** - (not good law) deference still owed on issues of law
* **Legislative Standard**
  + - **Where the legislature sets the standard of review, it must apply**
  + e.g. **Administrative Tribunals Act (BC);**
  + **Provincial Administrative Penalties Act (Alta)**;
  + **Traffic Safety Act (Alta);**
  + **College of Alberta Superintendents Act (Alta).**

**Rule of Law - - Issues that require one correct and consistent answer**

* **Constitutional Matters = Correctness**
  + Constitutional matters, including federalism, Charter, section 35 -
  + Applies to constitutional challenges to legislation
  + **Martin;Laseur** (but this is taken away in AB by APJA)
    - **Step 1** Tribunals who can (explicitly or implicitly) decide questions of law **CAN** (rebuttable presumption) answer constitutional issues including federalism charter s. 35 etc
    - **Step 2** - has the legislature taken away that right via explicit legislation
    - **BUT** cannot hold a law is invalid - just don’t apply it in this situation. Doesn’t strike down the law or cause stare decisis
  + **Peter v. Public Health:** Correctness applies to Charter and Alberta Bill of Rights
* **General Questions of Law**
  + General questions of law of central importance to the legal system as a whole
  + For example, solicitor-client privilege; res judicata; parliamentary privilege
  + Looking for something that will apply to the legal system as a whole - not a particular area of law or specific statute
  + Does the issue require a single determinative answer - if yes then it may qualify here
* **Jurisdictional boundaries** 
  + Jurisdictional boundaries between administrative tribunals;
  + applicants must know which tribunal to apply to
  + Horrocks v Northern Regional Health Authority
    - Labor arbitrators have exclusive jurisdiction because the nature of the issue squarely arises from the collective agreement. No leg intention for concurrent
* **Other**
  + Likely to be rare
  + Does not include jurisdictional questions
  + Does not include the resolution of persistent discord among administrative tribunal panels

**Standard of Review**

* Issues of Fact
  + - "[Q]uestions of fact are questions about what actually took place between the parties" - **BC v Southam**
  + **Credibility is an assessment of fact**, attracting a deferential standards: **Dr. Q v CPSBC - findings of fact attract a deferential standard**
* Mixed
  + "[Q]uestions of mixed fact and law are questions about whether the facts satisfy the legal tests." **BC v Southam**
* Law
  + "Questions of law are questions about what the correct legal test is".: **BC v Southam;**
  + **Pushpanathan v Canada** - questions of law = correctness standard

**Remedies**

**Breach of procedural fairness or error/unreasonable decision**

* **General rule** that **matter will be sent back to administrative decision-maker for consideration in accordance with court's direction.**
* Limited scenarios where sending it back would **stymie legislative intention for timely and effective resolutions**:
  + "Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose [? ] Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources

**Stay of Decision Pending Review (like a pause)**

* Generally, seeking judicial review does not operate as a stay of the decision (unless statute so indicates)
* Must apply for a stay if one is required.
  + **Alberta Rules of Court, r 3.23;** Stay of decision
    - 3.23(1) The Court may stay the operation of a decision or act sought to be set aside under an originating application for judicial review pending final determination of the originating application.
    - (2) Despite subrule (1), no order to stay is to be made if, in the Court’s opinion, the stay would be detrimental either to the public interest or to public safety.
  + **Federal Court Act, s 18.2** - **Test for stay is the tripartite test:** 
    - **1) is there a serious issue to be tried;**
      * A preliminary and tentative assessment of the merits of the case.”
    - **2) would the litigant seeking the interlocutory injunction, if not granted, suffer irreparable harm;**
      * Irreparable harm = hard to compensate via damages.
    - 3) **balance of (in)convenience - Which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits?**
      * Public interest (in addition to the parties) must be considered in constitutional litigation
      * These laws are made to better society so we don’t want to defeat the point of the law being passed in the first place
    - **Manitoba v Metropolitan Stores:**

**“Regular” remedies akin to prerogative writs**

* Certiorari, prohibition, mandamus, quo warranto, habeas corpus -
* **Alberta Rules of Court;** 3.15-3.24
* **Federal Court Act: ss. 2, 16-18, 28**
* Judicial review remedies are about setting aside or otherwise changing the administrative decision; actions for damages may proceed in regular civil process
* **Canada v Telezone** - fed courts act does not prevent actions against the crown in provincial courts. Public remedies value things like speedy process and public interactions and their validity. This case they were only seeking private remedies

**Constitutional Remedy**

Does tribunal have jurisdiction, explicit or implied, to decide questions of law?

If so, tribunal presumed to have jurisdiction to determine the constitutional validity under the Charter

Clear legislative intention to exclude the Charter from the tribunal?s jurisdiction? If so, the presumption in favour of Charter jurisdiction is rebutted.

Specific Charter remedy?

**Nova Scotia v Martin;**

* Cannot hold the law is invalid - just don’t apply it in the situation at hand. This is not binding on other decisions - maybe if the decision is upheld at judicial review

**R v Conway,**

* **Apply the Martin test; then ask if the specific remedy is the kind that the legislature contemplated** (i.e. prob not releasing someone from prison)

**APJA s 10**

* S. 11a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.
* Section 12: Notice of an intention to raise a constitutional question before a designated decision maker must be given to parties, Attorney General (Canada) and Minister of Justice (Alberta), except where application is to exclude evidence under section 24(2) of the Charter.

Section 16(a): Lieutenant Governor in Council **may designated decision makers by regulation**. Designation of Constitutional Decision Makers Regulation, Alta Reg 69/2006:

* Labour Relations Board and labour arbitrators (as defined), Law society entity (as defined),
* Alberta Utilities Commission, Alberta Energy Regulator (all questions of constitutional law)
* Human rights tribunal, Workers’ Compensation Board and Appeals Commission (only federalism - needs to be able to decide if something is a federally regulated industry or not etc)
* Law Enforcement Review Board (Charter only)
* Alberta Securities Commission (Charter and federalism)