Administrative Law – Winter 2023

The Rule of Law & Abuse of Admin Discretion

Thin vs thick conception: how may our understanding of ROL impact rulings on other topics? → he suggests thinking of this throughout the course.

Roncarelli v Duplessis (thin vs thick conception of the ROL)

Not a unanimous decision ⇒ while we often focus on the majority opinion (Rand J) re ROL & finding in favour of Roncarelli, relevant too is the dissent.

P: Constitutionalism & the ROL ⇒ all ppl subject to CA law; no one above CA law

R: Rand & Cartwright fundamentally disagree on status of admin law, resulting in different takes:

- Cartwright (**thin conception** → fewer legal restraints): only restraints **expressly stated** in the legislation constrain what actors can do.
  - If leg is silent = broad, discretionary power
- Rand (**thick conception** → implied legal restraints grounded by purposes of the legislation): ROL & purposive approach to legislation → legislation can **only give untrammeled power wherein it expressly permits** such power. "no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose"
  - Are the reasons underlying a decision consistent with the purpose of the legislation?

F:

- P owned (inherited from his dad) a snazzy restaurant in Montreal. P had converted to become a JW.
- Historical context:
  - During Premier Duplessis' reign (anti-communist, staunch Catholic, populist)
  - JWs would gather on the streets, their pamphlets were anti-Catholic ⇒ municipalities passed by-laws against passing out literature on public streets (this was really just a way to arrest JWs)
- P acted as a surety for JWs who were arrested (but did not take place in the handing out of pamphlets/gathering in public streets himself)
- Liquor Commissioner hired a PI to follow P around town → Liquor Commissioner pulled P's liquor license for his role as a surety (which was a huge deal considering P owned an upscale Montreal resto)

I/H: Was there an abuse of public power?

➢ Cartwright, dissent → **No**, nothing in leg restrains the Commissioner from revoking the license.
➢ Rand, majority → **Yes**, revoking the license is not consistent with a purposive understanding of the leg.

Statute: ***An Act Respecting Alcoholic Liquor***

- **s 5** [sets out jurisdiction for Liquor Commission to regulate sale of alcohol in the province]: "The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission."
  - Context: Small commission → Liquor Commissioner was effectively the entirety of the Commission.
- **s 9** [grants **broad powers** to Commissioner to administer the stat scheme] "The function, duties and powers of the Commission shall be the following:"
  - "To **control the possession, sale and delivery** of alcoholic liquor in accordance with the provisions of this act;"
  - "To **grant**, **refuse**, **or cancel permits** for the sale of alcoholic liquor or other permits in regard thereto, and to transfer the permit of any person deceased;.

A:

Cartwright J, <u>dissenting</u>: no language restrains the Commissioner, so he has unfettered discretion

- "…**no standards or conditions are indicated** [that restrain Commissioner's power] and **I am forced to conclude that the Legislature intended the commission "to be a law unto itself"**"
- Performance of the admin act was merely an exercise of the unfettered discretion conferred unto the Commissioner in the legislation. Therefore, commissioner was not bound to give P the opportunity to be heard before cancelling the license → "the **Court <u>cannot</u> be called upon to determine whether there existed sufficient grounds for his decision**"

Rand J, <u>majority</u>: w/o express language, no legislative act can grant unlimited arbitrary power

- No such thing as absolute, untrammeled discretion → "no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an

unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute."
- Admin decisions require "impartiality and integrity"
- Admin decisions must fall within the object of the administration: "the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means **that decision is to be based upon a weighing of considerations pertinent to the object of the administration**."
- **""Discretion" necessarily implies good faith** in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption [which is always implied in statutes as an exception to exercise of power]."
- Purposive understanding of the leg: can only revoke liquor license for **reasons consistent w/ broader objectives** & purposes of the law.
    - E.g., smuggling alcohol? Probably consistent w/ broader objectives BUT revoking license b/c P is a bail surety (which he's legally entitled to do) is NOT consistent with purposive understanding of the statute.

Conceptualizing Admin Law

Defining Admin Law

- Concerns the **legality of public decision-making**,
    - **Goal**: public decisions are rendered in a **fair and legally justifiable manner**
    - Goal accomplished through enforcement of transparency, rationality, due process in state decision-making & enforcement (on pol actors) to guard against arbitrary exercise of exec pwr
- Closely related to con law b/c it both empowers and constrains the use of public power.
- Complex b/c general concepts/princips must be interpreted in light of particular regulatory contexts.
    - *Look at legis, role of admin actor, pwrs held by the actor, etc.*
- Controversial b/c judges, lawyers, citizens, etc. **disagree about the legitimate role of the state**, the proper **scope of indiv freedom** in a liberal democracy, and how law should **regulate the relationship b/w indivs and the state**.

Decision-Makers Subject to Admin

Public Officials and Institutions (i.e., have delegated authority): Cabinet Ministers; Regulatory Boards; Administrative Tribunals; Public Institutions with statutory or licensing powers; Crown Corporations; Other public officials and institutions

Private organizations and indivs whose decisions **affect the public interest**: e.g., sports organizers (e.g., Hockey Alberta); BUT admin law doesn't apply to religious organizations (Prov courts said that they do, but SCC overruled and said that they don't); *Private orgs are a bit controversial b/c it'll depend on your conception of the exercise of power and whether it's public in its orientation.*

Sources of CA Admin Law

- CA Constitution (CA 1867; Charter; "Unwritten" Constitution[al principles]
- States, regulations, official policy statements
- CL doctrine
- Int'l treaties (see *Baker* for Heureux-Dubé's use of int'l law as articulating principles that limit scope of admin action)

4 Broad Aspects of CA Admin Law

(1) Procedural fairness (PF)

- *Before a decision is rendered PF is required*
- **Guiding Qs**: (1) Is this type of decision subject to judicial review? (2) If so, did the decision-maker abide by the principles of fair process (see below)?
    - Did the person affected receive **prior notice** of the decision?
    - Did the person affected receive **adequate disclosure**?
    - Was the person given the **opportunity to present evidence**, **cross-examine** witnesses and **provide submissions** in advance of the decision?
    - Was the person allowed **legal representation**?
    - Were **reasons** for the decision provided?
    - Was the decision-maker **biased**?

(2) Substantive review: What were the reasons for the decision? Are they justifiable in light of the law? Does the decision contain a substantive error in judgment which warrant judicial intervention?

- *After decision is rendered*
- Concerns the merits of a decision
    - Reasonable in the sense that it was **justifiable**?
    - Did the decision-maker act on **proper legal reasons**?
    - Was the decision motivated by **bias, arbitrariness or personal prejudice**?
    - Is the **conclusion logically supported** by the **evidence**?

(3) Remedies: If there are sufficient grounds for judicial intervention, what is the appropriate remedy under the circumstances?

- Can the court **overturn** the decision?
- Can the court grant **stay of proceedings** while party challenges administrative decision?
- Can the court direct the decision-maker to **reconsider** the case?
- Can the court order a **public official to take some action to resolve** the matter?
- Can the court step into the shoes of the **primary decision-maker**?

(4) Standing: Can this individual bring an application for judicial review?

- Does the person have **general/private interest standing**?
- Should the court exercise its **discretion** to give the person **public interest**?

Landmarks in CA Admin Law

CA 1867 s 96 Courts and Administrative Agencies (CB at 18-27) Constitutional Underpinnings of Judicial Review of Admin Action (CB at 447-448)	*Crevier; Nicholson; Guerin; CUPE*

"Anchors" in the law → useful for looking at all the other cases

CA 1867 ss 96, 99(1), 100

96 [fed jurisdiction to appoint superior court judges in the provs] GG shall appoint the Judges of the Superior, District, and County Courts in each Province

99(1) [s 96 judges security of tenure] … judges of the superior courts shall hold office during good behaviour, but shall be removable by GG on address of the Senate and HOC.

100 [salaries of judges] fixed and provided by the Parliament of Canada.

Crevier (constitutional right to judicial review; judicial independence)

Can't insulate provincial decisions from judicial review.

R: Prov legislation **CANNOT** prohibit judicial review by superior courts (strength of language in the prov legis = irrelevant, you can still apply for judicial review under s 96)
Cnxn to ROL: separation of powers (judicial independence)
F: ● Quebec National Assembly legislation → established prov court that oversaw prov discipline decisions pursuant to the *Professional Code* ○ ***Professional Code***, RSQ 1977, c C-26, s 194: "No extraordinary recourse contemplated in articles 834 to 850 of the Code of Civil Procedure shall be exercised and no injunction granted against the persons mentioned in section 193 acting in their official capacities." ○ Effect: if disciplined by one's professional organization, one could appeal that decision to the discipline Court. BUT the *Code* prohibited further appeals to a superior court (no opportunity for further judicial review)
I/H: Are QB provincial court decisions re *Professional Code* insulated from superior court review? → **NO**.
A: Laskin: do not interpret literally, interpret as subject to superior judicial review → prov legislation **cannot** prohibit judicial review conducted by superior courts (no matter how strong statutory language is, prov legis can never immunize admin decisions from judicial review). You can still apply for judicial review under s 96 - "In my opinion, **where a provincial Legislature puports to insulate one of its statutory tribunals from any curial review** of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be **struck down as unconstitutional** by reason of **having the effect of constituting a s 96 court**" - "It cannot be left to a provincial statutory tribunal, in the face of s 96, to determine the limits of its own jurisdiction without appeal or review [by a superior court]."

***Alberta Sovereignty Act* discussion**

- ***Crevier*** safeguards against claims in the Act re no ability to appeal to superior Courts → you could still appeal under s 96

Nicholson v Board of Police Commissioners (CL right to PF/assume all legislation includes a right to PF)

Admin decisions should be made in fair/transparent manner, viewed contextually

P: PF has 2 basic elements: 1. *Nemo judex in sua causa* → decision maker must be **impartial**; "no one should be a judge in their own cause" 2. *Audi alteram partem* →**right to a hearing**/to **state one's case** before final decisions; "let the other side be heard as well"
P: Laskin's CL principle of PF: Indivs have a right to (1) be **informed** of the **reasons** for the decision;

(2) have an **opportunity to respond** to the case against them

F:

- P = rural police officer in ON & was called into work on the weekend. When P asked boss for overtime pay, boss said "that's just what rookies do; no OT." P spoke to higher ups & boss wrote P up for insubordination + wrote letter to Board asking for P's termination. Board terminated P.
- ***Police Act*, s 27**: "No chief of police, constable or other police officer is subject to any penalty…except after a hearing and final disposition of a charge on appeal…but nothing herein affects the authority of a board or council …to dispense with the services of any constable within eighteen months of his becoming a constable."
  - No protection for P during the probationary period of 18 months.
- P applies for judicial review, claiming he should have had a hearing first.

A:

- Different from Cartwright in ***Roncarelli*** (Cartwright would've said the legislation doesn't give P the right to due process), BUT Laskin says that the legislation should be read against a background of CL principles, which includes the right to PF.
  - Common law PF principle that indivs facing admin decisions should have 2 pieces:
    - (1) Informed of reasons; (2) opportunity to respond/right to hearing
- Laskin: **Board can terminate Nicholson, but before so doing, they must inform officer of reasons for termination and provide opportunity to respond** (PF)
  - "I am of the opinion that although the appellant clearly 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."
  - "In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond."
    - Since the Board had not given P any information about the allegation against him or opportunity to respond, the Board's decision was legally invalid
    - P was reinstated to his position

Guerin v The Queen (fiduciary duty to Indg ppls, intro to DTC)

How does the DTC shape governmental procedures for approving of/Granting construction of infrastructure/resource development/etc?

P: Crown has an **implied fiduciary duty** under *IA*, s 18(1) to act in the best interests of the nation in question.

Fiduciary duty acknowledged in *Guerin* has **extended to s 35 DTC** which requires the Crown:

1. **Notify** Ab rights holders of any decision that *might* have a *negative* impact on *existing* Aboriginal rights.
2. **Respond to concern(s)** of those impacted rights holders → 2 conceptions in law:
   a. **Procedural/thinner conception**: notify, give info, provide opportunity for rights holders to voice concerns. BUT no substantive response to concerns.
   b. **Substantive/thicker conception**: no unilateral imposition, DTC extends beyond notice to require meaningful gov't response.

F:

- Land in the heart of Vancouver was Musqueam reserve land
- IA provision gives Crown exclusive right to deal with reserve lands on behalf of Indg nations
- Crown discusses a proposed lease with Musqueam (who did NOT have legal representation) → Crown then

proposes those terms to Shaughnessy Golf Club.

- Crown negotiates lease w/ Shaugnessy in a way that is **to the disadvantage** of the Band & **did not inform** the Band of the changed terms. (LT lease, 75 years, and the rent will be adjusted every decade to make sure it reflects a fair market rate...The Band agreed ⇒ 2 years later, the Department concluded a lease with the Golf Club on different terms for 10% of the fair market value (sizeable reduction in the rent))
- **Issue w/ Band's argument** → IA gives Crown unfettered discretion to determine terms on which reserve lands can be disposed of:
  - **IA 18(1)** … reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and … Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

I/H: Does the lease meet the Crown's obligation to ensure the land is used in such a way that benefits the band? → **NO** b/c there is a fiduciary duty to act in the best interests of the Band which requires satisfaction of the implied DTC. Band entitled to $10M in damages .

A: Decision presented similarly to *Roncarelli* & *Nicholson*

- **S 18(1)** is subject to an **implied fiduciary duty** to act in the best interests of the Musqueam Indian Band.
- Mirrors s 35 case law → any time Crown considers a decision that *might* have a *negative impact on existing Aboriginal rights*, it has a duty to (a) notify Aboriginal rights holders and (b) respond to their concern(s)
- Dickson J: "Through the confirmation in the [IA] of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a **discretion** to decide for itself **where the Indians' best interests really lie**…."
- Dickson J: "This **discretion** on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the **effect of transforming the Crown's obligation into a fiduciary one**."

CUPE v New Brunswick Liquor Corporation (deference to admin decision makers; interference only if decision = unreasonable in light of the facts)

Rationale for limiting interference: *modern day admin boards have budgetary concerns, robust institutional histories, heavy caseloads etc. that judges do not have sufficient expertise to understand (in contrast to a Board working exclusively w/ that legislation/policy day-to-day)→ therefore, judges should exercise restraint b/c their decisions can frustrate/undermine the purposes of the legislation & the administrative decisions/objects.*
Purpose of requiring a reasonableness analysis to determine whether interference is appropriate*: This is a form of quality control; Makes sure that public officials/administrative agencies exercise their power in a way that's publicly justifiable*

P: Deference required. Intervention only permitted when the Board's interpretation is **so patently unreasonable** that its construction **cannot be rationally supported by the relevant legislation and demands intervention** by the court upon review.

R: Conditions to interfere in an admin decision:

1. Court must explain why the **decision is incorrect**.
2. Court must explain why the **interpretation is unreasonable** such that it can't be rationally supported by the relevant legislation & demands intervention.

F:

- Labour dispute in province owned liquor stores in NB → management tasked w/ EE jobs
- TU claims ULP → says it's prohibited under the PS Labour Relations Act b/c managers are using replacement labour which is forbidden under s 102(3)
- Relevant legislation: ***Public Service Labour Relations Act (PSLRA)***
  - **101(1)** Except as provided in this Act, **every order**, award, direction, decision, declaration, or ruling of the Board, the Arbitration Tribunal or an adjudicator **is final** and **shall not be questioned or reviewed in any court**.
  - **102(3)** EEs may strike and during the continuance of the strike
    (a) the ER **shall not replace the striking EEs** or fill their position with any other EE, and
    (b) no EE shall picket, parade or in any manner demonstrate in or near any place of business of the ER.
- Province claims managers are <u>not</u> EEs
- TU claims quid pro quo in legislation → EEs prohibited from picketing in front of the workplace while ERs prohibited from filling the EEs places.
  - The quid pro quo is intended to resolve workplace disputes quickly → replacement workers & picket lines in front of the place of business can lead to longer disputes (which is contrary to labour relations purposes)
  - I.e., contrary to the purpose of the Act, which is timely resolution of disputes.
  - Board upheld grievance.
- ER applies for review, arguing that the Court shouldn't be bound by Board's decision nor should they regard it → <u>issue:</u> conflicts with s 101(1) of the *Act*, which states the Board's decision should have legal effect

I/H: Can the Court intervene despite the language in the statute granting the Board the final decision making power? → **YES,** but they shouldn't intervene **UNLESS** Board's interpretation of statute is <u>patently unreasonable</u>.

A:
Dickson J: only intervene when Board's interpretation of the legislation is **patently unreasonable**.

(1) **Ambiguity**: Legislation is ambiguous (The PSLRA "bristles with ambiguities")
(2) Don't interfere unless it's required (i.e., exercise deference): "The courts, in my view, should not be alert to brand as jurisdictional, and therefore to broader curial review, that which may be doubtfully so."
(3) The **privative clause is rationally defensible** ("compelling"): the labour board is a specialized tribunal that administers complex labour relations regime. Thus, its mandate is not only to find facts and decide questions of law, but also to develop its own jurisprudence.
(4) Was the Board's interpretation **so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review**?

General:

- Independent boards/tribunals have expertise in administering the legislation in question; whereas, judges are drawn from various areas of practice & may have only dealt with the legis in question once or twice.
- Tension: Decision pwr in question delegated to the Board who has requisite expertise BUT Courts retain authority to review decisions to ensure they are fair/justifiable in light of legislation, CL, and CA 1867.

Summary: Purpose of the 4 Cases

- ROL extends to **individual experience** → Firing ***Nicholson*** has a significant impact on his life & he is entitled to ROL (vis-a-vis PF)
- **DTC constitutionalized**, reflects ROL → ***Guerin***

- **Limits on judicial intervention** & **deference to underlying reasons** for admin decisions. Intervention only where reasons unsupportable in light of broader purposes/objectives of the legislation in question → ***CUPE v NB***

Due Process, Legality, & Legitimacy of Admin Law

What does the rule of law really mean? (CBC) (PDF)
Jeremy **Waldron**, "The Rule of Law and the Importance of Procedure" (PDF)
Jerry **Mashaw**, Due Process in the Administrative State (CB at 163-64)

What is Rule of Law? ("rule of law" vs "rule of man")
ROL: **evaluative standard** which gauges the **legitimacy** (**constitutionality**) of gov't action. By ensuring that administrative decisions are consistent with ROL, we can ensure that the government acts consistent with **publicly articulated legal standards** instead of arbitrary private opinions (ROL met when gov't action complies w/ previously announced legal standards; constrains gov't powers)

No ROL = exercise of raw pol pwr.

3 Main Conceptions of ROL: Dicey, Fuller, & Laskin

Dicey approach (English textbook on ROL; highly influential to CA discourse): An Introduction to the Study of the Law of the Constitution (1885)
Revolutionary at the time as it recentered ROL (no Crown immunity), emphasized role of judges. **ROL = Judicial monopoly on interpretation of the law**.

Three essential criteria in Dicey conception of ROL:

(1) **Courts have important role in ensuring exercise of law** ⇒ ""no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."
(2) **No one is above the law** (in practice, comes under repeated stress & strain) ⇒ "no man is above the law…every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."
(3) **Public law principles are customary** (**CL as anchor for legal principles that constrain pubic pwrs** = good thing insofar as customary principles are difficult to change; deeply embedded legal culture dedicated to ROL helps ensure public pwr complies with ROL in England better than in other continental jurisdictions) ⇒ "the general principles of the constitution…are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts".

Common Law Remedies flowing from Diceyan conception: Superior court judges have access to the common law remedies known as "**prerogative relief**"/ "**prerogative writs**" (**purpose**: check whether use of authority was compliant w/ ROL)

1. ***Certiorari*** (cert-yo-rare-i): Remedy used to **quash**, **nullify** or **set aside** an administrative decision (response to negative answer to Q: Was decision made in a legally accurate manner?)

2. **Prohibition**: STOP decisions at local level → Remedy used to order a tribunal **not to proceed** with a matter (decision constituted improperly, PF breach, etc.); today we think about this as a type of injunctive relief
3. ***Mandamus*** (man-day-mis): Remedy used to **compel** an administrative official to **perform a public duty** (*like an order of specific performance for decision makers to do something that is required by law)
4. ***Habeas corpus***: Remedy used to **compel** an administrative official to **justify a person's detention/imprisonment** (occurs upon unlawful detention → produce the body & show cause for the person's detention)

Problems with Diceyan conception of the rule of law:

- Prioritizes the constitutional role of the judiciary, which tends to interpret the Constitution and enabling legislation narrowly thereby frustrating the operation of the administrative state (e.g., judges overreaching their constitutional role and therefore **undermining the efficiency and operation of many social programs**)
- Context: 20th century → reforms of CA legal system to make it more egalitarian; construction of welfare state that redistributes wealth & power in society.
    - Complex task wherein parties w/ vested interests challenged redistribution of wealth etc. & appealed to courts in their opposition.
    - Such cases, particularly in realm of labour law, led to pattern in which judges would construe labour legislation narrowly (or even in perverse ways) that frustrated operation of the new legislative schemes.
    - Similar phenomenon in human rights cases wherein provs created human rights regimes b/c judges tended to support freedom of contract and other legal values (e.g., judges would say "Freedom of contract, bar owners can disallow some races from entering their bar)
- **Issue → judges interpret law inconsistent with legislative purpose.**
- E.g., ***Labour Relations Board of Sask v John East Iron Works Ltd***: s. 96 of Constitution Act, 1867 prohibits administrative officials from exercising powers traditionally exercised by common law courts (e.g., power to reinstate employees) → CL remedy of reinstatement only belongs to Courts & so allowing Boards to do it infringes s 96 of the constitution
    - Result of this case → Labour organizers skeptical when legislation puts increased power in hands of judiciary.
- E.g., ***Toronto Newspaper Guild v Globe Printing***: contested certification. Journalists voted to unionized, but ER contested certification, arguing for PF.
    - Requested to cross-examine every EE who signed a membership card.
    - **Administrative decision-making processes which are "judicial" or "quasi-judicial" must comply with full trial-type procedures** (eg full right to cross-examine union officials about membership lists)
- In the two above examples, we see that the Courts sometimes make decisions contrary to interests of and purposes underlying legislation.

Lon Fuller approach, The Morality of Law, 1969 (natural legal theorist; congenial to modern welfare state than that of Dicey):
Mid-20th century ⇒ conception arises from comparison of Nazi Germany as a breakdown of ROL to an ideal ROL (E.g., in Nazi Germany, no publication of law →ROL completely collapses, vacuum unto which unmitigated pol pwr takes over).

Instead of putting the judiciary at the centre, Fuller focuses on the essential differences between rule by fiat (executive order/Henry VIII clauses) and rule by law (legal system governed by statutes, administration respects the agency of those who are expected to follow the law)

Inner Morality of Law: the 8 formal principles:

1. Must be **general**
2. Must be **publicized**
3. Must be **intelligible**
4. **Cannot** have **retroactive** force
5. **Cannot** be **contradictory**
6. **Cannot** impose **obligations** that are **impossible** to perform
7. **Cannot** be so **unstable** that no one can understand what their legal obligations are
8. **Must be enforced consistently with the declared standards** (most relevant to our course → e.g., Roncarelli focuses on broader objectives/principles which constrain what the liquor commissioner can do)

Comparison of Fuller's inner morality of law to landmark cases: we use many of these ideas in our admin world. We ask if there has been publication, intelligibility, etc. to determine whether administrative decisions have met a basic standard of fairness.

Laskin approach (1973-1984) (CJC SCC in 1970s):
Context: professor, labour arbitrator, critical of judicial review over admin decisions.

Cases that demonstrate Laskin's conception of ROL:

1. ***Crevier***: Citizens have a **constitutional right to judicial review**, but administrative officials are entitled to exercise a broad range of adjudicative power
2. ***Nicholson***: A **general duty of/right to PF implied** unless expressly excluded by statute.
3. ***CUPE***: Judges should **respect administrative decisions** so long as those decisions are **rationally defensible in light of relevant legal standards**.

Three Aspects of Rule of Law (Waldron)

Reaction to the three conceptions: those conceptions don't stretch to the individual & provide mechanisms for PF which would allow indivs to interact with the decisions made against them
(PF in CA= AKA due process in US)

A. Formal Aspects of Rule of Law (Fuller → thin conception of ROL)

- Prospectively (No retrospective application of law)
- Non-contradictory (Rules must not contradict itself)
- Stability (Can't be changing so constantly that people don't understand what is expected of them)
- Publicity (Law must be accessible and made public)
- Clarity (Law cannot be vague)
- Generality (Law applies to all – no one is above the law)
- Consistency (Law must be enforced consistently)
- Practicability (Law cannot impose obligations that are impossible to perform)
- Intelligibility (Law must be intelligible)

B. **Substantive Aspects of Rule of Law** (other scholars → thick conception of ROL)
   - Respect for private property
   - Prohibitions on torture and brutality
   - A presumption of liberty
   - Right to Vote

C. **Procedural Aspects of Rule of Law** (Waldron's contribution) ⇒ Right to PF/due process = a fundamental respect to legal subjects. Provides a more concrete understanding of the decisions impacting them & corresponding rights to the following…
   - A right to **hearing** by an **impartial** tribunal
   - A right to a **legally trained judicial officer**, who is independent of other agencies of Government
   - A right to **be present** at all critical stages of the proceedings
   - A right to **confront witnesses** against the detainee
   - A right to **representation** by counsel and to the time and opportunity required to **prepare a case**
   - A right to an assurance that the evidence presented by the government has been gathered in a properly supervised way
   - A right to **present evidence** on one's own behalf
   - A right to **make legal arguments** about the bearing of the evidence and about the bearing of the various legal norms relevant to the case
   - A right to **hear reasons from the tribunal** when it reaches its decision
   - Some **right to appeal** to a higher tribunal of a similar character

Waldron's PF aspects = a way to show respect to indiv's dignity → indivs are moral agents ("active centres of intelligence") and are deserving of a corresponding basic form of respect.
Result = requirements for PF must be met before application of penalty & stigma. Further, indivs will accept adverse decisions so long as there is a level of respect and transparency given.

Issue: PF in tension w/ predictability of law. Reading legislation in holistic fashion could lead judges to varying positions.
Waldron's response to that issue: this is a tension we have to live w/ if we want to abide by these ideas of PF.

Moral right afforded to indivs to participate in the case made against them.

Waldron as a way to identify issues and begin to address them on a shared moral ground wherein arguments can emerge that are convincing insofar as they address a shared basis of morality.

Mashaw: Due Process in the Administrative State

A. How does the Rule of Law check the abuse of power in the exercise of admin discretion?
- Ensures that certain requirements are met prior to penalty, stigma or serious loss imposed upon one by the government. I.e., Constrains government from passing a retroactive law.

B. Should the legal doctrine of fairness be grounded in tradition (ie, historical precedent), natural rights (ie, the abstract concept of liberty), or interest balancing (ie, balancing individual interests against the public interest)?

1. **Tradition**: historical precedent → historically, what types of legal rights were extended to a person in this position?

2. **Natural rights**: abstract concept of individual liberty above all other social norms → Referring to fairness is an inalienable right of human beings
3. **Interest balancing**: PF determined in circumstances upon balancing indiv interest in particular outcome vs broader public interest → broadly utilitarian in its orientation, taking into account an indiv's interest in an outcome and weighing against the broader public interest at stake & then trying to strike a balance to find the applicable level of PF in the circumstances.
    - ➢ This approach emerges in many of the Canadian cases → spectrum of procedural rights in CA admin law & placement on the spectrum depends on a variety of factors
        i. Nature of interest affected
        ii. Legislation (What does the text say?)
        iii. Viewpoints of admin officials (how much PF can they afford in the circumstances?)

I. PROCEDURAL FAIRNESS

The CL & Duty of Procedural Fairness (PF)

Fairness: Sources and Thresholds (CB at 65-70)
Cooper *v Wandsworth Board of Works* (CB at 70-71)
Nicholson *v Haldimand-Norfolk Police*; The Baker synthesis (CB at 73-76)
Baker *v Canada* (CB at 29-53)

Common law duty of fairness steps: Cooper, Nicholson, Baker, Baker synthesis

R v Chancellor of Cambridge (UK; KB 1723) – CL duty of PF

Fortescue J: "The laws of God and man both give the **party an opportunity to make his defence**, if he has any…that even God himself did not pass sentence upon Adam, before he was called upon to make his defence." ⇒ appeal to bible for legal authority demonstrated PF is deeply rooted in history & of instrumental nature in legal process

What is Procedural Fairness?

- **PF** = broad, but the rigour in PF applied depends on the circumstances in the case. Contextual factors should be considered when determining the level of due process required in a case (see ***Baker***)
    - Type of decision, circumstances, statute, nature of the person's interest in the outcome, legitimate expectation ⇒ i.e., creates a spectrum upon which procedural fairness requires a decision maker do less → do more
- **PF**: Anytime someone is in legal jeopardy, they have the right to be informed of the case against them, and submit arguments in their own defence, and they should be entitled to be informed and involved in the legal proceedings.
- Two key elements: PF requires public officials to **act fairly** in the sense that:

Principles	**Individuals are entitled to…**
Audi alteram partem: persons affected by the decision are entitled to information and the ability to participate meaningfully	**1. Be informed of the reasons**

in the decision-making process (e.g., rights to notice, disclosure, know the case against you, hearing, make arguments, be represented, cross-examine, duty to give reasons)	**2. Participate in the decision-making process**
Nemo judex in sua causa: the decision maker must be impartial (e.g., CL principles prohibiting bias and adjudicative independence → preserving an independent adjudicative mindset so that we can be confident in how law is administered)	**3. Judicative independence**

How is PF Related to the ROL? Values of PF

PF has…

- **Instrumental value:** when decision makers comply with PF, they produce **better legal outcomes**
  - Akin to the adversarial process in the CL process → 2 adversaries who are well-informed who lead evidence to an impartial decision maker is more likely to result in truth (allows a complete thinking through of two sides of a story)
- **Inherent value** (inherent insofar as its value emergence independent of outcome): conveys **concern and respect** for people whose interests are affected by admin decisions
  - e.g., if decision maker failed to inform the affected person or take their concerns into account, then the court should intervene to vindicate the dignity of the individual who was vulnerable to the exercise of state power → see ***Baker*** at para 28).
- "**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision**" (***Baker*** at para 28) ⇒ Result: public confidence more likely; ppl more likely to comply with an adverse decision if it's been explained (contrast – arbitrary public decisions don't encourage compliance/ppl less likely to comply)

Historical Context

- Originally, principles of "natural justice" applied only to the exercise of judicial/quasi-judicial powers while "administrative" powers could be exercised w/o legal constraints.
  - PF did not apply to administrative powers.
  - PF = "**All or nothing**". PF attached to some situations, but not others. Why?
    - **When admin tribunals acted like courts** (hear from multiple parties, try to determine contested facts, etc.), then we **applied PF** since this was a quasi-judicial exercise of power (so we require things like notice, hearing, etc.)
    - BUT **when admin tribunals acted less like courts** (maybe they didn't do hearings but they did a town hall to hear public feedbacks & things start to look more like a political participation situation), then those are purely administrative (albeit sometimes executive) resulting in **no duty of PF** (no notice, no disclosure, no right to a hearing, etc.)
- Beginning with ***Nicholson*** (1978), see a shift away from categories & conceptual distinctions toward a **general duty of fairness** applied in a **nuanced, contextually-sensitive manner that balances competing private & public interests.**
  - Expansion of duty & right of PF across a wider domain of public decision making.
  - Also see an introduction of a **contextual** right of PF (movement away from the historical 'all or nothing' conception) → PF becomes more/less demanding *depending* on the circumstances.

Sources of PF: Constitution; DTC; Enabling legislation; Regulations (subordinate legislation); Executive orders (subordinate legislation); CL doctrine; Policy guidelines; Int'l law (not binding but, as we see in ***Baker***, can be used to inform statutory interpretation)

Considerations (apply to cases throughout the remainder of the course)

PF GENERAL test/considerations:

1. **Application of Duty PF**: Does this **type of decision** require a duty of PF? **Why**?
   - ➢ Note – there are some decisions that aren't subject to duty of PF
     - e.g., legislation that states that public decisions don't have any duty of PF
     - E.g., ***Mikisew***: does the DTC apply to the legislative process? → not really
       - Consider: *Sovereignty Act* → Treaty 6 & Treaty 8 nations push-back (claim – violation of DTC. Does the amendment of this type violate the DTC?)
2. **Relevant sources of law**: If there is a duty of PF, what are the relevant **principles** and **sources of law**? (more than one may apply)
   - ➢ CL:
     - Precedent (e.g., ***Cooper*** *v Wandsworth Board of Works;* ***Nicholson****;* ***Knight***)
     - Legitimate expectations
   - ➢ Enabling Statute:
     - General legislation concerning administrative process (E.g. *Alberta Administrative Procedures and Jurisdiction Act*)
     - Regulations; official guidelines
   - ➢ Constitutional Sources:
     - *Charter,* s 7
     - *CA 1867,* s 35 (DTC)
3. **Determine the level of PF required**: What **level** of or **degree** of PF is required, having regard for the **relevant legal context**?
   - ➢ Apply the relevant considerations
     - ***Guerin*** → Apply to DTC claims (more profound impact → higher DTC required; smaller impact → lower DTC required)
     - ***Baker*** → Apply to other claims (determine CL duty required)
4. **Was this decision rendered fairly?** (Own opinion – Was this particular decision-making process fair?)
   - ➢ Start at an abstract level, but then become particular in what you see as being wrong.

Cooper v Wandsworth Board of Works, 1863 (UK) (CL right to be heard)

PF in 1863 England to protect prop rights

R: Where the legislation is silent on right to be heard, we employ the CL principles (legislation is **silent**?→ intention to **abide** with CL)

F:

- Wandsworth municipality had sewage prob due to urban sprawl, few building codes, & open sewage ⇒ cholera outbreaks.
- Wandsworth created regulations on how citizens build structures to ensure integration with the new sewer system. Included requirement to provide 7-day notice period to municipality. Non compliance = Wandsworth can demolish building in question.
- Cooper claims he sent notice, but Wandsworth never received it.
- In any event, Cooper builds house within 5 days of giving notice (period has not elapsed).
- Municipality demolishes Cooper's house. Cooper sues for trespass and the city's destruction of the house.
- Municipality claims they were within their rights to destroy the house due to the regulation.

I/H: Should municipality have given notice and a hearing before tearing down the house? → **YES**. CL duty of fairness applies even though not explicit in the legislation.

Enabling legislation: no mention of a requirement of advance notice or the like. Merely says that Board can tear down house if it hasn't received adequate notice

A:

- Court synthesizes the enabling legislation w/ the CL, determining that while Cooper has a duty to give 7 days notice, there is a CL principle for a **right to be heard**.
  - Result = **Better informed decisions** and little in way of burden placed on the city.
- "Although there are no positive words in a statute requiring that the party shall be heard, … the common law will supply the omission of the legislature." ⇒ Silence means legislature intended to abide by CL presumption.
- Before demolishing Cooper's house, municipality must give him notice, and let him explain himself (it doesn't hurt the municipality to do this, other than being more informed and taking more time).

Today:

- Arguments about silence of legislation on matters of CL principles persist today → we can still cite ***Cooper***: **where the legislation is silent, we employ the CL principles**.

Nicholson, 1979 (extension of CL right to PF to incl public EEs)

Laskin takes logic of ***Cooper*** & applies in the context of a public EE that had been excluded from stat right of PF under the *Police Act*.

R: CL right to PF is <u>not</u> limited by silent statute (failure to mention the CL right ≠ abrogation of the CL right)

R: (1) Extension of CL duty of PF to **all** admin decisions (i.e., encompasses activities that fall <u>*outside*</u> of the judicial or quasi-judicial realm).
(2) If you want to exclude PF, have to <u>explicitly</u> exclude those rights.

F:

- Context: While cases like *Cooper* supported a duty of PF, the same had not been extended to public EEs
  - English laws said things like: 'Master can dismiss their servant for any reason at all w/ no right to a hearing'
- ***Police Act***: a police officer can be discharged <u>without</u> procedural protections if they have worked for under 18 months. P served as constable for 15 months and was discharged by the police board without reasons or a hearing. He sought judicial review.

Proc Hist: ON COA finds no right to PF for junior officers, only senior officers.

I/H: Under PF, was P entitled to a hearing prior to his discharge? → **YES**. Laskin finds that nothing in the *Police Act* overrules P's CL right to PF. Notwithstanding the lack of positive right in the legislation, the CL right still exists.

A:

- **CL right to PF is <u>not</u> limited by silent statute (failure to mention the CL right ≠ abrogation of the CL right)**
  - Statute doesn't explicitly entitle him to procedural fairness, but there is legal onus on board to give him notice and a hearing grounded in common law.
  - Laskin engages in interest balancing:
    - consequences for P were very serious,
    - requirement of notice makes board less likely to act in arbitrary fashion
- P should have been given reasons and opportunity to respond. He should not be treated unfairly and arbitrarily. Court states, "to endow some with procedural protection while denying others any at all would

work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question".

- This is the case that shifts duty of PF from categorical approach to contextual approach + **Reaffirmed in *Knight*** *v Indian Head School Division No 19* – " There is no longer a need, except perhaps where the statue mandates it, to distinguish between judicial, quasi-judicial and administrative decisions"

Baker v Canada, 1999 (contextualized determination of PF; RAB test; scope of duty to give reasons; scope of response)

Baker framework will be on exam – attempt framework on other cases

Sets out a contextual procedure for whether duty of PF has been met.

STAGE 1: Threshold → CL Duty of PF applies any time **rights, interests, or privileges are affected** (***Baker; Cardinal***) *broad, can encompass various admin situations

STAGE 2: Content of PF/Baker factors → PF is "**eminently variable** and its content is to be decided in the **specific context** of each case"; all circumstances must be considered to determine the content.

1. **Nature** of **decision** being made **& process** followed making it (i.e., how similar is the decision-maker to a court? → process, function of tribunal, nature of the decision-making body, determinations that have to be made)
2. **Nature** of **statutory scheme** and the terms of the enabling legislation (+ **policy guidelines**)
3. **Importance** of the decision to **indiv**(s) **affected** (e.g., work is sufficiently serious in ***Nicholson***)
4. **Legitimate expectation** of the person challenging the decision (legit expectation arises from (a) past practice or (b) express commitment by an administrative decision maker)
5. **Deference** to the procedural choices made by the decision-maker

STAGE 3: In light of contextual duty of PF (from Stage 2) did the actions of the admin body satisfy the duty?

- **Oral hearings may <u>not</u> be required where** the content of PF duty is such that **written reasons are sufficient** to satisfy one's ability to respond to case against them & make arguments
- **Duty to give reasons** = ***flexible*** standard; requires the person understands the **rational basis** for the decision.
- **TEST for reasonable apprehension of bias** (RAB) → "what would an **informed person**, viewing the matter **realistically** and **practically** – and having thought the matter through conclude. Would he think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly?" ***Consider****: whether inferences are supported by* ***evidence****, whether facts relied on are* ***accurate****, whether a decision-makers* ***individual opinions/frustrations*** *clouded their judgment,* ***societal values/judgments***)

F:

- Baker came to CA in 1981 working on a visitor's permit. Overstays permit.
- Has 4 Canadian-born children who are under 10 y/o.
- Public officials learn she is not a PR when she applies for social assistance & CA starts deportation proceedings → Ppl typically apply for PR from <u>outside</u> of Canada (rule), BUT Baker's lawyer applied for humanitarian/compassionate grounds (discretionary exception) to allow her to apply from within CA.
- Minister has discretionary power to allow stay on H+C grounds (discretionary exception)
    - Grounds: access to healthcare (Baker has a serious condition & it's unclear whether she'll have access to the healthcare required); separation from her 4 Canadian-born children (i.e., citizens) – one of whom is an infant.
        - Interestingly, the grounds used to justify the App were also used by officials to decide against her H+C App (*see RAB below*)

- App included letters re: lack of medical treatment in her country and the effect her departure will have on her Canadian-born children.
- Application denied: Senior immigration officer replied to Baker, via letter, stating insufficient reasons, but did not provide reasons for the decision in the letter. Senior officers used the investigating immigration officer's notes/findings to make their decision.
- Baker's counsel requests notes made by the investigation immigration officer → provided.

I/H: Did the Minister of Immigration exercise their power in a way that was PF:
(1) Were **participatory rights** given to Baker consistent with PF? → **YES**. Baker had *written* participation.
(2) Were the **reasons** provided sufficient to meet the duty of PF? → **YES**.
(3) Was there **substantive reasonableness** (i.e., **reasonable apprehension of bias**)? → **NO**

Purpose of the participatory rights contained within the duty of PF: **ensure that admin decisions are made using a fair and open procedure**, 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.

Statute: ***Immigration Act*, s 114(2)** = sets out the H+C exemption

A: Entitled to fairness b/c the decision impacts Baker's rights, privileges, & interests. *BUT* she's not the full range of procedural safeguards (contextual based on several factors)

STAGE 1: Threshold Q for PF= Duty applies any time **rights, interests, or privileges are affected** (***Baker; Cardinal***)
- **Broad def'n** → includes wide swath of ppl impacted by admin decisions.

STAGE 2: Scope of duty of PF ⇒ Apply ***Baker* factors**:
1. **Nature of decision being made & process followed making it** (i.e., how similar is decision-maker to a court?)
   - ➢ The more like a judicial decision-making process = the more likely procedural protections closer to the trial model are required for duty of PF.
     i. **Process** provided for
     ii. **Function** of the tribunal
     iii. **Nature** of the decision making body
     iv. **Determinations** that need to be made
   - ➢ Adversarial-like process culminating in a formal adjudication? ⇒ more extensive PF rights.
   - ➢ Here, H+C grounds = very **different from judicial decision**
     i. Involves **considerable discretion** → law does not dictate a specific outcome
     ii. Requires **consideration of multiple factors** → decision-maker has "a choice of options within a statutorily imposed set of boundaries"
     iii. Providing **oral hearing** (like in a judicial hearing) is **not realistic**.
2. **Nature of statutory scheme and the terms of the enabling legislation**
   - ➢ **Does the legislation give rights to PF?** ⇒ Examine the **enabling legislation, and policies and guidelines** (can also look at policy & guidelines under #4). (Note: Can argue General Procedural Statutes (I.e., APJA) outside of the common law procedural fairness argument.)
     i. Exclusion to right of appeal = higher degree of PF required (if you can't appeal, you have to get it right the 1st time)
     ii. ***Baker*** = no appeal procedure but there is judicial review available with leave to Federal Court
3. **Importance of the decision to the individual or individuals affected** ****spend the most advocacy time here****

- ➢ The more important the decision is to the lives of those affected and the greater the impact = more stringent the procedural protections will be mandated. Look at contextual considerations. How is the decision going to impact one's life?
  - i. Serious material damage? Economic harm? Related to someone's employment?
  - ii. ***Nicholson*** = decision to **terminate** had big impact on his life
  - iii. ***Baker*** = consequences are very serious. Being put on a plane to a place she hasn't lived in 10 years will have significant consequences wrt her **mental health**, **biopsychosocial needs of her children**.

4. **Legitimate expectation of the person challenging the decision**
   - ➢ Legit expectation occurs through either (a) **past practice** or (b) **express commitment** by an admin decision maker (e.g., I will consult XYZ before acting, or we will follow XYZ procedure).
     - i. ***Baker***: no legitimate expectation noted
5. **Deference to the procedural choices made by the decision-maker**
   - ➢ Asks judges to consider *why* decision-maker followed a particular procedure, deference to their expertise wrt public interests vis-a-vis budgets, time, etc.
   - ➢ Enabling legislation & regulatory context suggests expertise → courts should respect/exercise more deference
     - i. ***Baker***: **statute accords considerable flexibility to Minister** to decide proper procedure and immigration officers as a matter of practice do not conduct interviews in all cases. Implementation of a non-oral hearing is so that the system does not come to a halt. Thus, written reasons instead of an oral hearing is sufficient for PF.

STAGE 3: In light of contextual duty of PF (from Stage 2) did the actions of the admin body satisfy the duty?
Oral Hearing → not entitled; written reasons were sufficient to allow Baker to respond.

- Baker argues PF violated due to lack of oral hearing for her *and* her children.
  - **Oral hearings** allow for more efficient & effective facilitation of understanding & responding to decision-maker & their concerns.
- Denied oral hearing.
  - SCC found written reasons to be sufficient b/c if everyone got an oral hearing, the immigration board system will be halted – therefore, **impractical to warrant oral hearing**.
  - **Contrast to *Singh***: *Charter* right to oral hearings in the case of refugee claims.

Written Reasons → file notes satisfied duty to give reasons (**flexible standard of the duty to give reasons**)

- "In certain circumstances, including, where decision has important significance for the individual or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision"
- **Person has to understand the rational basis for the decision** ⇒ here, this was met by the provision of the junior immigration officer's notes.

Reasonable Apprehension of Bias →

- The test is "**what would an informed person, viewing the matter realistically and practically – and having thought the matter through conclude? Would he think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly?**"
- Here, the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had a psychiatric illness. A reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with impartiality.
  - Factually incorrect statements → drew inferences unsupported by the evidence; evidence even suggested the complete opposite
  - Justification using stereotypes
  - Decision-maker's own frustration w/ the system

Constitutional Duty of PF

Right *in addition to* CL Duty. Do not conflate with Baker Common Law Framework ⇒ these are 2 separate analyses .

- Even where it doesn't outright say "no PF" but seems like it's implying, still apply CL PF.
- Start with the stronger argument, then move to the weaker one.
- Just be very clear if you are going to make both arguments —> do the full baker & then do the full s 7 argument
- Know the differences, illustrate the subtle differences, but also recognize where they help each other/come to the same conclusion.
- Keep in mind the statutory arguments for PF.
- You can treat the statute as its own analysis (separate from CL & Const) OR embedded in the CL & Const arguments.
  - Just do what makes the most sense

Introduction (pp. 121-122)
Singh *v Minister of Employment and Immigration* (pp. 126-139)
Charkaoui *v Canada (Citizenship and Immigration)* (pp. 139-146)
Blencoe *v British Columbia (Human Rights Commission)* (pp. 146-154)

When to Raise Constitutional Argument for PF

(1) When the **statute expressly excludes CL** duty of fairness;
   (a) Legislation reads "you are not entitled to a hearing"
   (b) Contrast to ***Cooper/Nicholson***: Laskin "when I read the legislation, it does not expressly say Nicholson is not entitled to procedural fairness"
(2) When the CL duty of PF is **unlikely to apply** or particularly weak; or
(3) When you want to argue for an **especially onerous duty of fairness**, which implies trial-type procedures.
   (a) E.g., when you want full disclosure, oral hearing, counsel, etc.
   (b) If stakes & significance to indiv are very high, argue this

CAN I RAISE A CONSTITUTIONAL ARGUMENT FOR PF?

Situation 1: Does Charter apply to decision making entity? (the "slam dunk" situation – immediately argue PF)

- ***Charter,* s 32(1)**: Charter applies (a) to the Parliament and government of Canada **in respect of all matters within the authority of Parliament** including all matters relating the Yukon and NWT; and (b) to the legislature and government of each Province in respect of **all matters within the authority of the legislature** of each Province. (**s 32 should be considered when dealing with boards, agencies, institutions, etc.**).
- **s 32 TEST**:
  - Is it a **governmental entity**, i.e., "Part of the fabric of government"?
    - Is entity completely **controlled** by government? (E.g. Transit Authorities – ***VTA***) OR
    - Is this entity **exercising governmental functions**? (E.g. Municipalities – ***Godbout***)
    - If so, *Charter* apples to **all** actions, including internal management
    - BUT universities likely excluded → ***McKinney v University of Guelph***: Universities are not a governmental institution for the purposes of the *Charter*

- Does it conduct **governmental acts**, i.e., the entity is not part of government but performs **governmental function**?
  - I.e., Is the impugned action **implementing a gov't program?** (***Eldridge***)
    1. E.g., ***Eldridge v BC***: Provincial Hospital Boards are a governmental institution because they implement a specific legislative policy or program.
    2. They aren't gov't institutions necessarily, but some of what they DO is. **To the extent that they implement a policy/program, they are subject to *Charter* scrutiny**.
  - i.e., Are they **exercising statutory power of compulsion**? (e.g., Canada Labour Board using statute to force someone to do something)
    1. If so, *Charter* applies but **only to activities in furtherance** of government policy or program.
  - BUT unis may be included under this branch of the test → recent arguments suggest unis do "gov't acts" so ***McKinney*** may not be accurate depending on the impugned action in question (not all uni actions are gov't acts, but some may be).

Situation 2: Is a *Charter* right infringed upon? (useful when s 32 doesn't apply, e.g., arms-length institutions)

- ***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**.
  - Everyone = applies to citizens AND non-citizens, literally everyone.
  - **Right to life**: protects ppl from **death & risk of death**. *Less common in the case law, but more common wrt refugee & extradition claims.*
  - **Right to liberty**: more expansive def'n than right to life. Includes:
    - **State imposition** of decisions that **limit freedom of movement**
    - But also extends to right to make **fundamental life choices** (***Morgentaler***) such as right to terminate pregnancy & where to live
  - **Security of the person**: protects from serious state imposed psychological distress (***Morgentaler***)
  - **PFJs**: deeply rooted in CL principles, fairly open-ended (can be broadly argued)
    - Broadly argued BUT subject to four conditions:
      1. Must be a legal principle (E.g., principle of fundamental fairness, audi alteram partem, nemo judex)
      2. Must be some social consensus that the principle is vital or fundamental to our shared notion of justice;
      3. Principle must be identified with precision and applied in a manner that yields predictable results (i.e., not too abstract or unduly vague)
      4. Regulation of s 7 interests by the PFJ cannot be overbroad, arbitrary, or grossly disproportionate.
    - **Procedural PFJs include** (non-exhaustive):
      1. Right to oral hearing
      2. Notice
      3. Disclosure
      4. Opportunity to make arguments
      5. Must be a legal principle.
    - There must be social consensus that the principle is vital or fundamental to our shared notion of justice. (E.g. Law cannot be overbroad, arbitrary or grossly disproportionate. Innocent should not be punished. Defences cannot be illusory - *Morgentaler*)

POFJs

Singh v Canada, 1985 (right to oral hearing found; LLS all infringed; General $ claims & admin convenience ≠ s 1 justification)

The fact Singh gets an oral hearing & Baker doesn't is b/c Singh's case is resolved on the basis of *Charter* arguments.

S7 TEST:

1. Does the law infringe a claimant's right to life, liberty, or security of the person? (Here – yes)
2. Are the claimant's rights engaged in a manner contrary to the PFJs? (Here – yes, he needs oral hearing)

R: Oral hearing may be required by PF where Canadian gov't indirectly subjects claimant to risk of torture (here, by sending Singh to Sri Lanka where he is/was persecuted).

R: Indirect exposure to risk of a violation of s7 interests is **sufficient** to infringe s 7 (Decision-maker and/or Canada do not need to directly expose a claimant to risks on one's LLS interest, even indirect exposure is sufficient to engage a s7 infringement).

R: General claims about the need to have an efficient or **cost-effective** decision-making process do **not** suffice as a s 1 justification. *Charter* guarantees will **not** be ignored on the basis of **administrative convenience**.

LLS Infringement Analysis:
Life → protection from state decision that enhances the risk of death, even if the risk of death isn't *directly* caused by the gov't. Deportation to country of origin that would expose someone to an enhanced risk of death is **sufficient** to trigger right to life (may include extradition treaties w/ countries that have the death penalty like the US)

Liberty → situations where the state either (1) **physically** detains someone OR (2) encroaches on **fundamental personal life choices**. Singh's liberty infringed by physical detention risk associated with deportation to country of origin. (see also ***Godbout***: decision where to locate personal residence (infringes liberty interest by encroaching on fundamental personal life choices)
Note: property rights being read in to the liberty interest (developing area – keep eye on SCC)

Security of the person → 2 elements: (1) right to bodily integrity; (2) right to be free from serious psychological state-imposed distress. Singh's bodily integrity is threatened by going back to country of origin (E.g., body search triggers interest in security of the person; access to abortion outside of major centres, significant delays to abortion services, or complete unavailability of abortion services infringes right to be free from serious psych state-imposed distress b/c of increasing danger that comes with longer wait times for abortions–***Morgentaler***)

F:

- Singh = refugee claimant landed in CA
- Basis for claim: if he was deported to Sri Lanka, high risk that he would be detained, tortured, possibly killed
  - Stakes are high
- Process for Convention Refugee Status:
  - Give statement under oath to a senior immigration officer.
  - Transcript of that interview is sent to Refugee Status Advisory Committee (RSAC)
  - RSAC makes recommendation to Minister.
  - Minister makes determination.
  - Person can appeal. If so, transcript, recommendation, and determination sent to Refugee Appeal Committee
- Singh claimed refugee status, lost the claim, and appeals to Refugee Appeal Committee.
  - Makes s 7 claim to Court ⇒ Singh says he should have right to oral hearing b/c the stakes are so high & his rights to LLS have been infringed contrary to PFJs.

I/H: Has Singh's s 7 right to LLS been infringed in a manner contrary to the PFJs by b/c he wasn't permitted to participate in the appeal? → **YES**

A:
Does the *Charter* apply?

- S 32 → not much of an application in this case.

- S 7 → Citizens and non-citizens have constitutional rights under s 7 ⇒ "**everyone**"

The fact that the legislation provided only a written appeal from an unfavourable decision infringed s 7 because:

1. CA's legislation **indirectly** engaged Singh's s 7 LLS interests → Even though CA gov't isn't threatening Singh's life, sending him back to a country where he will likely be harmed & tortured infringes his right to life, liberty, & security of the person ⇒ <u>all</u> of the s 7 rights are engaged b/c Singh is <u>*exposed*</u> to the risk of infringement of his right to LLS.
2. It engaged the claimant's right in a manner contrary to the PFJ – by failing to allow him to participate in the appeal
    a. At very least, Singh should have an oral hearing.
    b. Wilson J states that credibility is a key factor in decisions like this ⇒ difficult to make determinations about fact w/o assessing Singh's credibility
    c. Threatening to deport to another jurisdiction where one is likely to face torture will allow you to oral hearing – as contrasted with Baker.
        i. Possibility for psychological distress

General claims about the need to have an efficient or cost-effective decision-making process do not suffice as a s.1 justification. Charter guarantees will not be ignored on the basis of administrative convenience.

- Gov't claims that it's too expensive to hold oral hearing → Wilson J says that we can't just say that we will ignore Charter rights due to high costs.

Blencoe v BC (HRC), 2000 (s 32 Eldridge analysis; stress of legal proceedings ≠ sufficient to trigger security of the person in s 7)

R: Charter scrutiny **extends to arms-length/independent adjudicative bodies** engaged in human rights processes b/c these bodies **implement** a specific gov't policy/program and have **powers of statutory compulsion**. Subject to scrutiny to the extent they implement that gov't program (i.e., *Eldridge* analysis).

R: Reaffirms 2-step s7 analysis from ***Singh***, i.e., (1) LLS infringed? (2) right engaged in a manner contrary to PFJs? (call on the PF PFJs and see if the denial of a procedure is connected to infringement → use *Charkaoui* to determine whether the PFJs were violated – they may not be violated even if certain PF safeguards aren't engaged b/c this step of the analysis is contextual)

R: Liberty interest <u>NOT</u> engaged by personal choice to move to a new province by reason of media scrutiny/significant delay in legal proceedings (contrast to ***Godbout*** → s 7 engaged b/c gov't stipulates where claimants had to live).

R: Security of person interest <u>NOT</u> engaged by normal stress associated w/ **legal proceedings & their delay**. **<u>MUST</u>** show identifiable, added element of serious state imposed psych stress that can be attributed specifically to the delay.

- Consider: claimants released on bail conditions whose personal liberty is severely curtailed prior to trial → additional liberty interest is engaged.AZ
- Consider: pre-trial conditions for criminal trials → additional liberty interest.
- Contrast ***Blencoe*** wherein P still had the ability to go about his life *to* ***Singh*** who is <u>also</u> detained→ s 7 analysis is quite different where you can see both a liberty & security of the person argument being made

F:

- Blencoe is caucus member accused of sexual assault.
- There is a 30-month delay in his hearing (at least some of the delays have nothing to do w/ Blencoe, but due to the public profile of the investigation).
- During the delay, Blencoe doesn't run for re-election/wouldn't be able to be elected anywhere (effectively lost his job), forced to move, is a nervous wreck. Argues that his s 7 right is infringed.

I/H: Does unreasonable delay amount to a breach of PF? → **NO** b/c of the extent of anxiety & stress suffered. Anxiety and stress suffered by Blencoe was not serious state-imposed psychological stress.

A:
If this was a crim charge, there would be alarm bells re unreasonable delay (18-24 mos for crim cases)

- Delay infringes on your ability to respond to the case against you → evidence disappears, compromised, witnesses disappear, etc.

1) Does the *Charter* apply?

- HRC is arms-length from gov't → wrinkle contrasted to Singh wherein Minister made the decision.
- Even though the Human Rights Commission is independent of govt/arms-length body, the Charter applies to its processes because it is "**implementing a specific government policy or program**" and has "**powers of statutory compulsion**." (Eldridge-esque argument) Charter applies to its mandate.
- ***Charter scrutiny extends to arms-length adjudicative bodies, as it is engaged in the human rights processes/policies here**

2) Court reaffirms the s 7 two-step from Singh:

A. Does the law infringe a claimant's right to life, liberty, or security of the person? *(Blencoe argues that it does b/c he isn't working, press is following him everywhere, he has had to move)*
B. Are the claimant's rights engaged in a manner contrary to the principles of fundamental justice?

3) Definitions of "life, liberty, and security of the person":

- Life= freedom from governmental threats to one's existence
  - Not engaged. No risk of death.
- Liberty= freedom from physical restraint + freedom from state compulsions regarding important or fundamental life choices (*Godbout, Morgantaler*)
  - Blencoe claims significant delay & media scrutiny made it intolerable to live in BC
  - Blencoe claims he had to move which infringed his liberty ⇒ SCC says no, this is nothing like in Godbout where the gov't stipulates where you have to live; Blencoe decided to move on his own.
- Security of the person= freedom from state interference with bodily integrity + freedom from serious state imposed psychological stress (Rodriguez, Morgantaler, etc)
  - Blencoe claims by virtue in significant delays & resolution of the case, I suffered serious state imposed psych stress
  - SCC says normal stress associated w/ legal proceedings will **not** engage security of the person interest under s 7. MUST show identifiable, added element of serious state imposed psych stress that can be attributed specifically to the delay.
  - SCC assumes security of person was not engaged.

4) 30-month delay does not breach Blencoe's s 7 rights, because "[f]reedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected right" **the ordinary stresses from investigation by the Human Rights Commission doesn't trigger s 7 interests*

Example (apply Blencoe): WCB claims (or other claims to similar Boards) wherein pressure on the system results in significant delay of 30 months.

1. Does Charter apply to delay of WCB claim?
   a. Do a truncated P&S ⇒ purpose of act is to set up arms-length admin board responsible for administrating & assessing a fund for the benefit of workers.
   b. Apply P&S to CL ⇒ CL here is making a claim directly related to the P&S of the Act b/c they are making a decision directly related to the ability of person to access a fund for the benefit of the person as a worker.
2. LLS engaged?

a. Life ⇒ enhanced risk of death is a bit of a stretch. In absence of facts suggesting suicide, it's a stretch.
b. Liberty ⇒ hard to prove there's a fundamental personal choice being curtailed b/c he wants to get gov't benefits.
c. Security of the person **probably the best place to advocate & increase success** ⇒ if you're unable to return to full employment and your ability to earn income has been significantly small over a 30 month period, the stress can really add up (beyond legal stress in Blencoe). We could see mental illness, fears about losing a home, fears about being able to eat.
    i. Here, we can think about spelling out what the practical implications are to a judge. Think about the ivory tower judge and spell out the basics of being a normal person lol

3. Call on the procedural PFJ elements to tie undue delay to the fairness of the hearing (second step of Singh analysis combined with the recognized PFJs in a procedural capacity)
    a. witness death, moving, deterioration of evidence.

Charkaoui v CA, 2007 (PF under s7 are contextual → policy concerns take on a heavier weight than in CL arguments)

R: Duty of PF under *Charter* s 7 is contextual and involves a balancing of interests. Here, policy concerns take on a heavier weight than in CL arguments for PF ⇒ Procedural rights & indiv interests protected by s 7, but limitations to procedural rights are counterbalanced by social interests (here, national security interests).
Look at the various options for PF and look at whether those PF safeguards would be subject to policy concerns (consider the outcomes of certain PF safeguards in the context of the public interest).

F:

- **Historical context**: post-9/11 fears about terrorists. Litany of case law where ppl are accused of being terrorists w/o provision of evidence that people have actually done anything.
- Security Certificate Process:
    - CA identifies 5 men suspected to be threats to national security on basis of secret info shared to Minister of Public Safety by CSIS.
    - Minister reviewed classified info & decided to issue security certificate.
    - Issuance of security cert lets RCMP arrest & detain ppl indefinitely until satisfied they're no longer a threat to national security.
    - Upon issuance of certificate, "hearing" before federal court judge: ***Ex-parte, in camera* hearing** with only the judge & Crown counsel to help review the docs. The person accused is not notified, has no info, and is not party to the 'hearing.'
    - Individuals could then be subject to additional proceedings, stripping them of refugee status and deporting them.
- Charkoui had no notice, no disclosure, no opportunity to understand info & respond, no opp to be heard, and decision could not be appealed.
    - Note: No full disclosure because CA afraid of jeopardizing relationships with other countries' national intelligence programs, and don't want to let potential terrorist know what the gov't knows about them.
- Charkoui made a *Charter* argument b/c the IRPA expressly excludes the CL duty of fairness – therefore, rely on constitutional argument. Procedural rights protected by s 7, but limitations to procedural rights are counterbalanced by national security interests.

I/H: Does IRPA offend s 7 of the *Charter* and, therefore, is P entitled to PF? → **YES.** BUT, because the duty of PF is flexible & alive to public policy concerns, Charkaoui is not entitled to full disclosure. He does get the following PF rights: hearing; hearing before independent & impartial magistrate; decision must be based on the facts & law; right to know the case against him; right to respond. Law later changed to appoint a special advocate.

Statute: **IRPA** → expressly excludes CL right to PF.

A:
Do you think s 7 analysis should attempt to balance social interests w/ indiv rights? Or is this issue best addressed under s 1 of the *Charter*?

- Content of principles change depending on regulatory context in which you find yourself
- Full disclosure is not possible in this case. If s 7 is to be satisfied, either the person must be given the necessary information or a substantial substitute for that information must be found. Neither situations found here.
    - This seems to pre-empt the s 1 analysis → it's essentially done before the s 1 analysis.
    - In some regulatory contexts where s 7 is engaged, PFJs may require full disclosure of all relevant information BUT in a national security context where dealing with highly sensitive, classified info we may not be able to disclose that info with that person.
- Policy considerations influence procedural fairness. Usually, these concerns come up under s 1. But here, **McLachlin J uses policy to shape what is required under fundamental justice**. In a national security context, the PFJ needs to be interpreted to give more room to that national security interest.
    - "The **overarching principle of fundamental justice that applies here** is this: before the state can detain people for significant periods of time, it must accord them a **fair judicial process**". In this case there was lack of:
        - The right to a hearing
        - The hearing must be before an independent and impartial magistrate
        - The magistrate's decision must be based on the facts and the law
        - The right to know the case put against one and
        - The right to answer the case
    - HOWEVER, P is not entitled to disclosure.
- McLachlin uses the same type of analysis or rationale as that in *Baker*
    - He gets some information, but not all of it. ⇒ McLachlin looks at schemes in Britain & says there are other options.

Legislative Changes Post-Decision

- New legislation provides for appointment of a special advocate who could challenge government claims to evidence as well as its relevance, reliability, sufficiency and weight, make submissions, cross-examine witnesses, and with permission exercise any other powers required to protect the interest of a named person.
- BUT **no solicitor-client relationship** b/w special advocate and named person → advocate CANNOT tell the named person any of the information since it's confidential (but there is solicitor-client privilege). *govt amends certificate process

Companion case: *Harkat*

- Upholds the special advocate regime
- Harkat says that the new legislation doesn't allow you to understand the case against you & respond ⇒ Court says that it's not perfect, but it's good enough for s 7.

DTC & s 35

DTC has developed into something with more "teeth" – Prof relates to public interest standing

- Corps exist to shield indivs from liability → can't pierce corp veil to go after SHs/directors in their personal capacities for wrongs of the corp. Look at public interest standing for more

Haida Nation v British Columbia (Minister of Forests) (pp. 391-399, 410-417, 420-422)
Clyde River v Petroleum Geo-Services Inc (TWEN)

Lorne Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012 45:2 UBC L Rev 595)
BC Public Service: Lake Babine Nation Foundation Agreement: https://www.youtube.com/watch?v=vtDxbpe_nPQ
BC Government News Release: Tahltan Central Government, BC make history under Declaration Act: https://news.gov.bc.ca/releases/2022PREM0034-000899

Guiding Qs:

- Why is there a Duty to Consult? → fiduciary obligation + s 35. Honour of the Crown. Crown must act honourably in all its dealings with Aboriginal ppl (***Haida***)
- When is the DTC triggered? → whenever Crown contemplates decision that may negatively impact s 35 claimant groups (***Haida***)
- Practically speaking, what does the DTC require of administrative decision-makers and government officials? → This process: Notify → provision of information → opportunity to be heard → respond
- To what extent might DTC include Indigenous legal perspectives & institutions? → When Indigenous group can accommodate & respond to Indg concerns

DTC = s 35 remedy (separate from Treaty remedy)
DTC = timely remedy (options: injunction, damages, declarations, orders compelling action/mandamus)
Notify → provision of information → opportunity to be heard → respond

Haida Nation v BC (DTC: source, trigger, content, delegation)

Moves away from unfettered Crown discretion → DTC says that whenever Crown contemplates decision that may negatively impact s 35 claimant groups, it has a duty to give information, listen & engage in negotiations, & duty to accommodate (in some cases → may have to accommodate or respond to Indg concerns)
Trans Mountain Pipeline, Northern Gateway Pipeline, etc.

R: Source of DTC = **honour of the Crown** which is always at stake in gov't dealings with Aboriginal ppl. Scope of DTC = much be understood **generously** to reflect underlying realities from which is stems. Honour of Crown gives rise to **different duties in different circumstances.**
R: DTC is a timely remedy (Acts like an injunction before Aboriginal Title Claims under s 35 are adjudicated)
R: DTC triggered early! Triggered when: 1. The Crown has knowledge, real or constructive (ie know or ought to know), of the potential existence of an Aboriginal or Treaty rights; AND 2. Contemplates conduct that might adversely affect that right
R: Content of the DTC: contextual & **proportionate** to a preliminary assessment of: 1. The **strength of the s 35** claim, and 2. The **seriousness** of the potential adverse impact of the gov't decision upon the right.
R: Crown can delegate procedural aspects of DTC (eg rely on environmental assessment agencies or admin boards like NEB to conduct hearings), but the Crown ultimately remains responsible for fulfilling the DTC.
F: ● Haida people make a claim to title of the Haida Gwaii territory. Claim has not been approved yet. ● Government grants forestry licenses to third parties despite the claim being in process.

- Haida launches a lawsuit objecting to one of the licenses.

I/H: What duty is owed to Haida? → Good faith consultation & accommodation of Haida interests, but no duty to reach an agreement. *Past* consultations re replacement of licenses do not satisfy DTC.

A: Crown **cannot** act in a way that *may* negatively impact the Haida Nation's title claim while that title claim is being litigated.

1) DTC grounded in the **Honour of the Crown** (fiduciary relationship b/w Crown and Indigenous peoples). DTC is an **obligation to claimed Aboriginal rights AND established rights**.

- The Crown exercises **substantial discretionary power** over both unceded and ceded territories. This discretionary power must be exercised in a particular way (also see ***Guerin***)
- Forestry licenses on title lands or asserted claim of title that has yet to be resolved
- Dishonourable for Crown to make unilateral decisions in respect of title lands ⇒ would breach fiduciary duty

2) DTC triggered when:

A) The Crown has knowledge, real or constructive (ie know or ought to know), of the potential existence of an Aboriginal or Treaty rights; AND
   - ➢ Here, Province had knowledge of title claim

B) Contemplates conduct that might adversely affect that right
   - ➢ Here, Province contemplated conduct that may adversely affect Haida

- Intended to be a timely remedy & therefore triggered very early.
- DTC = form of judicial relief that's available even before the Aboriginal/Treaty rights are proven in court)
- In *Haida*, DTC required before issuance of licenses. It's triggered as soon as Crown has real or constructive knowledge of existing Aboriginal or Treaty rights claim & contemplates conduct that might adversely affect that right.
  - As soon as Crown on notice of potential s 35 issue, must immediately address

3) Content of the DTC (what is required of the gov't) is **proportionate** to a preliminary assessment of the strength of the case and the seriousness of the potential adverse effects upon the right.

- Spectrum (looks a bit like Baker) → consider factors:
  - Strength of s 35 claim
    - Strong evidence that Haida have **good claims to at least some of the lands**
    - *Prima facie* case in support of Aboriginal title
  - Seriousness of the impact of the gov't decision on the rights in question
    - Red cedar has long been **integral to Haida culture** & is **limited in supply**.
    - Meaningful DTC would require consultation at the stage of granting or renewing licenses.

4) Crown can delegate procedural aspects of DTC (eg rely on environmental assessment agencies or admin boards like NEB to conduct hearings), but the Crown ultimately remains responsible for fulfilling the DTC.

- Crown wants to delegate some procedural aspects → Court says that's fine BUT ultimate responsibility to fulfill DTC rests with Crown.

Environmental & Industry Concerns:

- Some ppl think of DTC as being thin: merely listening, making space for ppl to vent.
- Others think of DTC as thicker: more than letting groups vent/blow off steam. Instead, need to actually & meaningfully address concerns
  - ***TransMountain Pipeline***: first certificate issued by National Energy Board included 250 conditions that had to be satisfied to address concerns of different Indigenous groups. Federal Court yanks the original certificate & says DTC means actually accommodating concerns. Next year spent meeting with different Indigenous groups to satisfy the DTC (no consensus resulted, but satisfied the Court that DTC was met).
- Still issues w/ understanding what the DTC is.

Rio Tinto v Sekani, 2010

Legal Criteria (Nothing really changes post-Haida, it all mostly stays the same notwithstanding some minor tweaks. Still roughly the same)

GROUNDING & ROLE OF DTC:
- Grounded in **honour of Crown**
- Seeks to **reconcile** assertions of **Crown sovereignty** w/ **Aboriginal interests**.

DTC ARISES WHEN…
1. Crown has **real** *or* **constructive knowledge** of a **potential** Ab rights claim (i.e., aries early in the process; real = actually know, e.g., receive letter from Treaty 6 FN communities; constructive = ought to know)
2. Crown is **contemplating** a decision; and
3. The contemplated decision might **adversely affect** Ab rights (causal relationship, but generous & purposive approach required; adverse impacts extend to any effect that may prejudice a pending Ab claim or right)

DTC CONTENT: **contextual** (similar to ***Baker*** – becomes more or less demanding) ⇒ look at circumstances
- strength of s 35 claim? Weak or strong? nature of the right?
- seriousness of impact?

deeper analysis of content based on the context = higher grade

DTC BREACH REMEDIES: very broad. **Vary** with circumstances:
- Ranging from injunctive relief, damages, declaration, order (in *mandamus*) requiring the Crown to fulfill the DTC before proceeding.
- Remedies are broad b/c DTC is a constitutionally grounded claim
- While the Crown can delegate the DTC, the court will require clear evidence that the DTC was delegated. (eg clear intention in setting up a joint review board w/NEB: who is fulfilling which aspect?)
- Delegation of procedural aspects of DTC to admin bodies is becoming more popular, but Court says that the duty <u>still</u> rests with the Crown. Practically speaking, this means there is no passing of the buck from cabinet to the national energy board (or something)

F:
- Power plant was built on Nechako River in BC in 1960 ⇒ Seriously altered water levels and fishing.
- Carrier Sekani Tribal Council (CSTC) had been pursuing a treaty since 1993 &claimed the Nechako Valley as their ancestral homeland, as well as the right to fish in the river.
- HydroBC entered into a contract to sell electricity from the power plant.
  - BC Utilities Commission assessed that there would be no impact on water levels or management of the river's fishery, so there was no duty to consult or expand the scope of deliberations to address CSTC's concerns.

Clyde River v Petroleum Geo-Services (regulatory processes can fulfill DTC)

No fundamental shift in DTC law, but case demonstrates how DTC can break down when admin agencies on the ground try to adjust their regulatory process.

R: Regulatory processes can (partially or completely) fulfill DTC → delegated bodies must have direction about what to do wrt DTC & Crown has the ultimate responsibility to make sure DTC is met. This DTC must be met in <u>substance</u>, not just in <u>format</u>.

F:
- Context: NEB holding hearings re whether to approve seismic airgun testing
  - Seismic airgun testing: allows for exploration of petroleum on the seafloor by sending air pulses into the sea floor
  - Pulse req'd for testing: noise stretches 300,000km^2 raising background noise levels 100 fold for

continuous weeks or months (can kill mammals within ear shot, harm animals)
    - Existing land claims agreements protecting traditional hunting & fishing activities
- Testing taking place in an area where Clyde River have rights to hunting. This clan relies on hunting for survival and this testing disrupts the ecosystem, thereby diminishing the food source for this group.
- PGS applies to National Energy Board (NEB) for authorization to conduct seismic testing. NEB launches an environmental assessment of the project. Clyde members asked basic questions about the effects of the survey on marine mammals, but PGS unable to answer. PGS filed 4000-page document with the NEB purporting to answer those questions. This document was untranslated, and no further efforts were made to determine whether their questions were answered.

I/H: Is DTC triggered? → YES.
What DTC is required? → Consultation & accommodation
Did Crown properly delegate & discharge procedural aspects of DTC? → YES & NO. Yes = notice duties. No = reasons duty.

A:
Threshold Q: Is DTC triggered?
- **Real knowledge** of existing rights ⇒ YES – land claim agreement in place = real knowledge
- **Contemplating decision?** ⇒ YES – contemplating seismic airgun testing.
- **Decision impact rights?** ⇒ YES – significance of pulse kills and/or harms mammals and ecosystems.

Degree of consultation & accommodation req'd?
- Strength of claim
    - Clyde had established treaty rights to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being.
- Seriousness of impacts
    - Science points to intense impacts of seismic airgun testing
- Court says deep consultation is required – they should be able to participate fully, right to reasons, opportunity to make submissions, accommodation.

Did Crown delegate procedural aspects of DTC? **Was the duty discharged?**
- Properly discharged notice duties.
- Held a hearing to listen to concerns **BUT** did **not** discharge reasons duty:
    - "We don't know" of the effects on marine life; "we aren't experts"
    - NEB provided a 4000-page report on the effects on marine life that wasn't translated (some pages were translated; doc was way too big to be printed)
    - **Information dumping ≠ deep consultation** has been met and DTC discharged. Should've given understandable information. There was also no participant funding and no formal hearing process. Formal hearing process may be required for meaningful consultation.
    - *Looks like an attempt to meet DTC in form, but not in substance.*
        - *Inaccessible (can't print), unintelligible (limited translation), etc.*
- Perhaps, state appointed advocate or translation services would have been helpful in this case. Should've informed clan how testing can be regulated in order to mitigate the damage to marine life/Clyde's rights.

Example Q:
Told to hold hearings & determine whether seismic airgun testing is in the public interest.
- Participant funding ⇒ could channel existing gov't resources to a particular agency so they can fund process to understand the content of the decision & its impacts (e.g., hire their own marine biologist to discuss the impacts)
- Ensure hearing process accommodates concerns adequately → e.g., extend horizon of the approval process to provide adequate time to consult

- Translation services

Steps for DTC analysis:

1. Threshold Q: Has the duty been triggered? (***Haida, Rio Tinto*** breaks into 3 considerations) i.e.,...
    a. Crown has **real** *or* **constructive knowledge** of a **potential** Ab rights claim (i.e., aries early in the process; real = actually know, e.g., receive letter from Treaty 6 FN communities; constructive = ought to know)
    b. Crown is **contemplating** a decision; and
    c. The contemplated decision might **adversely affect** Ab rights
2. Define scope of duty: prelim assessment of **strength of s 35 claim** + **seriousness of the impacts** on s 35 interests)
    a. Strength of Claim:
        i. Look to cumulative effects (this is a newer development in law)
    b. Seriousness of Impacts
        i. Possible retention of experts
        ii. Possible consultation of various gov't and industry reports re impact on land
3. Define scope of duty: Determine where scope falls on spectrum:
    a. Low end: rights are limited and potential infringement is minor ⇒ DTC requires notice, disclosure, and some discussion of Aboriginal concerns. (some degree of transparency and disclosure)
        i. When breach is less serious, duty to discuss (in good faith) may be all that is required (***Delgamuukw***)
    b. High end: rights are significant and high risk of non-compensable damage (see ***Clyde River; Haida***) ⇒ DTC requires 'deep consultation,' and 'accommodation' to find satisfactory interim sol'n. This entails:
        i. Opportunity to make submissions, (face-to-face negotiation & consultation)
        ii. Formal participation, and
        iii. ***Provision of written reasons to demonstrate that Aboriginal concerns were considered and addressed (demonstrate gov't decision was impacted/changed by what was heard in negotiation & consultation). E.g.,
            1. Mitigation measures?
            2. Pipeline monitoring?
            3. Rerouting pipeline to avoid the problems altogether
4. Confirm DTC was properly discharged.
    a. Did the Crown itself meet the duty?
    b. If Crown itself didn't, did it delegate procedural aspects of DTC? → Confirm DTC was properly discharged
        i. Crown has ability to delegate listening, responding, reporting back on concerns, etc.(***Rio Tinto; Clyde River***). E.g., delegate to an enviro assessment agency
            1. BUT if delegating, **must provide direction** re what the agency must do wrt DTC
        ii. If DTC ≠ properly discharged ⇒ Crown still holds responsibility (+ issues may arise leading to gridlock for both Crown & claimant)

Sossin Article

- How do we build institutions at local level that are better equipped to navigate DTC issues?
- Could give more voice to FN communities to voice their concerns re environmental processes

- Basic principles of CA Admin law may need to be rethought to allow for greater voice from local communities & greater sensitivity to their own Indg legal traditions.
    - Could move away from town halls/hearings and toward round table or consensus-based hearings
- Building & maintaining admin agencies operated and overseen by Indg communities themselves.
- Examples: self-gov't agreements, comanagement arrangements,
    - Comanagement: set out const principles that lay the groundwork for these type of agreements
- Dispute resolution mechanisms to navigate the issues

Lingering Questions

Does DTC apply to gov't proposals to rollback enviro regulations & oversight?

- Current event: *AB Sovereignty Act* → Treaty 8 Nations saying that this isn't constitutional wrt s 35, offends DTC

Should DTC be interpreted more broadly in light of CA's obligations under UNDRIP?

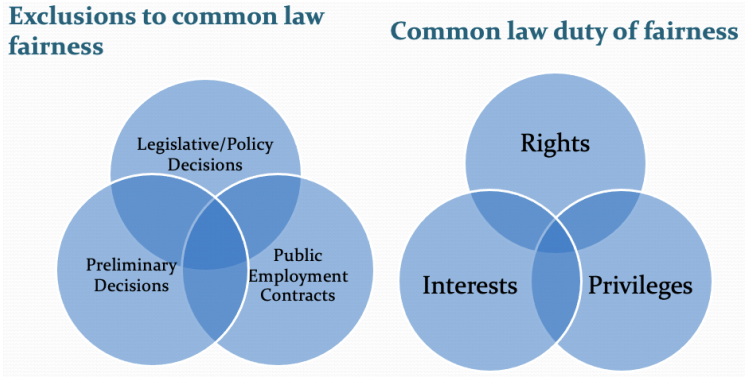
- FPIC concerns ⇒ DTC ≠ FPIC
- BUT does adoption of UNDRIP signify a more consent-based approach to this obligation?

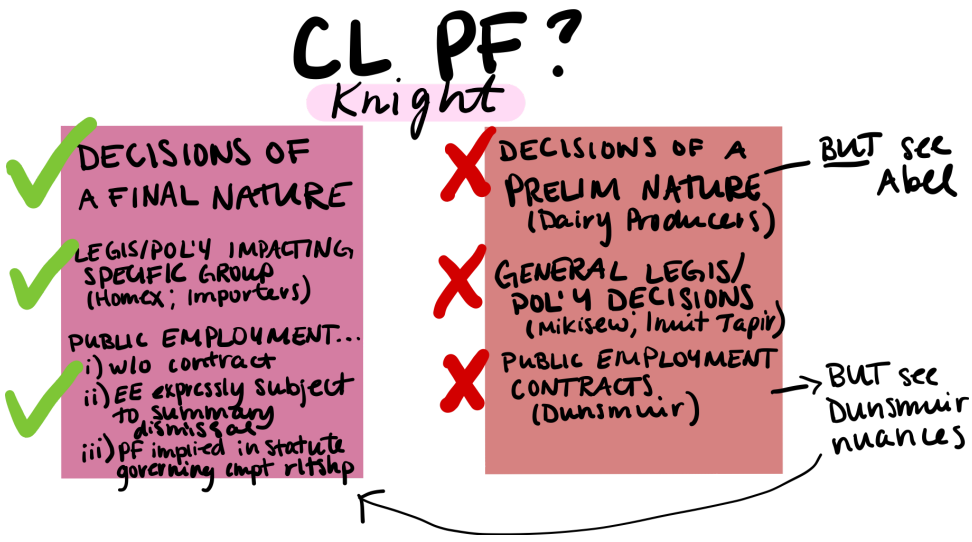
How should DTC incorporate Indg legal perspectives?

- Is there a way to reimagine admin processes/decisions/etc to better reflect Indg perspectives and voices? → i.e., **Sossin** article
- Up to this point ⇒ Boards hear evidence from Indg nation & then just make a decision
    - No one is happy with how the process is functioning
    - Is there another way to receive reconciliation?

Limits to CL Doctrine of PF

- CL Duty of PF is broad, but not limitless (***Baker***) → Some admin decisions do <u>not</u> trigger CL duty of PF
    - E.g., s 35 captures a lot but does not extend to legislative process (at least not at this point)
- Note: conceptualizations are fuzzy (space for argumentation but lack of certainty)





Context & Development of PF

- **Pre-*Nicholson***: PF limited to judicial or quasi-judicial decisions
- ***Nicholson***: probationary constable makes successful args for PF
    - Why is this significant?
        - Historically, ppl like Nicholson were considered servants
        - Servants had no procedural protections
    - **Nicholson stands for expansion of PF to ppl/circumstances wherein PF traditionally wasn't**
- **Post-*Nicholson***: expansion of PF into areas that traditionally didn't have any PF (e.g., extensions to prisoners – see *Khela*)

Knight v Indian Head School Division No 19, 1990 (CL PF Exceptions)

R: Duty of PF ≠ universal, there are **exceptions**:
1. Decisions of a **legislative** and **general nature**
2. Decisions of a **preliminary nature** (contrast: final decisions attract PF// CL PF only arises at the hearing stage).

A:
Movement away from all-or-nothing duty of PF
- L'Heureux-Dube J reaffirms Nicholson: "there is no longer a need, except perhaps where the statute mandates it, to distinguish between judicial, quasi-judicial and administrative decisions."
    - The duty of fairness applied to the situation as it was a school board BUT was satisfied as P was informed of the school board's concerns and given an opportunity to reply before being let go from job.
- **Duty of fairness ≠ universal** – there are still some exceptions to this common law duty of PF → "...not all administrative bodies are under a duty to act fairly..." EXCEPTIONS:
    - Decisions of a legislative and general nature can be distinguished in this respect form acts of a more administrative and specific nature, which do not entail such a duty.
    - The finality of a decision will also be a factor to consider. A decision of a preliminary nature will not in general trigger a duty to act fairly, whereas a decision of a more final nature may have such an effect." (*concern of types of decisions and pre-maturity)
        - High-level admin decisions raise separation of powers concerns & courts shouldn't interfere w/

the pol process
- Preliminary admin decisions don't raise this concern. Under CL PF, the duty only arises at the hearing stage (not as preliminary as something like DTC)

Exception 1 to CL PF: Legislative & Policy Decisions

Legislative decisions:
Canada (AG) v Inuit Tapirisat of Canada (pp. 87-92)
Mikisew Cree First Nation v Canada (pp. 407-410)
Policy statements:
Canadian Association of Importers v Canada (pp. 96-99)

Canada v Inuit Tapirisat, 1980 (CL PF does not apply to bodies exercising legislative functions)

R: Reasons for the "bodies exercising legislative functions"/Inuit Tapirisat exception:
1. **Legislative Functions Rationale**: separation of powers argument → legislative functions are reserved for elected officials. Character of decision maker also important here (further from actually making decisions, more likely CL PF applies)
2. **Legislative intent rationale** (contrast to ***Nicholson***) → if legislature clearly intended to give power for the body to act unfettered by the CL through their statutory language, CL PF less likely.
    a. *BUT… you can argue Nicholson rationale by pointing to ROL problems/justifications.*
3. **Logistical ineffeciency rationale**: the more stakeholders the body has, the less likely PF will be owed (b/c we want bodies to make efficient decisions & if they have to hear all stakeholders impacted, this will take a long time).
4. **Absence of individual rights or privileges rationale** (Marxist interpretation): if wide swaths are impacted, it's not an indiv right/privilege Q.

R: PF doesn't apply to some admin entities ⇒ *Inuit Tapirisat* sometimes used as a **shield** to argue that some admin processes aren't amenable to judicial scrutiny/PF doesn't apply.
BUT parts of Estsey J's reasoning are contradictory → Can get around the shield by finding facts/ideas within the case you're looking at that are in tension with admin law principles (e.g., ROL problems where high ranking officials don't have to abide by principles of PF, cabinet decisions that are "administrative and specific")

*CL PF does apply in **Homex** though → Court says the policy addresses a **specific** property or entity (i.e., bylaw affecting single property development)*

F:
- **Context**: high expense to construct utilities generally, but particularly telecommunications. High initial expense, but regulations prevent companies from charging over $X. For companies to charge over $X, must apply for rate increase approval through CRTC.
- Bell Canada made an application to CRTC for approval of a rate increase. App was approved.
- Inuit Tapirisat intervened to oppose the application → they wanted the CRTC to put a condition on rate increase in the form of an obligation to provide better service to Northern communities.
- CRTC approves rate increase despite Inuit Tapirisat intervention. However, any rate changes have to be ultimately approved by the Cabinet.
- Inuit Tapirisat appeal to Cabinet (general right of appeal to Cabinet on CRTC decisions).
    - Inuit Tapirisat only gets briefing note of Bell (not other bodies involved) and Inuit Tapirisat wasn't able to provide submissions.

- Minister gets briefs from Gov't Dept, CRTC, and Bell.
- Cabinet met and refused the appeal (w/o submissions from Inuit Tapirisat)

- Inuit Tapirisat brings application for judicial review, saying it had a right to PF at CL (i.e., implied duty).
  - Claims PF includes notice, copy of the briefs, and opp to respond.

I/H: Is there a CL duty of PF? → **NO**. Duty does **not** apply to decisions of a legislative nature.

Statute: ***National Transportation Act*, s 64(1)**: Canadian Radio and Telecommunications Commission (CRTC) has power to regulate the utility rates

A: How did the SCC determine whether Inuit Tapirisat was entitled to PF? What criteria did it use?
(1) Legislative Functions Rationale (aka separation of powers argument)

- Cabinet qualitatively different from admin decision makers
- Since Inuit Tapirisat appealed to Cabinet as of right & cabinet is legislative, their decision is legislative in nature.
- Recourse available through lobbying gov'ts, not through judicial review.

(2) Legislative intent rationale (contrast to *Nicholson*)

- In tension w/ Nicholson/contrasts Nicholson → enabling legislation **doesn't mention CL duty** of PF, so there is **no CL duty**.
- Exec branch subject to judicial review BUT purpose of judicial review is to ensure cabinet complies w/ explicit terms in the legislation.
- The **Statutory language is relatively clear that Cabinet can act unfettered by the common law** (Cartwright J-type argument where silence = Parliament didn't intend the CL duty of fairness to apply)
- **Character of the decision maker** themselves: Here we are dealing with federal cabinet in Ottawa and not just a municipal police board. As you get closer to seat of power, less procedural fairness is required.
  - Note: there can be recourse through democratic process and lobbying to hold them to account (Legislative Function Rationale)

(3) Logistical ineffeciency rationale

- Practicalities of PF Inuit Tapirisat is one of many pockets of population subject to the decision. If everyone had the right of PF on a decision like this, it would overwhelm. Impossible to get any decisions on an autonomy basis.
  - This was a legislative decision on broad policy matters and would be **impractical** to allow a hearing.
- Effects of the decision: this case affects lots of people. If grant all of them procedural rights, this Cabinet decision will be prolonged. Impractical for everyone (tens of thousands of people) to be heard as it would put decision making to a halt. (Logistical inefficiency rationale) *Bell Canada has millions of users, so many stakeholders

(4) Absence of individual rights or privileges rationale (Marxist interpretation)

(5))not discussed in the case, Lewan's idea) Why can Bell give a brief to Cabinet, but Inuit Tapirisat cannot? → Inuit Tapirisat, arguably, stands for the proposition that only wealthy corporations have PF rights, but others do not.

Case Notes: municipal issue of who will pay for sidewalks. Negotiations break down & municipality deregisters the subdivision (you won't pay? Everything stalled until we solve this issue). Developer appeals, municipality brings forward Inuit Tapirisat. Decision goes up to SCC & says that b/c it impacted 1 body (i.e., the developer), CL PF applies. *(seems like this case contradicts Inuit Tapirisat)*

**** On EXAM flag the disputed authority and then can use Inuit Tapirisat or Homex to argue either side. ****

Homex: municipal council passes bylaw rezoning property that had already been approved for development. Court said Inuit Tapirisat exception doesn't apply. Because the developer is the one impacted body, the CL PF applies.

Mikisew Cree v Canada, 2018 (DTC *may* not apply to legis decisions)

Court fractures on similar fault lines that muddied court's reasoning in ***Inuit Tapirisat***

R: Can **circumvent the DTC by passing/enacting legislation** to rollback provisions for environmental assessments → *if you declare it to be in the public interest in legislation, you effectively 'cut out' the process of considering legislation, declare it the public interest, and then the DTC is used to undermine legislation (instead of using DTC for decisions, we are using it on legislation.*

- To argue against this, make sure to point to ROL (e.g., arbitrary decision making, backroom decisions, not actually listening to the full public interest)

F:

- **Context**: Rollback of provisions in CA Environmental Assessment Act
- Cabinet introduced omnibus legislation that changed several environmental protection acts/regimes. There was **no consultation with the Mikisew Cree First Nation before legislative changes introduced/passed**.
- Mikisew Cree argued that Crown had DTC as the changes reduced federal environmental protections and had the potential to adversely impact their Treaty 8 harvesting rights. Mikisew Cree sought judicial review.

I/H: Did the duty to consult apply to Cabinet's decision to pass binary legislation through the House of Commons? → Mixed results (1) no - doesn't apply; (2) sometimes but not here; (3) yes here

A:

- Mikisew argument made: Duty to inform & consult w/ affected s 35 groups
- By the time case is in SCC, it's moot
- Uncertain result with 4 concurring decisions.
  - Concurring 1/baby majority/not real majority (4 members) held that DTC doesn't apply to legislative process on separation of powers ground (i.e., the development, passage and enactment of legislation does not trigger the duty to consult)
  - Concurring (3 members): DTC not triggered here but there may be constitutional remedies available in other circs
  - Concurring (2 members): DTC applies in situations like this.

Once Treaty 8/Sovereignty Act claim unfolds, we may see *hot takes* citing Mikisew Cree saying the DTC doesn't apply full stop (this is obviously an overstatement given 5 judges said otherwise).

Recall: Charkaoui & POFJs

- P detained indefinitely w/ ex parte hearing, no notice. Court said breach of PF, but you only get **what's appropriate in the circumstances** & full disclosure, like in Stinchcombe, isn't appropriate in these circs (i.e., less than full disclosure is fine here). You only need sufficient info to make an adequate response in the national security context (so, e.g., lawyer w/ national security classification but w/o the typical fiduciary duty to CLs.
- Change toward a strange approach of disclosure → somewhat redacted type of disclosure.
- Probe the nuances in *Charkaoui* to make args re what type of disclosure is appropriate

Charkaoui, Inuit Tapirisat, & Mikisew provide limits of PF in different claims ⇒ look to the nuances of the cases and argue ("Great" lawyers do this… it's beyond "this is a legislative enactment so PF doesn't apply)

CA Ass'n of Importers v CA, 1993 FC (policy decisions not necessarily subject to CL PF or exception)

R: High level policy decisions aren't necessarily subject to CL PF, BUT policy decisions can be depending on the context & effects of the decision.

- Final & Binding Decision= weighs toward CL PF
- Guidelines for internal admin use = weighs away from CL PF

F:

- Cabinet Minister changes importation quotas for eggs → significantly affected historic importers.
- Importers challenge the change, arguing they had not been consulted.
    - Egg farmers argue there's a direct econ impact on chicken farms, particularly those that have historically relied on a particular supply chain.

Proc Hist:

- Federal Court Judge: Duty of fairness applies such that Minister has to consult and give time for egg producers to plead their case; It affects 84 importers (Small #). Need to provide notice to importers and give them an opportunity to be heard
- App for judicial review at FCA ⇒ gov't makes an Inuit Tapirisat argument (no PF b/c this is a high-level legislative or policy decision that impacts egg farmers, retailers, consumers

I/H: Are policy decisions immune from judicial review? → **NO, not necessarily.** BUT read this case narrowly. Reed says the farmers can make submissions, suspends the new quota system until that happens.

A:

What is the difference between "legislative" and "policy" decisions? When, if at all, should policy decisions attract a common law duty of fairness?

Reed J: CL PF found → Consultation should happen

- Reed focuses on the fact that farmers are deeply impacted by the Minister's egg decision, emphasizing the econ consequences for those indivs. (i.e., applies *Baker* #3, looking at the impact on indivs, to ground his PF rationale)
- Argument re risk associated w/ farming → backlash re harming family farms, adding red tape, etc. ⇒ significant impact to lives of farmers
- Minister was exercising a statutory power which had been delegated to him & statute implied the principle that Parliament intended that the statutory powers being exercised in this case would be exercised in accordance with the administrative law rules of fairness, which included notice to the applicants of what was being proposed and an opportunity to comment
- Not impractical to give indivs impacted a chance to comment (not a large number of persons affected and those affected were known).
    - Although personal and individual notice to every person affected was not required, some sort of general notice, perhaps by newspaper notice, and an opportunity to submit representations was required before a decision was taken.
- When looking at review of a policy decision, what is important is an assessment of the effects of the decision. The decision was treated as setting down rules according to which permits would be and were strictly issued. These were not guidelines for internal administrative use. It was applied as a binding decision with respect to the issuance of permits. No discretion was left to an official acting in the name of the Minister to depart from the system of quota allocation detailed in the notice to importers.

Linden J (disagrees w/ Reed): CL PF not found → Consultation not necessary

- Linden disagrees w/ Reed → not *just* farmers impacted by this decision. Many ppl in CA rely on eggs.
    - If everyone is entitled to PF when it comes to egg importation quota policy, does that mean they're all entitled to PF?
- It affects producers and consumers – broad amount of people therefore is a **public policy decision**.
    - If the judiciary starts getting involved telling Minister they have to have townhalls etc., the Minister will not be able to make decisions.
    - If the citizens don't like it, they can vote them out in the next election.

- Because this was a policy decision, the principles of natural justice do not apply.

Outcome:
- Significant public backlash, saying that gov't should've consulted with farmers (kind of looks like the DTC arguments)

On exam, if you sense that PF may be limited (i.e., it's not clear that the duty of PF applies), then do this analysis (ask yourself: would someone want to apply an Inuit Tapirisat argument?)

Exception 2 to CL PF: Contracts of Public Employment

Dunsmuir, 2009 SCC (walks back *Nicholson*; contracts of public employment ≠ subject to CL PF)

R: Private law of employment trumps public CL of PF → where there is a contract of employment, it should be viewed as any other private law employment relationship – and the contract excludes the CL duty of PF.

SO, instead of *Nicholson*, the law is:
If the public ER breaches the employment contract, EE is entitled to notice, salary in lieu of notice, and the opportunity to sue for wrongful dismissal (private law remedies oust the public law remedies)

Public law duty of PF still applies in 3 circs:
1. Public EE not protected by a contract (judges, ministers, officials who fulfill constitutionally defined State roles, ie certain high-ranking public employees)
2. Where an employee is expressly subject to summary dismissal
3. Where a duty of fairness is necessarily implied from a statutory power governing the employment relationship, including for example, a statute that provides for notice to employees of a motion to dismiss.

F:
- P held a position "at pleasure" in NB civil service as a court official; was a non-union member
- P didn't get along w/ many of his coworkers & his probation was extended because of these vague probationary reasons. P gets out of the probationary period (but still has typical annual review pursuant to *NS Public Service EEs Act*).
- Prior to one of the annual reviews, things were getting tense w/ P. Annual review was postponed & while it was pending, manager sent P a termination letter & gave pay in lieu of notice
- Under the leg, ppl not in scope of the union can still grieve their termination & request info.
  - Arbitrator held that termination was unlawful b/c ER hadn't acted fairly (applied the law in ***Nicholson*** → before terminating Dunsmuir, have to give reasons & opportunity to respond **BUT** SCC says duty of PF doesn't apply in public employment context when there's a contract).

I/H: Did ER legally terminate Dunsmuir? → **YES.** Duty of PF at CL does not apply in public employment context where there is a contract.

A:
- "Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder."
- "A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to the ordinary contractual remedies."

Fall out from Dunsmuir: *CL duty of PF retreats; Cautionary tale for lawyers accepting employment in gov't b/c you may be limiting your admin law rights*

Qs emerging from Dunsmuir:

- Does the duty of PF apply when gov't exercises procurement powers? (see *Irving Shipbuilding Inc v CA,* 2009 FCA 116)
- Does the duty of PF arise in the context of immigration sponsorship agreements? (see Canada (AG) v Mavi, [2008] 1 SCR 737
  - ***Mavi***: sponsors under CA immigration law sign a waiver that if person being sponsored makes a claim for social security benefits, gov't can sue the sponsor to recover the cost of the social security benefits.
  - SCC holds duty of PF applies in this context, but the gov't argued the *Dunsmuir* exception applies b/c the contract trumps the CL doctrine.

Triggering CL Duty of PF: Rights, Privileges, or Interests

These cases are about **expanding** the duty of PF (these cases "push" from a different direction) to extend to a broader range of public decisions (comes at the issue of PF from the *other* direction; contrasting to the exclusions)

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General Triggers

Cardinal v Kent Institution (available on TWEN) [PRISON CONTEXT]

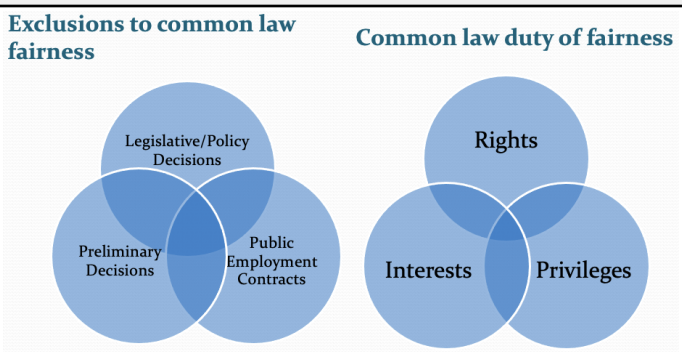
Re Webb and Ontario Housing Corp (pp. 99-104) [BENEFITS CONTEXT]

Administrative Recommendations:

Re Abel and Advisory Review Board (pp. 104-107)

Administrative Inspections:

Dairy Producers' Co-op v Saskatchewan (Human Rights Commission) (pp. 107-110)



Cardinal v Kent Institution, 1985 (PF in AS → residual liberty interests, rejection of *Inuit Tapirisat* argument)

AS = administrative segregation

PF applies to decisions by a prison administrator to confine someone in AS

Triggered when rights, privs, interests are impacted → Cardinal has **residual liberty interests** that courts need to take seriously

R: Whenever an admin decision affects someone's **rights, privileges, or interests**, duty of PF is triggered. *("This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual")*

R: AS triggers CL PF b/c AS infringes on **residual liberty interests** (i.e., AS affects rights, privileges, or interests)

F:

- Cardinal in med security institution, involved in a hostage-taking situation resulting from a prison riot. Cardinal transferred to max security institution on emergency basis (no hearing, no reasons, no opportunity to respond). Placed in AS for hostage situation.
- Enabling legislation includes a regulatory framework for review of AS
  - Review Board meets once per month
- Review Board repeatedly recommends Cardinal's release from AS.
- Warden does not follow recommendation & continues to keep him in AS w/o providing reasons or right to hearing so Cardinal can plead his case.
- Traditionally, the warden's decision would be immune to CL PF. Cardinal seeks judicial review

I/H: Is there a duty of CL PF? → **YES**. CL PF triggered based on infringement of residual liberty interests. Argument that this is a decision of a general or legislative nature does not succeed–PF is contextual & available where substantial injustice occurs resulting from failure to act fairly.

A:

Gov't makes *Inuit Tapirisat* argument

- Arg: This is a decision of a legislative or general nature, Warden is akin to Cabinet in *Inuit Tapirisat*. ⇒ although Warden's function is administrative in nature, he is given **broad powers** under section 40 of the Regulations & not subject to standards or guidelines in exercise of that discretion. Also argues that PF hasn't been imposed or implied.
  - Broad powers necessary to ensure safety & good order

Inuit Tapirisat argument rejected – broad powers mean that PF is *contextual*, not completely absent.

- "The question is not whether there has been a breach of the prison rules, but whether there has been a breach of the duty to act fairly in all the circumstances"
- Not every breach of procedural rule in prisons justifies judicial interference/intervention → "the **nature of a prison institution** requires officers to make **"on the spot" disciplinary decisions** and the power of judicial review must be exercised with restraint."
- Interference available where failure to act fairly, having regard to all circs, caused a **substantial** (not trivial or merely technical) **injustice that's capable of remedy**.

Holding:

- If Warden wants to keep P in AS, must at least provide reasons.
- Duty of PF triggered b/c Cardinal's rights, privileges, or interests are affected by Warden's decision
- Because of the serious effect of the decision, fairness is required. This entails duty to give reasons for the decision and give an opportunity to be heard.
  - AS = torture. Impacts personal interests and welfare.
  - AS = contrary to CA international law obligations.
  - Cruel and inhumane punishment under s 12 of the Charter? Court did not decide → reckoning awaits in CA on whether this is breached.
- Idea is that Cardinal has a residual liberty interest even though he is in prison. And this decision affects this residual interest such that he has a right to common law duty of fairness.
- Note: If run through Baker factor re: public policy reasons to stick with Warden's decision, can consider safety and good order of the institution.

Re Webb and Ontario Housing Corp (benefits = statutory privilege, PF applies)

R: PF triggered once someone **acquires a public benefit** (b/c it's a **statutory privilege**); CANNOT revoke benefit UNLESS gov't complies with PF.
- Before benefit acquired ⇒ no right to CL PF
- After benefit is acquired ⇒ beneficiary has a right to PF if gov't wants to take a benefit away

R: Reasons & information from gov't to beneficiary must be intelligible to the recipient (e.g.,, letters/notice via letters is insufficient if recipient is illiterate, but verbal communication may suffice provided its intelligible to recipient) (see also ***Clyde***)

F:
- Context: In the past subsidized housing was considered a gift from government – therefore no CL PF required.
  - HERE, subsidized housing = statutory "**privilege**" – and duty of fairness applies. Housing is now seen as a legal right.
- Companion case to Cardinal: ppl who enjoy benefits (here, subsidized housing) are considered recipients of a 'gift' from the gov't ⇒ **statutory privilege**
- Ms Webb was a tenant in subsidized housing & she's being evicted b/c of issues with her kid's behaviour.
  - She was sent 2 warning letters, a formal warning, and visits from OHC community relations worker.
  - She made an application for judicial review of the decision on the basis she wasn't given the opportunity to respond before the eviction notice was issued.
- Webb applies for judicial review to quash the eviction decision.

I/H: Was Webb owed a duty of procedural fairness? → **YES**. Ms. Webb has a substantial **interest** in her subsidized housing (statutory privilege) which triggers a duty of PF in the process of evicting her.

Was duty of PF met? → **YES**. Written notices were insufficient b/c Webb was illiterate, but oral communications were sufficient to satisfy PF.

A:
Trigger?
- Subsidized housing = substantial benefit to Ms Webb.
- Since she had already acquired the benefit, she has a right to PF = privilege

Was the duty of PF satisfied?
- Although entitled to PF, the duty was met.
  - Webb was given multiple notices; however, she could not read or write (recall ***Clyde*** where no translations = inaccessible = breach)
  - Even though she could not read or write, a community worker sat down with Ms Webb and explained the problem ⇒ made sure that she actually knew there was an issue (NOTICE, REASONS)
- If no notice is given to a person who is in danger of losing an important benefit and no opportunity is afforded to answer the case against him, such a procedure would be unfair.
- So long as the person adversely affected is advised of the case against him and is permitted to give an answer through the servants or agents of the investigating body, that is sufficient.

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Exception 3 to CL PF: Decisions of a Preliminary Nature

Recall ***Knight***: "A **decision of a preliminary nature** will **not** in general **trigger a duty to act fairly,** whereas a **decision of a more final nature** may have such an effect."

Administrative Recommendations

Re Abel and Advisory Review Board, 1979 (exception to no CL PF for admin recs; functional test for *de facto* final determination)

Functional Test for discerning the exceptional cases where CL PF triggered at preliminary state:
Look at degree of proximity between

1) the **investigation** *and* the **decision** **AND**
   - ➢ Justified reasons for limiting duty of PF?
   - ➢ Did the decision-maker/Minister merely rubber stamp?
2) the **investigation** *and* the **exposure of the investigated individual to harm**.
   - ➢ Significance of the harm?

F:

- Context:
  - NCR ⇒ directed to psych hospital & held there on administrative grounds. Held there indefinitely *UNLESS* NCR person can convince review board they've been successfully treated & no longer pose a public safety risk
  - Being held in a **psychiatric hospital has a significant impact on one's life, liberties**.
- ***Mental Health Act*** creates an Advisory Board to see if patients who are NCR should be released back into the public (from mental health hospital). Process:
  - Board looks at medical records, nurse's notes, psychiatrist notes
  - Board makes a recommendation to the Minister who makes the final decision re release.
- **Board does not recommend Abel's release**.
- Abel **requests disclosure of medical reports submitted to the board** that were used to make the decision
  - **Request rejected** on the ground that **chairman had no authority to give them**.

I/H: Did the Review Board merely make a preliminary decision and, pursuant to Knight, does not attract PF? → **NO. This is a de facto final recommendation**, not a preliminary decision.

**Note: Can argue that this is a matter of public policy because it involves the safety of the public. Or can argue like Homex, this targets the rights of one individual. Can also argue since the Minister gets the final say, this is more of a preliminary hearing.*

Statute: ***Mental Health Act,* RSO 1970**: Advisory Board collects evidence (medical recs, nurse notes, psych notes, etc) & then makes a recommendation to Minister on whether NCR person should be released. Minister then makes final decision re release.

A: Court quashed Board's decision and made them redo the whole decision in a fair process.

Grange J: Held that the Board should disclose the records to Abel's lawyers.

- **Minister does not usually deviate from the recommendations of the Board**. So, even if decision rests with the Minister, the Board's recommendation can be seen as final.
- **Liberty interests engaged led to a higher degree of PF**; therefore, provide records to lawyer.

Functional Test for discerning the exceptional cases where duty of fairness will be triggered at preliminary state:

- Look at degree of proximity between

- 1) the investigation and the decision AND
  - Minister here rubber stamps Board's recommendation.
- 2) the investigation and the exposure of the investigated individual to harm.
  - Proximity b/c acceptance of Board's recommendation has **significant impact on the freedom** of Abel.

Does ***Abel*** establish a CL PF for all administrative recommendations? ⇒ NO, just an **exception**

- *De facto* final determination exception to the general rule that CL PF not owed for admin recs.
- Typical rule applied in ***Dairy Producers*** (***Abel*** is *just* an exception to the typical rule).

Additional notes/considerations:

- Physician-patient relationship:
  - forcing disclosure may jeopardize the physician-patient relationship (I.e., if Abel knew which physician said he was not ready for the public, he may be resentful). Therefore, this is a balance between individual's rights vs jeopardizing the relationship/treatment with physician.
- Potential s 7 argument: s 7 argument can be used in this case – dealing with the NCR government program, liberty interest is affected.

Administrative Investigations

Dairy Producers Co-op v SK (HRC), 1993 (typical prelim decision rule)

R: PF not generally owed in investigative/preliminary stages – must consider context in finding PF. Here, no formal process in place and giving procedural rights to ER at this stage might have negative consequences.

F:

- Workplace sexual harassment complaint by EEs re culture of harassment ER is complicit in/fails to address.
  - Context: this type of complaint is rare despite how frequently grounds for complaint arise.
    - When brought up, complainant often just ends up leaving before pursuing the complaint in its entirety.
  - Investigation: if there's evidence to support the complaint, a conciliation stage arises.
    - At the conciliation stage, HRC sits down with the parties & discusses how to prevent the problem from recurring in the future.
    - Here, the ER would be the party sitting down.
    - If party agrees w/ complaint, parties come up with solutions.
    - If party disagrees, goes to a hearing wherein there are witnesses, submissions, etc. and the Court will make an award & provide direction.
- HRC appoints an investigator: sent an investigator to talk to EEs and interview potential witnesses.
  - ER wants disclosure of evidence gathered by investigator & wants to sit in on witness interviews.
  - Full disclosure not given → If there is full disclosure, that equates to informing the employer who is commenting what in the investigative stage, which can create further employee harassment and intimidation (very sensitive issue)
- **HRC Investigator makes recommendation that *Act* had been infringed**.
  - Conciliation meeting happens and settlement efforts fail.
  - ER applies to Court for judicial review on the grounds of breach of PF at the investigative stage.

I/H: Was the HRC's decision preliminary in nature, therefore not attracting PF? → **YES.**

Statute: ***Human Rights Code* (SK)**

A: The commission conducting an investigation was not obliged to comply with CL PF.

- ER has power over the EEs & may impact witnesses.
- Court balances ERs right to notice with public interest/EE interest in not having their identity & story disclosed (**disclosing the EE's statements to the ER would frustrate the purpose of the legal processes** → process is supposed to help EEs, but telling the ER a bunch of info about the EE or allowing the ER to be present when the EE makes statements can really limit what the EE says).

Wright J: duty of fairness doesn't apply at the investigative stage.
- ERs legal right NOT impacted at investigative stage → All the investigators can do is recommend that a probable cause existed and then complaint goes to the conciliation stage (tribunal) and then a hearing.
- There is a right to a hearing if/when it gets referred to a tribunal, but not at the investigative stage.

Baker Factor 2: legislative purposes undermined if PF is at investigative stage.
- **Disclosing EEs' statements to the ER would frustrate the purpose of the legal processes** → process is supposed to help EEs, but telling the ER a bunch of info about the EE or allowing the ER to be present when the EE makes statements can really limit what the EE says.

Baker Factor 3: importance of decision to indivs low b/c investigator's findings ≠ determinative (distinguish: ***Dairy Producers*** and ***Abel***)
- Abel = high importance to indiv.
  - Preliminary inquiry was **functionally dispositive** (the end), so the outcome is of high importance to indiv.
- Dairy Producers = low importance to indivs
  - **Finding of fact of the investigators is NOT determinative** – it is just looking at whether there is sufficient evidence and recommend hearing. SO, the outcome of the investigation is of lower importance to indiv.

Baker Factor 1: Nature of the Decision ≠ court-like
- Decision is **not** similar to an actual court hearing, unlike in *Abel* where they heard the information in a court-like room & then made a decision based on finding of fact.
  - Investigator sat down for a **private interview**.
  - Investigator **privately made findings of fact** that they put into a report & gave to decision maker.

Baker Factor 4: No Legitimate Expectation
- No legitimate expectation of being present for the investigation to determine whether this situation will get sent up the line.

Exam: Reflect critically upon the different principles in these cases and be able to make a coherent legal opinion about what you think the level of fairness should be in a given context ⇒ he wants to see us illustrate our reasoning (less concerned about what you conclude and more concerned about whether your analysis adequately illustrates your conclusion).

Baker Factor 2 = keep legislative purposes in mind when assessing amount of PF due (in addition to the more obvious parts of the legislation)

Legitimate Expectations (Baker Factor 4)

Canada (Attorney General) v ***Mavi*** (111-117)
Agraira *v Canada (Public Safety and Emergency Preparedness)* (117-121)

What is Legitimate Expectation?

- ***Baker* #4**: "The legitimate expectations of the person challenging the decision"
- CL doctrine from England. Migrated to CA in early 1980s, but never took off in CA like it did in England; however, we do see this in Baker factor #4.

When is a legitimate expectations (LE) argument triggered & what can it get you?

- "If the claimant has a **legitimate expectation that a certain procedure will be followed**, this procedure will be required by the duty of fairness…. Similarly, if a claimant has a **legitimate expectation that a certain result will be reached** in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded" (***Baker***)⇒ i.e., LE based on official saying that (1) a certain procedure will be followed OR (2) a certain result will be reached & then either the procedure isn't followed or that decision isn't reached ⇒ the decision can be quashed and a hearing may have to be held, but it doesn't mean you'll get the result you want. English case law fleshes this out:
    - **Situations that give rise to LE arguments:**
        - **Express representation that a certain process will be followed & public decision maker does not follow: Estoppel**-type argument gives rise to LE; arises when decision maker claims they will consult with the affected party **prior to** making the final decision. This becomes a 'promise' under the doctrine of LE.
        - **Past practice** leads interested parties to believe a certain process will be followed & public decision maker doesn't follow it.
        - **Informal representation** that a certain process will ensue and then the decision maker decides to change that decision
            - e.g., Minister of Education writes to a rural community worried about losing their school and says "don't worry, you won't lose your school." If Minister doesn't end up keeping the school open, they must first give a hearing (i.e., have a duty of PF for hearing) to allow the community to plead their case.
    - "Legitimate, or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue" (Lord Fraser, Council for Civil Service Unions)
    - A legitimate expectation is "an expectation of a hearing arising out of express representations, a practice of holding such hearings or a combination of the two" (Van Harten, et al., p. 159).
    - "The court supplies the omission where, based on the conduct of the public official, a **party has been led to believe that his or her rights would not be affected without consultation**" (Sopinka J., ***Old St. Boniface Residents Assn***)
- CA approach to LE is a bit more muted than LE in England.

Reference re CA Assistance Plan, 1991(LE does <u>not</u> apply to legislative decisions/processes)

Guiding Questions:
What is the difference between "procedural rights" and "substantive rights"? Why does the doctrine of legitimate expectations protect merely "procedural rights"?
Should the SCC have enforced the notice provision of the transfer agreement? Explain.

R: Doctrine of LE does <u>not</u> apply to legislative decisions/processes

R: Doctrine of LE falls under PF, not substantive review (i.e., LE does not create substantive rights)

F:

- Context: Federal gov't has limited jurisdiction over health & education. Has indirect control through funding agreements (redistributes tax revenue to provinces as conditional funding using legislation).
- **Legislation**: federal gov't can't change the equalization formula w/o notice of at least a year OR consent of the provinces.
- Provinces challenge the fed gov'ts decision
  - similar argument to *Mikisew* → provinces say that duty of PF requires fed gov't consults w/ provs (cannot reduce transfer payments w/o consent from BC, AB, ON)
  - Provs also claim that there is an LE argument → legislation gives LE that a certain process will follow (i.e., 1 year or consent)

I/H: Is fed gov't precluded from introducing Bill changing equalization formula by the doctrine of LE? → **NO**. Doctrine of LE does not apply to legislative decisions

A:

- Doctrine of LE applies only to PF, not substantive review: Court holds that the most provinces can get is notice and a hearing, i.e., provinces won't get guaranteed level of funding they were hoping for.
- Doctrine of LE doesn't apply to legislative decisions/processes: Court also holds that doctrine of LE doesn't apply to legislative decisions/process (recall ***Inuit Tapirisat***).

Canada (AG) v Mavi, 2011 (LE test, discretionary language in statute)

Guiding questions:
What evidence grounded the legitimate expectations argument in this case? (discretionary language in statute)
Do you think the undertaking in this case is a "contract" that ousts the duty of fairness (see Dunsmuir)? (no – the contracting out of CL PF only occurs in the public EE context)
How, if at all, did the undertaking shape the requirements of procedural fairness in this case? (meant that notice & opportunity to make representations was required before debt judgment enforcement)

LE established & gov't will be held to its word **where**:

1. Gov't official makes **representations within** scope of their **authority**
2. To an indiv about an **admin process the gov't will follow**
3. The **representations** are **clear**, **unambiguous**, & **unqualified**

**these actions = undertaking & imply a duty of PF*

Nuances:

1. Reps made must be **procedural** – i.e., must not conflict w/ decision maker's stat duty (can't be substantive in nature)
2. **Proof of reliance** on representation **≠ necessary** → Breach of LE established where decision maker simply fails "in a substantial way to live up to its undertaking"

R: Discretionary language in a statute re procedure = implied undertaking that procedures will occur *before* decisions are made. *(could use this discretionary language in a contract to surmount CL PF exceptions)*

F:

- Context: Sponsors of immigrants have to sign **undertakings** with Provincial and Federal agencies, promising

to reimburse if the immigrant makes a claim for benefits.

- Gov't wants to collect debt from sponsors and can do so by merely taking the undertaking to a Court and getting it certified as a debt enforcement judgment.
- Sponsors argue they are owed notice of intention to collect and opportunity to make representations, such that collection might be waived/delayed.
    - Makes LE argument on the words of the Act → undertaking (representation that hearing would occur before enforcing a debt).
    - Undertaking in the Act ⇒ Act states Minister *may* choose not to take action on the sponsor in appropriate circumstances and ***MAY*** defer where the circumstances warrant deferral → establishes LE that sponsors will be heard prior to a decision adverse to their interest.
    - Argue **would only waive/defer if heard the sponsors, therefore implied opportunity to be heard**.

I/H: Does the wording of *IRPA* ("*may* be recovered") give sponsors a LE that they will be notified and have an opportunity to be heard before the debt is collected? → **YES**

Statute: ***IRPA,* s 145(2)**: if person comes to CA and relies on social assistance, the sponsor is required to pay for social assistance and that money "***may*** be recovered" by the fed and/or provincial gov't.

A:

- SCC states if there is discretion for Minister to stay enforcement, that is saying the sponsor will have opportunity to convince the Minister not to seek enforcement. How else would the government know if the circumstances warrant a stay.
- "Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representation said to give rise to the legitimate expectation are clear, unambiguous and unqualified, the government may be held to its word, provided the representation are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite…"
- Gov't uses a ***Dunsmuir*** argument, claiming that this is a contract that ousts the duty of PF ⇒ Court rejects this argument stating that the Dunsmuir exception applies only in the employment context (i.e., doesn't expand the limit of Dunsmuir)
    - This case may also expand PF → you could insert language into your employment contract that would create LE & therefore entitle you to notice and a hearing pre-termination
- CL does not have to know about the representation to use LE

Before they proceed to judgment enforcement against you, they first have to (1) give you notice and (2) hear representations ⇒ in this case, you'll want to insist on reasons for the decisions so that you can determine whether those reasons were unfair/unreasonable like in Baker (this may allow you to challenge the enforcement decision)

E.g., FP where decision maker makes a representation that a certain process will be followed, this is a potential LE argument & we should cite *Mavi*

Agraira v Canada (Public Safety and Emergency Preparedness), 2013

R: Rule

F:

- Guidelines don't define national interest, but Minister looks at things such as H&C grounds. This case takes a narrow view of term "national interest"
- Like ***Baker*** or ***Singh***, Agraira is arguing to remain in the country on H&C grounds

• Agraira from Libya, had previously been a part of an organization that immigration CA had deemed to be a terrorist organization. • Agrairia applies for leave to remain in the country on H&C grounds
I/H: Did the Minister meet the appellants legitimate expectations (LE) notwithstanding his narrow definition of "national interest"? → **YES**, Minister met LE b/c he followed duty of PF (no limiting language to give Minister a scope for defining "national interest")
Guidelines (instead of statute): Guidelines (i.e., a type of soft law) "constitute[d] a relatively comprehensive procedural code for dealing with applications for ministerial relief."
A: Agraira's argument: • When Minister assessed the file, he relied almost exclusively on P's past membership in a deemed terrorist organization. Thus, Minister defined national interest exclusively as a security interest w/o any attention (or very limited attention) to other considerations e.g., keeping families together • While the Guidelines = soft law, he could reasonably expect his application would be dealt with in accordance with the process in the Guidelines. Minister's argument: • Process was followed, no breach in terms of PF that was owed under the circumstances. • Minister looked at security interest but also did consider H&C grounds, it just looks like he put more weight on security. Court's analysis/decision: • Court holds that the process was followed

Distinguishing *Mavi* & *Agraira*

- ***Mavi*** = **permissive/discretionary language** (in the context of sponsor agreement) and the gov't did not give sponsor an opportunity to be heard before proceeding to enforce the agreement
- ***Agraira*** = the **process** in the Guidelines were **followed**
- Difference re **Ministerial reaction/response** to (1) Guideline 7 in Agraira & (2) language in Mavi
  - ***Agraira*** (Guideline 7): "The Minister renders a decision on the application. The decision is entirely within the Minister's discretion." → **Minister did turn his mind** to the entirety of the Application to make a decision.
  - ***Mavi***: where there was **no turning of the mind** despite the presence of language.
- There's **no requirement** in ***Agraira*** to **define "national interest" in a particular way** (contrast to ***Mavi*** where "*may*" does give us a requirement for response)

Emphasizing facts that mirror ***Inuit Tapirisat*** can allow us to rebut claims of PF.

Including language in a public service employment contract about having a right to be heard upon termination may give a PF argument in light of the ***Dunsmuir*** decision

Review/Recall → The Baker CL doctrine of PF:

1. The **nature of the decision** being made and the process followed in making it;
   - ➢ Administrative decisions which are made in an adversarial context culminating in a formal adjudication will normally require more extensive procedural rights.
2. The **nature of the statutory scheme** and the terms of the enabling legislation;

- ➢ Remember to examine the enabling legislation or general procedural statutes to see if they mention procedural rights. *Baker* also states that when the enabling legislation does not provide for an appeal or attempts to exclude judicial review, a higher degree of fairness is owed.

3. The **importance** of the decision to the individuals affected by the decision; *(point for good advocacy, get creative here on the exam & in practice)*
    - ➢ Where the consequences of a decision are significant for an individual, the court will normally require a higher degree of procedural fairness.
4. The **legitimate expectations of the person challenging the decision**; and (has the public decision maker expressed that a certain procedure would be followed or a certain outcome would be reached? *OR* does past practice give rise to an LE that a certain procedure would be followed or outcome would be reached?)
    - ➢ Where the decision-maker has given an express promise or past practice leads one to believe that certain procedural rights will be respected, it may lead the court to impose a duty of procedural fairness.
5. **Deference** to the procedural choices made by the decision-maker. (policy args re level of PF due; can also think of them as s1 args; why might a decision maker be reluctant–potentially justifiably–to meet certain levels of PF, e.g., reluctance to hearings, reasons, etc.)
    - ➢ Where the enabling legislation and the regulatory context suggest that a decision-maker has special expertise in administering public policy, courts should respect the process chosen by that decision-maker.
    - ➢ E.g., national security interests weigh heavily against full disclosure of information (*Charkaoui*)
    - ➢ E.g., health professionals reticent to give medical records to claimant in indefinite detention (*Abel*)
    - ➢ E.g., ER argues for disclosure of witness information & interviews at the investigative stage (*Dairy Producers*) → policy reasons militate against disclosure at the investigative stage of the Human Rights complaints process in order to protect the integrity of the investigation
    - ➢ E.g., representing the gov't? → highlight the costs/benefits of disclosure in a particular context.
        - i. Maybe ER in Dairy Producers is entitled to PF, but at a later stage

Brief cases through the *Baker* framework (most cases don't brief this way, but we should) "rubric" → see Google Sheet

PF in Context/Specific Content Issues

Notice

Right to Notice (175-180)
Canada (Attorney General) v Canada (Commission of Inquiry) (180-185)

Scope of Notice

- What form of notice is required? Written or oral?
    - ***Webb***: once someone enjoys a benefit, entitled to PF

        - (1) be notified of future loss of benefit
        - (2) have opportunity to give representations
    - ***Webb***: recall that P couldn't read/write, so PF required that someone come speak to her in order to discharge effective notice (effective notice = part of duty of PF).
    - ***Clyde River***: sending unintelligible notice (in ***Clyde***, thousands of pages of PDFs written only in English) is **not** sufficient to discharge PF.
- How must notice be delivered (I.e., Personally, by mail, newspaper ad)
- When must notice be given to be fair (***Torchinsky***) ⇒ is the time of notice adequate, under the circumstances, to allow someone to be heard?
    - Adequate time to prepare representations required
    - E.g., notice of a hearing after hearing is insufficient
    - E.g., notice of a hearing one day before hearing is insufficient (no time to call witnesses, review statements, get lawyer, etc.)
    - ***Torchinsky***: notice of assessment was delivered *after* the appeal period expired.
    - ***Wilks***: Immigration Appeal Division sends notice of hearing to applicant's last known address and dismisses appeal when the applicant fails to respond
    - ***Zeliony***: Community College sends witness list less than 48 hours before the hearing contrary to its disciplinary policy
- How detailed must the notice be (I.e., general terms or specific – ***Re Central Ontario Coalition v Ontario Hydro; Mayan v World Professional Chuckwagon Assn***)
    - Are general reasons sufficient?
    - Are specific reasons required?

What is the purpose of a notice?

- The purpose of issuing notices is to allow parties to prepare for or respond to any possible findings of misconduct which may be made against them. The more detail included in the notice, the greater the assistance it will be to the party (***Krever Inquiry***)

Krever Inquiry [CA (AG) v CA (Commission of Inquiry)] (timing req'd for notice varies; public inquiry context)

Guiding Questions:

1. What were the terms of reference for the public inquiry? What was the scope of the commissioner's authority?
2. What sources of law are relevant to assessing the duty of fairness?
3. Why was notice required in this case? When was notice required? How detailed did the notice have to be? How would you explain the result in this case in light of the Baker framework for procedural fairness?

R: Timing of notice depends on the circumstances – in inquiries, depends highly on the issue & evidence
- Evidence = extensive & complex? ⇒ may be impossible to give notices before the end of the hearings.
- Issue = straightforward? ⇒ may be possible to give notice of potential findings of misconduct earlier in the hearing process.

F:
- Discovery of HIV tainted blood due to inadequate oversight of blood supply.
- Minister of Health at all levels convened a **public inquiry** to examine the blood system, see what caused contamination, & find preventative measures for future.
- Hearings in public inquiry:

    - Parties with standing at the inquiry: CA Red Cross, numerous high ranking doctors responsible for monitoring CA's blood supply, etc.
    - Hearings lasted nearly a year → parties w/ standing had the opportunity to cross-examine witnesses, ask Qs, and lead their own evidence.
    - At conclusion of hearings, Minister started making his report & sent out notice to parties implicated ⇒ i.e., gives notice to parties that they *may* be named in the report & if they want to say anything before the end of the hearings for the inquiry, then they must do it ASAP.
        - Args from parties to the inquiry: "You notified me after the evidentiary hearings that I may be a named party, now what am I supposed to do?"
    - Timeline:
        - Dec 21: parties given notice of charges against them
        - Dec 22: hearings ended
        - Jan 10: responses of parties due
- Although the Inquiry was not to make findings of criminal or civil liability, once the report came out, there were questions of whether criminal charges/civil charges should be laid.
- ***Inquiries Act*, s 13**: Commissioner required to give notice to parties against whom he intends to make findings of misconduct.
- Some recipients brought applications for judicial review arguing notice was insufficient b/c there was no opportunity to respond.
    - Parties claimed if found out earlier, would have called more witnesses, submitted more documentary evidence, engaged in more aggressive cross examination of witnesses when giving their testimony. Notice was unfair as given after the evidentiary of the inquiry hearings had concluded, therefore cannot adequately respond to the case being made against one.

I/H: Was the notice given reasonable? → **YES**. While the parties were entitled to reasonable notice, they had the opportunity to give/call evidence & were at the hearings. PLUS, Significant uncertainty prior to the last day of hearings about what the commissioner would be writing in the report. Commissioner wouldn't have known to whom notice was owed until they had all the information. "It was impossible to give adequate detail in the notices before all the evidence had been heard. In the context of this Inquiry the timing of the notices was not unfair"

A:

- Court focus on reasonable notice. There is no statutory requirement that the Commissioner give notice as soon as they foresee the possibility of an allegation of misconduct. Practically speaking, the inquiry board has no way to give notice earlier as they have to review all the evidence. Court did not find the notice given breached the duty of fairness under Inquiry Act s. 13 or in common law because there no practical means of giving notice earlier. So long as adequate time is given to the recipients of the notices to allow them to call the evidence and make the submissions, they deem necessary, the late delivery of notices will not constitute unfair procedure
- Baker Factors:
    1. [quasi] judicial situation (weighing of evidence)
    2. *Inquiries Act,* s 13 entitles parties to receive reasonable notice
    3. High significance to indivs → Reputational costs & potential civil/criminal liability for ppl named in report
    4. LE: there aren't any extra-statutory representations here.
    5. Decision-maker won't really know who will be mentioned in the report until they hear all of the relevant evidence. (weighs against earlier notice)

Counterexample:
Allan Inquiry: Nefarious influence of environmental groups → No open hearing, hosted online, review of documents, secrecy around the inquiry *paying* witnesses. Notice was sent to environmental groups saying that those groups may be named in a report. Would this be adequate notice?

- We don't have a ruling yet, but environmental groups have expressed serious concerns about how the ruling occurred.

- PF concerns may actually rise to a level that wasn't met here.

Discovery/Disclosure

Right to Discovery:
Ontario (Human Rights Commission) v Ontario (Board of Inquiry into Northwestern General Hospital) (186-191)

Scope of Discovery

- Once you have received notice, how much information do you need to understand the case and respond to it?
- To what extent should principles of disclosure in administrative law track the criminal law standard (i.e., *Stinchcombe* doctrine)? To what extent should they track the civil law standard (i.e., rules of civil procedure)?
    - *Stinchcombe:* broad entitlement to discovery
    - Civ pro: entitlement to discovery significantly more limited than *Stinchcombe.* Limitations include:
        - Litigation privilege
        - Solicitor-CL privilege
        - Statutory privilege
        - Etc.
    - The questions we come across in these cases = what's the appropriate amount of disclosure required to meet PF in the administrative context?
        - Complex in admin context & will vary based on the circs using Baker framework
- How detailed must disclosure be in order to satisfy the requirements of procedural fairness (***Charkaoui***)?

Ontario (HRC) v Ontario (Board of Inquiry into Northwestern General Hospital) (ONCA) (Scope of Disclosure: Stinchcombe is persuasive depending on context/Baker factors, particularly Baker 3)

Guiding Qs:

1. What was the b asis for the Court's decision to require disclosure: the Ontario Statutory Powers Procedure Act, the Stinchcombe doctrine, or the common law doctrine of procedural fairness?
2. Do you think there are sound policy reasons for refusing discovery or disclosure of documents in this context?

R: While Stinchcombe disclosure may not apply in the non-criminal context, it is persuasive in the admin law context. Appropriate level of disclosure hinges most obviously on Baker Factors 1, 2, 3, 5 (nature of decision, nature of legislation, impact on indivs, public policy). The more court-like, the higher the impat on indivs, and the less public policy concerns weigh against the impact on indivs/the more legis or policy protects complainants→ the closer disclosure requirements are to Stinchcombe.

F:

- Nurses of NW General Hospital file complaint of racial discrimination.
- HRC strikes a Board of Inquiry to hear the evidence from the investigation & make a decision.

Proc Hist:

- Board of inquiry grants an order requiring:
  - HRC to disclose statements made by complainants at the investigative stage.
  - HRC to disclose statements of witnesses who were interviewed, but who the HRC doesn't plan on calling at the hearing.
- Question was whether Stinchcombe applied?
  - HRC argues it doesn't apply to human rights legis.
  - Board says that it isn't bound by Stinchcombe, *but* Stinchcombe does provide an "important analogy" b/w Crown Counsel & HRC counsel (para 15)
  - Stinchcombe: any time gov't has info about a decision they are considering that will affect ppl, those ppl should have access to the info re that decision.

I/H: Does Stinchcombe level disclosure apply in the context of human rights litigation? → **NO but PERSUASIVE**. Stinchombe is not binding, but the legis *does* allow the Board to order disclosure it thinks appropriate.

Statute: ***Statutory Powers Procedures Act***:
s8: IF good character, propriety, conduct, or competence of a party is at issue in a proceeding → party is entitled to disclosure with reasonable information of any allegations related to good character/propri/cond/compet
s12: Tribunal's jurisdiction to order any party to (1) give evidence at a hearing; (2) produce evidence for a hearing

A:
Stinchcombe discussion
- Repeated reference to Stinchcome → comparison being drawn b/w admin context & crim context
- Stinchcombe = high bar for duty to disclosure → if Crown has relevant info, it has a duty to disclose that info to defence council
- While Stinchcombe doesn't apply, Court finds much of it to be persuasive.
- SO, considering invoking Stinchcombe when making argos in admin law proceedings.
- To distinguish fact patterns from Stinchcombe:
  - Argue that ⇒ Nature of the decision is quite different than in the crim law context [apply/describe how]
  - Argue that ⇒ This is not a situation where admin decision making sifts through evidence & makes finding of facts like a court (i.e., calling on Baker Factor #1). Instead, this decision maker takes more of a role wherein they make public policy. [remember to apply]

Baker Factors:
1. Nature of decision requires findings of fact, like a court.
2. Statutory Powers Procedure Act, s 12: authority for a board of inquiry to order production of documents, subject to claims of privilege.
3. Allegations are extremely serious ⇒ racial discrimination claims "could and should seriously damage the reputation" of the respondents (at para 29).
4. N/A
5. Court balances public policy concerns:
   a. disclosure may intimidate potential claimant who is often from disadvantaged class; could place the complainant in an adversarial relationship w/ representative of the commission. BUT balance this against (1) HRC procedures which protect against intimidation & (2) provision of access to independent legal council.

Held: the Court accepted the ruling of the board of inquiry that any claim to litigation privilege for the information in question did not extend to the investigative functions of the commission. Court further held that there was no class privilege for communications between complainants and officers of the commission.

Napoli v BC (WCB) (Disclosure of full medical records, heavy weight on Baker 3)

R: Baker 3 is highly significant in determining the scope of disclosure owed to satisfy the duty of PF. When

individual interests at stake are particularly high, the greater the scope of disclosure (subject to other contextual factors).

F:

- Napoli injures back at work. Qualified for short term medical benefits and rehabilitation. WCB physician and PT thinks he is ready to go back to work. Napoli does not think so & appeals decision.
- Appeal board relies on medical records as evidence.
  - The medical records suggest he has mental issues, not physical.
  - Napoli was only given a summary of the text.
  - Note: there is resemblance to Abel (NCR).
  - Napoli argues that he medical summary are not medically precise.
- WCB's reasoning in only giving these summaries was that to give Napoli more would jeopardize the decision-making process. It argued that the need to keep a WCB assessment confidential outweighed Napoli's procedural rights to full disclosure.

I/H: Can Napoli access the full medical records the Appeal Board relies on? → **YES.** The summaries are insufficient to satisfy fairness. There needs to be disclosure of the full medical records such that Napoli can respond properly.

A:

- Baker 1: decision maker making findings of fact and looking at competing evidence, thereby looks like judicial process. (eg. disclosure of medical documentation, opening files)
- **Baker 3**: significant indiv interests are at stake. Napoli is fully reliant on WCB to afford his life, Napoli may lose his job
- Baker 5: Policy reasons not to disclose medical records. Could jeopardize the healthcare provider-patient relationship. *BUT* Court says that Dr's are detailed in their reporting in almost all cases, but particularly careful in the context of WCB claims where they know their records will be subject to scrutiny.

"If the claimant is not told the precise statement made against him and when, where and by whom they were made, how can they effectively answer it."

- Disclosure is vital as you cannot make a case for yourself if you have no idea of the case against you.
- Disclosure exists on a scale: What falls between no disclosure (or an incompressible minimum), civil disclosure, and Stinchcombe disclosure. The question in each case is how much disclosure is warranted.
  - Depends on the context of the case
  - Where indiv stakes are extremely high, tendency to move dial of disclosure to Stinchcombe standard
  - Where public policy concerns weigh heavily against disclosure, that can change things.
  - Note: When dealing with industrial competitors, scope of disclosure may shrink because regulator should not reveal the competitors' private information

General Procedural Statutes; Access to Statutes (pp. 154-157; 170-174)
Alberta *Administrative Procedures and Jurisdiction Act* and *Designated Authorities Regulation* (TWEN)
Access to Information Legislation (pp. 216-217)
Mission Institution v Khela (pp. 234-237)

Alberta Administrative Procedures and Jurisdiction Act (*APJA*) and *Designated Authorities Regulation*

APJA: Scope & Agencies Bound

- Companion legislation in other provinces
    - Scope varies based on province (higher in ON, differences in substantive review in BC, etc.)
- **Scope** of *APJA* = **limited**
    - does **not** apply to every admin body in AB
    - **Applies to authorities that have been designated** under *APJA AND* is **authorized** to exercise a statutory power
- **Agencies bound** by *APJA*:
    - **Land Compensation** Board
    - **Surface Rights** Board
    - **Alberta Transportation Safety** Board, and
    - **Natural Resources Conservation** Board.

APJA adds to, but doesn't subtract from, CL PF rights

Relationship b/w *APJA* & CL doctrine of PF = **adds to**, but does not take away from, CL rights to PF

- I.e., codifies PF in the regulatory domains identified in *AJPA*

Procedural Rights in *APJA*

Procedural rights in *AJPA*:

- **Adequate Notice, s 3** [must give all parties adequate notice of the App before it or the power it intends to exercise]
    - When (a) an application is made to an authority *or* (b) an authority on its own initiative proposes to exercise a statutory power, the **authority shall give to all parties adequate notice of the application that it has before it *or* of the power that it intends to exercise**.
- **Duty of Disclosure, s 4** [before refusing application or making a decision/order, must give opportunity for party to get disclosure, give disclosure in sufficient detail, give adequate opportunity to respond]
    - **Before** an authority, in the **exercise of a statutory power, refuses the application or makes a decision or order** adversely affecting the rights of a party, the authority
        - (a) Shall give the party a **reasonable opportunity of furnishing relevant evidence** to the authority
        - (b) Shall **inform the party** of the facts in its possession or the allegations made to it contrary to the interests of the party **in sufficient detail**
            - (i) **To permit the party to understand the facts or allegations**, and
            - (ii) **To afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations**
        - (c) Shall give the party an **adequate opportunity of making representations** by way of argument to the authority
- **Right to a Hearing, ss 5–6, 9**
    - **Right to cross-examine, s 5** [post-disclosure, party has right to cross-examine if they're entitled to do so under section 4]
        - **When** an authority has **informed a party of facts or allegations** and that party
            - (a) Is entitled under section 4 to contradict or explain them, ***BUT***

            - (b) **will not have a fair opportunity of doing so without cross-examination** of the person making the statement that constitute the facts or allegations the authority **shall afford the party an opportunity of <u>cross-examination</u> in the <u>presence of the authority or of a person authorized to hear or take evidence</u>** for the authority.
    - **Right to an oral hearing, s 6** [written representations can satisfy duty of PF so long as the enabling statute doesn't say otherwise; oral representations & right to counsel not necessary]
        - Where by this Part a party is **entitled to make representations** to an authority with respect to the exercise of a statutory power, the **authority is not** by this Part **required to afford an opportunity to the party**
            - (a) To make **oral representations** or
            - (b) To **be represented by counsel**
            if the authority affords the party an opportunity to <u>make representations adequately in writing</u>, but nothing in this Part deprives a party of a right conferred by any other Act to make oral representations or to be represented by counsel.
    - **Rules of evidence, s 9** [throw them out the window, it's fine]
        - Nothing in this part
            - (a) Requires that any evidence or allegations of fact made to an authority be made under oath, or
            - (b) Requires any authority to adhere to the rules of evidence applicable to courts of civil or criminal jurisdiction.
- **Right to reasons, s 7** [if rights adversely affected, written decision req'd incl findings of fact & reasons]
    - When an authority exercises a statutory power so as to **adversely affect the rights of a party,** the **authority shall furnish to each party a written statement of its decision** setting out
        - (a) the **findings of fact** on which it based its decision, and
        - (b) the **reasons** for the decision

Policies and Guidelines

- Public authorities will frequently issue guidelines and policies, sometimes regarding the procedural aspects of decision making, which do not set down legally binding requirements. While not strictly law, **soft law instruments like guidelines play a dominant role in public authorities' decision making**.

AB Freedom of Information & Privacy Act (FOIP)

- **Purpose**: enhance transparency in public decision making
- **Use:** can be useful in getting information that may help your CL. However, takes a long time to process &, even if processed, you may receive a substantial list of restrictions to your requests.
- **Function wrt PF**: Adds to, but doesn't subtract, from CL rights to PF.
- **Concern**: FOIP isn't as strong as it should be
    - E.g., Tobacco-gate in AB → public scandal wherein tenders from several agencies were rejected &, instead, Premier's buddy got the contract. FOIP request happened & we saw a lot of back-room dealings, but there was still significant
    - Withheld on grounds that FOIP **doesn't apply to some internal gov't communications**
    - FOIP requests go **unanswered for long periods of time**
    - FOIP requests come back with significant **redaction**
- ***FOIP*, s 3**: Adds to but does not subtract from procedural protections at CL or under the *Charter*

- ***FOIP*, s 4**: Applies to "**all records in the custody or under the control of a public body**" **except** information on a **Court file**, **judicial records**, **personal correspondence** between government officials, **deliberative materials** of governmental bodies, etc.
- ***FOIP*, s 6**: Applicant has a **right of access to any record** in the custody or control of a public body, including records containing personal information about the applicant.
- ***FOIP*, ss 16–29** disclosure can be **refused if** it would::
    - Reveal **business secrets**
    - Harm **personal privacy** interests
    - Harm individual or public **safety**
    - Disclose **confidential evaluations**
    - Harm **law enforcement** interests
    - Harm **intergovernmental relations**
    - Breach the **confidence of Cabinet communications**
        - E.g., couldn't reveal info b/w cabinet & public health wrt lifting COVID restrictions b/c it would breach confidence of Cabinet communications.
    - Reveal **bureaucratic advice**
- FOIP request will be **dependent on if the government interprets the reasons for refusal narrowly or broadly**.
- FOIP request **take a long time to process**, since no government resources to sift through all the records. In reality, there is a promise, but not efficient and may run into issues re: reasons for refusal.
- **BUT** exemption from FOIP disclosure ≠ denial of disclosure in Court proceedings to which CL or PF apply!

Paul Haavardsrud, "Access Denied: How the government of Alberta obstructs requests for public information" (1 January 2014) albertaviews

- Research document describing that AB's FOIP is among the worst in the country lol.
- "B" grade for processing speed.
- "D" grade for completeness of disclosure (3rd lowest in the country)
- AB's FOIP "contains a long list of exceptions" (see exceptions above)
- "Exceptions can… be used to keep information hidden from public view, even if doing so violates the spirit of the law."
- "Alberta's FOIP Act contains an exception, for instance, that allows cabinet ministers to keep all manner of records—briefing materials, meeting minutes, emails—away from the public. The idea is to protect the decision-making process, allowing for frank discussions among officials. What's lacking, though, is an obligation to prove how the information, if disclosed, would harm the public interest. Without such a test, this exception can be used as a catch-all that allows officials to withhold almost any information."

Mission Institution v Khela, 2014 (Baker Factors + Failure to Comply with Statutory Disclosure Requirements)

R: To be PF, a decision maker **must comply with the statutory disclosure requirements**. Statutory disclosure requirements create an LE that a certain process will be followed.
F: ● The warden of Mission Institution decided to transfer a federal inmate, Khela from the medium security Mission Institution to the maximum-security Kent Institution on an emergency and involuntary basis. Khela

claimed that his transfer was unreasonable and procedurally unfair. Khela was informed the primary reasons for the transfer was a security intelligence report. Was not told detailed information with respect to the sources name what they said, or why they might be considered reliable.
- Khela wants reasons, scoring matrix, and what the witness statements say/why they're credible.

I/H: Did Mission Institution owe Khela a duty of PF (and should he therefore be returned to a medium security institution/should HC be granted)? → **YES**. Mr. Khela was owed a duty of PF consistent with s 27(1) of the *CCRA* in light of Mission failing to lead evidence respecting the s 27(3) exception.

Statute: **CCRA, s 27(1)**: gives a **general duty of disclosure** + exceptions to the duty.
Exceptions s 27(3): commissioner can withhold if disclosure of that info would (a) **jeopardize** the **safety** of any person; (b) the **security** of a penitentiary; or (c) the **conduct of a lawful investigation**.

A:
Trigger → residual liberty interests engaged (restrictions on movement)

Baker Analysis:
- Factor 1: Trial like – facts were presented, legal conclusion. His transfer was premised on his "guilt or innocence".
  - Administrative in nature b/c the decision is about maintaining safety & security (policy-like)
- Factor 2: Legislation weighs in favour of disclosure
  - S 27(1): general duty of disclosure
  - S 27(3): Exceptions → when disclosure can be withheld
- Factor 3: Interests engaged upon transfer from medium to max:
  - Location interests
  - Tighter restrictions on movement
  - Less access to programming
- Factor 4: the legislation gives an LE of full disclosure *unless* under s 27(3)
- Factor 5: Give deference to the warden for the good order of the penitentiary.
  - Khela could order further hits if he finds out who snitched.

Presumption in favour of disclosure in s 27(1) was not adequately displaced by s 27(3) b/c Mission Institute did not lead evidence wrt the exceptions
- If s 27(3) is invoked, deference will be given to the authorities on whether there was a reasonable basis for the belief. Where it is not invoked, however, it will not be given.
- Here the withholding of information was not done under s 27(3), as a result the disclosure did not meet the statutory requirements.
- **To be lawful, a decision to transfer an inmate to a higher security penitentiary must be procedurally fair.** To ensure that it is, the correctional authorities must meet the statutory disclosure requirements.

TO DO IN ADVANCE OF NEXT CLASS:
You have been retained to represent Mr Khela to file two different applications in the BC Supreme Court. The first is an application for habeas corpus based on the common law doctrine of procedural fairness; the second is an application based on s 7 claim under the Charter. **Advise him about the likelihood of success of both claims**.

Discussion Topics/My Anticipated Essay Style Qs:
- Serious questions about whether FOIP legislation is "window dressing"
- FOIP requests relatively new thing that constitute a heavy admin burden

***Khela* Discussion:**

- **Good type of exam Q → b/c it's recent & deals w/ PF course content**
    - On exam: Deal w/ trade offs involved in arg re PF. i.e., avoid oversimplification of *Khela* – we don't have a full right to PF. Instead, we should think about both the CL and S7 arguments re PF & the trade off b/w right to disclosure & policy reasons for withholding disclosure.
- ***Charkaoui*** says **duty of PF in light of s 7 includes**:
    - Right to **know case against you**
    - Right to **respond** to that case
    - **BUT** the rights of PF **need to be contextualized** (i.e., a s 7 claim doesn't necessitate full, Stinchcome disclosure; instead, you get a fair amount of disclosure in light of the circumstances)
- ***Charkaoui*** applied to ***Khela***: how much disclosure arises from the context of a prison?
    - In ***Khela***, that includes requiring prison officials to corroborate evidence from anonymous informants before relying on it & requiring prison officials provide judges with sealed information about *why* the information is subject to CCRA s 27(3) exception.
- For CL analysis:
    - Threshold → Show that duty applies wrt impacted rights, interests, privileges
    - If threshold is met, do the Baker analysis (make sure to elaborate on each point on these facts)
- For s 7 analysis:
    - Threshold → right to LLS is engaged. Here, liberty is engaged.
    - What do the POFJs require? (cite ***Charkaoui***)
    - Contextualize the POFJs (again, using ***Charkaoui***) → i.e., an *appropriate* amount of PF, having regard to the context.

Right to a Hearing

Right to an Oral Hearing (197-198)
Khan v University of Ottawa (201-207)

General dilemma – lens w/ which to view the right to hearing & counsel content: having counsel is invaluable to ppl & everyone should have the right // right to counsel benefits ppl who can afford a lawyer (but then ppl who can't afford a lawyer don't get that level of representation). IF admin tribunals are set up such that right to counsel is present, those tribunals can get bogged down by legalistic arguments or be made such that ppl who don't have counsel are totally hooped.

Timeline/Context

Historically, prior to ***Nicholson***, traditional approach = fairness was all or nothing proposition. Oral hearing was required whenever the reviewing Court deemed it judicial in nature/there was a duty to act judicially.

After *Nicholson*, PF expands beyond traditional parameters (e.g. Prison decisions). This **new contextual approach** to PF doesn't include a full right to trial-type procedures & oral hearing in every case. INSTEAD, we have a flexible duty to act fairly which is more or less demanding dependent on the circs → **oral hearings are required only in certain circumstances**. The question that arises is how much fairness is warranted in each specific case.

- Recall: ***Baker*** makes claim for oral hearing (unsuccessful, written suffices)

- Recall: ***Singh*** gives particulars of refugee claim to immigration officer. Once he receives adverse decision, he has no way to appeal (successful, SCC says lack of oral hearing breaches POFJs)

Relevant legal RULE today: In cases where credibility is central issue, that **credibility weighs centrally to the determination of whether there's a right to an oral hearing**. **BUT you still have to do a *Baker* analysis** to make sure.

- Prof notes that we should be careful w/ *Baker* analysis b/c there are some A2J issues.
- Legal Aid programs have received significant budget costs (this is a pan-Canadian issue) which have rendered it "a shell of its normal self" (–Prof)

Khan v University of Ottawa, 1997 (ONCA) (oral hearing based on (1) credibility + (2) grave consequences to interest at stake)

R: An oral hearing should be granted where/likelihood to right of oral hearing is heightened if:
1. **credibility** is a **serious issue**; and
2. where the **consequences to the interest** at stake are **grave**.

F:
- Khan=uOttawa 2L. Failed her evidence exam & therefore the semester. Requires her to take an additional semester.
  - She claims she thought the exam was 2 hours, but in fact had additional 35 minutes and therefore wrote a 4th answer booklet that she wrote "INSERT" on (to supplement her other answers)
  - When she got her exam back, the insert booklet was MIA.
- Khan appeals to student committee (students can appeal if there's a "serious error or injustice"). **Committee meets w/o providing her notice** of the meeting or asking her to appear and dismissed her appeal. **No oral hearing given, just written**. Appeal rejected because:
  - 1) something like this has never previously occurred,
  - 2) exam booklets labelled 1/3, 2/3, 3/3,
  - 3) last booklet was not very full,
  - 4) collection of booklets are a strict process. Indirectly calling her a liar. Khan seeks judicial review – procedural argument (lack of oral hearing). This type of case requires oral hearing.

I/H: Did the committee breach duty of PF by failing to provide a hearing → **YES** (Laskin, majority)

BUT dissent said NO (Finlayson): Effects don't reach sufficient level of seriousness (contrast repeating a semester of law school w/ torture in Singh). Here, the effects aren't severe enough to warrant an oral hearing.

A:
Khan argues that she was unable to (1) understand the case against her & (2) respond to that. Why would someone like Khan (or Singh or Baker) want an oral hearing? → Value-added information
- Opportunity to cross-examine witnesses
- It's not just what you say, but how you say it (i.e., nonverbal cues or inconsistencies indicating lack of credibility)
- Build sympathy/empathy.
- Khan argues she wasn't given an opp to appear personally in front of the appeal committee so she wasn't able to make her case fully/establish her arguments.

Baker Analysis

	HEARING REQ'D (Laskin)	HEARING NOT REQ'D (Finlayson)
FACTOR 1	The decision being made is one of **credibility** → Q is whether Khan did, in fact, write a	Proceedings were not adversarial in nature & no allegations were made against Khan

	fourth booklet.	
FACTOR 2	Law School Manual said students can appeal grade assigned where it may be the result of "significant error or injustice" → this was the case here.	
FACTOR 3	Outcome could delay, if not end, one's career; could render valueless any previous academic success; may foreclose further uni education entirely.	Requiring additional term isn't necessarily a bad thing & may even be a good thing in the context of Khan having bad grades generally; impacts not as significant here as in *Singh*.
FACTOR 5		Unreasonable procedural burden on university to give a hearing when the Committee doesn't accept Khan's evidence.

Right to Counsel

Right to Counsel (208-209)
Re Men's Clothing Manufacturers Association of Ontario and Toronto Joint Board, Amalgamated Clothing and Textiles Workers' Union [***ACTWU***](209-214)
New Brunswick v G(J) (214-216)

AJPA, s 6 (no absolute right to counsel)

***Alberta Administrative Procedures and Jurisdiction Act*, s 6**: does not require, but does not exclude, the right to counsel. I.e., **no absolute right to counsel**.
BUT where the matters are **complex and involve questions of law** (factors below) there ***may*** be a right to counsel wrt the **legal questions only**.

Factors to consider when determining whether someone should be afforded opportunity to be represented by counsel

1. Significance of the interest affected?
2. Complex or difficult question of law/fact/process? (Are there interesting or difficult legal questions that might arise that a non-lawyer might have difficulty grappling with)
3. Capacity of the individual? (Asking do they have the educational background to make their case)
4. Legitimacy of the decision-making process.

Re Men's Clothing (ACTWU), 1979 (general rule = no restriction; can agree out of general rule but judicial discretion still exists to allow for counsel when Qs of law arise)

R: General rule ⇒ a party entitled to be represented by an agent before a domestic tribunal cannot be restricted by the tribunal in choice of its agent in the absence of an applicable rule or agreement containing that restriction.

BUT even where counsel is typically restricted, Courts can exercise discretion to allow for counsel if the issues are

complex, necessarily requiring answering questions of law.

F:

- CA b/w ER Association & TU sets out rights & obligations for both parties and an ADR mechanism, i.e., arbitration process.
  - Benefits of arbitration include: timely resolution, less expensive, etc.
- Here, prof from Osgoode was the arbitrator.
- Parties wanted to bring forward a lawyer to address the scope of the arbitrator's powers, to determine if arbitration is possible in this case.

Proc Hist: Arbitrator determines no right to counsel on basis of:

- Baker 1: Labour & mgmt have jointly created & administered an arbitration system for 60+ years w/o lawyers. No witnesses called, chairman questions the parties, parties agree on facts/disposition when possible.
- Baker 2: Arbitration system from CA → allows for quick resolutions in the industry.
- Baker 5: Ongoing, extensive, & intimate relationships b/w firms in the industry & the TU; quick resolutions; Arbitration procedures are responsive to the industry.

I/H: Do parties under this CA have an absolute right to legal representation for arbitration proceedings? If not, can the court use discretion to permit representation? → **NO** absolute right to representation, *but* applicants entitled to legal counsel here b/c the factual issues involved are old & complex, necessarily requiring questions of **law**.

A:

Professor's Arguments: lawyers not required

- If they are required, we require them only for very specific questions.
- Undermines/frustrates purpose of arbitration regime: Purpose of arbitration regime will be frustrated if lawyers are brought in → i.e., technical, legal arguments will be brought forward instead of focusing on the underlying facts of the dispute.
  - Labour is about maintaining confidence b/w parties in the resolution of disputes under a CA. Once litigation ("war through other means") begins, that confidence/trust is undermined.
  - Increased litigation mindset = increasingly cumbersome, litigious, etc process that could undermine trust b/w ER & EE.

New Brunswick v G(J) (right to counsel under s 7 directly proportional to seriousness & complexity, inversely proportional to capacities of claimant.)

R: A right to counsel is **contextual**. The right is **directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the claimant.** (think of a continuum, increasingly serious + increasingly complex + low capacity of parent = more likely to have right to counsel *vs* less serious + less complex + high capacity of parent [well educated, composed, familiar with legal system, good communicator] = less likely to have s 7 right to counsel).

Right to state funded counsel may be found under section 7 if…

1. Threshold of LLS engaged (renewal of child custody orders + NB's decision to stop granting Legal Aid Certificates for renewals of TGOs).
2. PFJ of right to fair hearing is offended for want of representation by counsel if…
   a. Sufficiently serious (here = parent & children already separated 1 year+, now potential for 6 more months. The longer the separation, the less likely parent will ever regain custody.)
   b. Sufficiently complex (here = Child custody proceedings effectively adversarial proceedings in a court of law. Parent must adduce evidence, cross examine witness, make objections, & present legal defences; all other parties had counsel; three day hearing; Minister planned to present 15 affidavits)
   c. Parent has low capacity (here = parent had little education, difficulty communicating in court of law)

NOTE: onus on claimant to bring s 7 for right to counsel (this is an issue, see below)

R: (short) Serious question, raises questions of fact or law, or lacks the ability to self-rep ⇒ there may be a right to state-funded counsel

F:

- If Minister/gov't believe a parent/parents are incapable of providing necessaries of life, children will be taken from parents & placed in protective custody (and then foster care) for a specified period of time. In this case, once the order expires in 6 mos, Minister can reapply for additional time in custody.
- Children apprehended and put into foster care for 1 year. Once apprehended, the state has to make periodic renewal to keep the children in their custody. Child Welfare NB making renewal of 3 children for 6-month extension. Mother of children resist the application. She wished to be represented by counsel. Legal aid plan prohibits the granting of lawyer in custody order renewal proceedings. GJ argues that this refusal violates her s. 7 rights.
- How did the government's decision to refuse legal aid engage GJ's s 7 rights?
- Affects right to security (I.e., psychological health) because GJ is separated from children. State imposed stress is prominent in this case.

I/H: Does JG have a right to counsel? → **YES**

A:

Threshold: LLS

- Fundamental life choices that impact ppl deeply (here, it's more of a relationship than a choice, but it still triggers)
- Renewal of child custody orders, & these proceedings generally, are extremely distressing to parties involved/subject to the proceedings.
- NB had made a decision to stop granting legal aid certificates for renewals of temporary custody orders (recall: reduced funding of legal aid mentioned at start of class)
    - Significance: 1 year in the life of a young child is VERY significant & can really harm the relationship b/w a parent & child AND can impact the BIOTCs in the future (once child is in custody, unlikely a court will change that b/c stability is a BIOTC consideration)

Do the POFJs require representation by counsel? → Yes

- Yes – they impose a constitutional obligation on the province to provide state funding for representation.
    - BUT such an obligation is contextual, depending on circumstances of the particular case (*Charkaoui*)
        - Seriousness: parent & children already separated 1 year+, now potential for 6 more months. The longer the separation, the less likely parent will ever regain custody.
        - Complexity: Child custody proceedings effectively adversarial proceedings in a court of law. Parent must adduce evidence, cross examine witness, make objections, & present legal defences; all other parties had counsel; three day hearing; Minister planned to present 15 affidavits.
    - State-funded legal counsel is **not always required** to comply with s 7– depends on **contextual analysis**. Just because s 7 rights are engaged doesn't give an automatic right to a lawyer – need to look at seriousness and complexity of the proceedings and the capacity of the parent.
    - Increasingly complex cases = increasingly likelihood of higher levels of PF
- Lamer CJ: Stakes are high in this case, complex proceedings and the capacity of parent is affected in this emotive time. To expand on complexity, it is a 3 day hearing with cross-examination and the other party is allowed to counsel. Therefore, warrant counsel. PFJ of right to fair hearing infringed on if there is no counsel to represent her.
- PROBLEM (according to Prof): **Onus on claimant to bring a s 7 claim**. It's not a full right to counsel, but claimant will have to go to Court to bring the claim & argue for a right to counsel depending on the facts (which makes it more likely prov gov'ts can play fast and loose)

Right to Cross-Examine

- Many pieces of enabling legislation include the right to cross-examination where someone wouldn't have a fair opportunity to rebut or explain a case brought against them otherwise (e.g.., APJA, s 5).
- The **right to cross-examination is <u>NOT</u> universal** and not required in every case.
- The **content** of cross-examination is also **<u>NOT</u> unlimited** (ie. asking some witnesses questions, but not all).
    - Be mindful of what the cross-examination is for, what it would help, etc. wrt *Baker* factors.

Innisfil v Vespra (248-250)
Djakovic v British Columbia (Workers' Compensation Appeal Tribunal (251-254)

APJA, s 5 (right to cross examin is NOT universal)

When an authority has informed a party of facts or allegations & that party

(a) **Is entitled under s 4** to contradict or explain them, but
(b) **Will not have a fair opportunity** of doing so **without cross-examination** of the person making the statements that constitute the facts or allegations

The authority **shall afford the party an opportunity** to cross examine

Innisfil v Vespra, 1981 SCR (when cross-examination is likely)

R: Right to cross-examination flows from court-like adversarial proceedings & should only be curtailed with **clear statutory language**.

R: Right to cross-examination does NOT flow from proceedings wherein the statute or subject matter is more concerned with **community interests** at large & **technical policy** requires specialized knowledge of the tribunal.

R: Court should not withhold right to cross-examination because it's unlikely or impossible for a claimant to advance its case; Claimant decides for themselves whether they'll cross examine ("he… must exercise it as his peril").

F:

- City of Barrie applies to ON Municipal Board to annex land in adjacent townships. Minister approves.
    - Board has jurisdiction to annex land.
- Letter given states that the witness will answer any questions they have → BUT can they cross examine the witness?
- At SCC, the issue was whether the municipalities could cross examine a ministry official who provided a letter for the judicial record confirming the policy re annexing the land.

I/H: Were the municipalities entitled to cross-examine the ministry official who presented the letter? → **YES**.

Statute: *Statutory Powers Procedure Act*, s 10(c)

A:

- Baker 1: adversarial proceedings, but looks more similar to gov't, exec decision
    - Estey J: role of truth in adversarial proceedings necessary to judicial decision-making
- Baker 2: Statutory Powers Act includes <u>no</u> clear statutory curtailment of the right to cross examination
- Baker 2/4: Statutory Powers Act, s 10(c) → all parties assumed it would be able to cross-examine the ministry official b/c 10(c) doesn't make any exceptions to cross-examination and doesn't give the tribunal

discretion to prohibit cross-examination.
- Baker 4: letter that tendered the report included offer for departmental official to testify at hearing.
- Baker 5: unlimited right to cross-examine *could* unravel the proceeding.

Djakovic v British Columbia (Workers' Compensation Appeal Tribunal), 2010 (when cross examination is likely)

Complex Qs of fact or law = more likely to require cross examination

R: Cross-examination likely required by PF when…
1. Cross examination is central to the case/question at issue.
2. Significant rights of the complainant are at stake.
3. Questions of **credibility** are at issue.

R: Cross-examination is at the heart of the right to respond to the case against you

F:
- Djakovic was injured during a physio session & claimed compensation. WCB was denied.
- Djakovic appealed. At appeal tribunal, counsel asked to have two witnesses who saw the injury attend the hearing & be cross examined. Vice-chair refused, got witnesses to provide written evidence.
  - Written evidence was shitty & Counsel again asked for attendance for cross examination.
  - Vice-chair again refused on the basis that there would be little value in cross examination *and* unlikely that the incident caused a "very, very strong pain" that would have been unnoticed & untreated by 3 treatment professionals.
  - Djakovic's appeal was dismissed.

I/H: Was Djakovic entitled to cross-examine the witnesses? → **YES**

A:
- Baker analysis:
  - Factor 1: court-like (rules re disclosure, witnesses, oral evidence, cross-examination)
  - Factor 2: Appeal body's role in stat scheme weighs toward cross-examination b/c no further appeals in the Act; i.e., decision is determinative
  - Factor 3: high importance to complainant.
  - Factor 5: Appeal body has wide discretion re its procedures & expertise in making decisions.
- Cross-examination was **central to the case** ⇒ we wanted to know whether the worker suffered an injury or had the injury aggravated during the physio program
- Written responses were **unsatisfactory**.
- **Significant rights** of complainant were **at stake**.
- Questions of **credibility** were at issue.
- Vice President also erred in reasons to refuse cross-examination:
  - (1) decision maker presupposed what success could be achieved (and was wrong about that success!)
  - (2) Goal of PF is to allow ppl to respond to case against them & cross examination is integral to this.

Duty to Give Reasons (DGR)

The Duty to Give Reasons (254-257)
Wall v Independent Policy Review Director (260-265)

- Interplay b/w **process** & **substance**
- Traditional view: no CL duty to give reasons

- **Dube's view: general CL duty to give reasons**
    - In ***Baker***, Dube J changes this tradition for several reasons…
        - **Instrumental rationale**:
            - Fosters **better decision making** by ensuring that reasoning is well articulated & carefully considered → if you know that you will have to give reasons, you're more likely to *actually* think through the reasons
            - Process of writing reasons itself may be a guarantee of a better decision
        - Inherent value:
            - Demonstrates **respect for litigants** as ppl who deserve to know why outcomes were reached
            - **Builds trust/makes ppl feel they are treated fairly** → trust/confidence of public in finding that there are fair decisions that are legally justifiable, there's less litigation & so gov't can spend more time doing their actual jobs than just litigating.
    - BUT ***Baker*** does **NOT** establish a universal DGR: "in certain circumstances, the duty of PF will require … a written explanation for a decision." This is the case where "the decision has **important significance for the individual**, when there is a **statutory right of appeal**, or in **other circumstances.**"

STEP 1: general trend in favour of DGR; imply DGR when reasonable in light of Baker analysis.

- **Imply DGR whenever it's reasonable to do so in light of the *Baker* analysis** (seems to be the general trend/rule since ***Baker*** → DGR is almost always required)
    - DGR is **broadly** conceived
- **BUT Exceptions to R**:
    - Municipal rezoning decisions
    - Ministerial decisions to close community colleges
    - Debt proceedings in ***Mavi*** (duty to provide hearing, but don't have DGR for *why* they were proceeding to debt collection)
    - NOTE: with exceptions, we can usually explain why there's no DGR by looking to the **Baker factors**.

STEP 2: Apply the Baker factors to determine whether the trend of DGR is appropriate.

STEP 3: How detailed must the reasons be to satisfy PF? → use a **flexible** standard using ***NL Nurses***,

- ***Baker***: DGR was satisfied by the (basically) shorthand transcription of the thought process of an immigration officer who had looked at the file.
    - Different decision-makers will have different ways of making decisions and we should look at the DGR flexibly
- Reasons do **not have to be perfect**, BUT should **provide an explanation** for the outcome that is **intelligible** to the people impacted by the decisions (i.e., should be able to understand the **rational basis** behind the decision): "Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (***Newfoundland and Labrador Nurses' Union v Newfoundland***)
    - Reasons do not need to be perfect, but do have to give the parties an understanding of why the outcome was reached.
- "Baker stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision. It did not say that reasons were always required, and it

did not say that the quality of those reasons is a question of procedural fairness." (***Newfoundland and Labrador Nurses' Union v Newfoundland***)

- "It strikes me as an unhelpful elaboration on Baker to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of procedural fairness and that they are subject to a correctness review." (***Newfoundland and Labrador Nurses' Union v Newfoundland***)
- Step 3(a): understand case against you/the case to meet.
- Step 3(b): if you understand the rationale but think that the rationale is unacceptable in light of the facts, then you challenge it on **substantive grounds**

Wall v Independent Policy Review Director (ONSC, aff'd ONCA)

Does not give reasons (i.e., doesn't satisfy DGR) → Q is whether DGR is required on **procedural grounds**.
Satisfies DGR, but explanation is inadequate → Q is whether the reasons can be challenged on **substantive grounds**.
Explanation here is deficient from DGR perspective. What was it about the explanation that was deficient? [brevity, didn't meet LE in the statute, didn't answer 'why'] Why does it offend our sensibilities re PF? What should the decision-maker have done to make a decision that was fair? [explained how they applied the statute]

R: DGR means decision maker has to provide a transparent & intelligible explanation for the outcome. At a minimum this requires the decision answer the question of "why?" and comply with any LE in the legislation. Must explain themselves in reasonable terms that can be understood by an intelligent audience.

R: IF no reasons are given → test is whether the DGR is required for PF.
IF reasons are given, but are inadequate → test is whether the reasons could be challenged on substantive grounds. If the reasons aren't sufficient to conduct a substantive review, those reasons do not meet the duty of PF. **At a minimum**, the reasons must describe **why** the decision was made (if there is an LE, reasons should meet the LE).

R: Sometimes a decision maker will use a template that isn't very revealing wrt reasons. Ask yourself:

- Does the template give information about how the decision maker viewed the evidence?
- Does it explain the findings of fact that underlie the decision?
- Does it give me at least a rudimentary understanding of the legal logic that supports the outcome?

**If these questions aren't met, more likely to have a failure to meet the DGR.

F:

- Context: 2010 G20 summit; Group of protesters brought outside of Toronto core & then released w/o charges; indiscriminate use of police force (i.e., assaulting protestors)
- Wall was arrested for wearing a disguise with intent and later released without charge.
- During G20, RCMP engaged in controversial crown control tactics, such as intimidation, mass arrests.
- Wall files complaint with civilian oversight agency – The Office of the Police Review, asking them to look at the indiv officers who engaged in the conduct in question
- Others started saying that there was a chain of command issue (not an indiv officer problem). Wall tries to change his complaint to look at the chain of command.
- Response Wall gets from the Director of the Office is that 6 months have passed since incident.
    - Enabling legislation states that Director has **discretion** not to deal with complaints made > 6 months after the facts upon which the complaint is created.
    - "The OIPRD is aware of your concerns. S. 60(2) of the *Police Services Act* permits the Director not to deal with a complaint if the complaint is made more than six months after the facts on which it is based occurred. Taking all of the information into consideration, I have decided not to proceed with the complaint as it was made more than six months after the facts on which it is based occurred."
    - Director says based on the enabling legislation & the circumstances, he won't proceed

I/H: Were the reasons sufficient to discharge DGR? → **NO**. ONSC says there were no reasons, but ONCA says that the brevity & lack of explanations in the reasons were such that the reasons did not satisfy the duty of PF.

Legislation: Police Services Act
60(2) the director "**may** decide not to deal with a complaint… if [it] is made more than six months after the [fact]."
60(3)~in determining whether to deal with the complaint, the director **shall** consider:
(a) If the complainant = minor or disabled
(b) If the complainant is/was subject to criminal proceedings related to the event underlying the complaint
(c) If dealing with the complaint is in the public interest (having regard to all circs)

A:
- There are situations in which reasons are insufficient to discharge the PF duty to give reasons ⇒ this occurs when the reasons are not sufficient to give the reviewing body the ability to conduct substantive review.
- "Answering the question 'Why?' with the statement 'Because I can' is not providing reasons" (ONSC).
- "We are only left with [a] cursory and generic statement… [this] is not adequate" (ONCA)
- "Did the Director apply his mind to this mandatory consideration [as required in the legislation/the LE]? We have no way of telling" (ONCA).

Brief review:
- Ensures people are informed & have a way of understanding the rationale that supports the decision.
- If you cannot understand the rationale/the reasons one is given are nonsensical or don't really explain anything, one can challenge it as a breach of PF.
- If the reasons are intelligible (you can understand the basic logic), but you think that logic is deeply flawed (e.g., unsubstantiated in principles or legal reasoning that flouts the relevant law, think of ***Baker***), then you challenge on **substantive grounds**.

Reasonable Apprehension of Bias (RAB)

RAB deals with *NEMO JUDEX SUA CAUSA* (everything before was audi) → "no one should be a judge in his own cause" (i.e., entitled to an impartial judge)

More or less demanding depending on regulatory context.
Guiding questions for readings: Under what circs does the concern about impartiality become more or less pressing?

Introduction (267-272)
Variations in the Reasonable Apprehension of Bias Standard:
Newfoundland Telephone *Co v Newfoundland* (292-296)
Old S*t Boniface Residents Assn v Winnipeg* (297-299)
Save ***Richmond Farmland*** *Society v Richmond* (299-300)
Seanic *Canada Inc v St John's (City)* (300-301)
Pelletier *v Canada* (284-289)

RAB Context

Historically speaking, the CLdoctrine of natural justice is comprised of 2 fundamental legal principles:
- Audi alteram partem: "No one should be condemned unheard."

- Right to notice, right to disclosure, the right to know the case against you, right to a hearing, right to be represented, right to cross-examine, duty to give reasons, etc.
- I.e., everything discussed in class up to this point

- Nemo judex in causa propria sua debet esse: "No one ought to be a judge in his or her own cause."
  - Right to an impartial decision-maker, who approaches the issues with an open mind, does not have an interest in the outcome, etc.
  - I.e., everything we discuss re RAB.

RAB Triggers

The principle of impartiality is offended when an administrative official:

(1) **Has a conflict of interest**: An administrative official has a pecuniary interest in the outcome or a previous relationship with one of the interested parties;
   (a) E.g., securities regulator owns stock in one of the companies they are charged w/ overseeing.

(2) **Is judge, jury, & executor:** An administrative official…
   (a) Becomes an adjudicator (e.g., at hearing) after initially being involved at the investigative stage,
   (b) Sits on a rehearing (after successful judicial review)
   (c) Sits on an appellate tribunal which is reviewing his or her previous decision

(3) **Is biased to the outcome**:
   (a) An administrative official **makes statements during a hearing** that indicate he or she is biased as to the outcome/ not capable of acting with impartiality; (***more common**)
   (b) An administrative official **makes out-of-hearing statements** that raise concerns that he or she is biased as to the outcome

(4) Administrative officials **consult with colleagues** who do not participate in the hearing

RAB Test

TEST: Reasonable Apprehension of Bias (contextual, objective test) → determination of whether an adjudicator should be disqualified

- "**What would an informed person, viewing the matter realistically and practically – and having thought the manner through – conclude an admin decision maker is biased as to the outcome?** (***Committee for Justice and Liberty v National Energy Board***)
  - Can intervene, quash decision, & remit back for redetermination.
- **RAB test becomes more or less demanding depending on the circumstances** (more formal process in adjudicative admin processes with targeted impact vs less formal processes in municipal decision)**
  - The application of the test is **contextually sensitive**, in the sense that a reviewing court will require a decision-maker to be more reserved in a trial-type process as opposed to a policy-making or legislative forum.
  - When decision makers make decisions about fact → RAB test becomes increasingly stringent

NL Telephone Co (NTC) v Newfoundland (RAB vs closed mind test)

R: Closed mind test applies at the investigative stage (i.e., before hearing is announced) ⇒ wide licence given to board members to make a public comment as long as those statements do not indicate a mind so closed that any submissions would be futile.

R: RAB test applies once the matter reaches the <u>hearing stage</u> (i.e., once the hearing is called and/or taking place) ⇒ requires a greater degree of impartiality than the open mind test ⇒ **would an informed person, viewing the matter realistically & practically – and having thought the matter through – conclude the board member had a RAB?** (i.e., <u>conflict of interest, biased to outcome, consulting pals</u>)

R: Closed mind test & RAB must be applied **flexibly** so that the standard applies **varies with the role & function of the board being considered** (does the board make legislative/policy decisions? Admin decisions? Legal questions? Policy questions? Are they experts? Bureaucrats? Various members of society? etc.)

F:

- Utility board rate setting decision.
- Commissioner (Wells) comments on the case before and after the hearing commences.
- Wells states he is an advocate for consumer rights and intended to play an adversarial role as a champion of consumer rights. Wells made critical statements regarding Newfoundland Telephone Co.
- NTC objected to Well's participation on the panel on the grounds that his statements created an apprehension of bias.

I/H: Is there a reasonable apprehension of bias on the part of Wells? → **YES**. Although Wells could make w/e statements he wanted before the hearing was called (b/c none of his statement suggested his mind was so closed that all submissions would be futile, he failed to exercise sufficient discretion such that a RAB was found)

A:

- Not all of the evidence was in before a conclusion was reached
- The composition of the board should reflect all aspects of society. But, the statements during trial give a clear indication that there was a RAB
- Wells demonstrated a closed mind. It's fine to make those statements before the hearing starts, but once hearing commences, have to be discrete in how you talk about the evidence. If not, it looks like you are impartial.

Old St Boniface Residents v Winnipeg (prior statements & closed mind test)

Higher threshold for judicial review regarding RAB in cases involving policy-making/legislative proceedings. Use the open mind or "amenable to persuasion" test.

R: Whether there is a RAB is contextual, to be decided with "reference to all the circumstances under which the tribunal operates":

- Nature of decision/decision maker
  - Is it a council? (here, it was)
  - Are decision makers expected to vote on a decision (here, they were)
  - Are decision makers expected to assist people on either side of the issue? (here, they were)
  - Functions of a municipal councillor require that objectors or supporters be heard by members of Council who are capable of being persuaded.
- What does the statute say?
  - Are there prohibitions to acting in certain ways? (none here)

General R: councillors must be **amenable to persuasion** by objectors & supporters in public hearings on broad matters of zoning made by city council (i.e., policy-making/legis proceedings). To prove that councillor was NOT amenable to persuasion, use closed mind test.
Closed mind test: Party alleging bias must establish that there is a **prejudgment of the matter,** in fact, **to the extent that any representations at variance** with the view, which has been adopted, **would be futile**. HIGH threshold for judicial review.

- **Factors that, alone, do NOT indicate a councillor has a closed mind**:
  - Statements by indiv members of Council ≠ expression of a final opinion on the matter that can't

be dislodged
    - Support in favour at a committee meeting or more generally ≠ bias in the absence of some further indication that the position taken is incapable of change.
    - Speaking on behalf of/advocating for a party ≠ closed mind
- However, one of the factors above could fail the amenable to persuasion test **IF** the Councillor's **support was motivated by some relationship with or interest** in the entity instead of in support of the issue itself. Moreover, other circs may show a closed mind w/o conflict of interest.

R: Prior statements by councillors ≠ RAB, UNLESS there is evidence that the municipal councillor had a **personal interest in the outcome** *OR* a **"closed mind**"/weren't amenable to persuasion.

F:
- Developer wanted to buy up land in this area and build condos.
- Winnipeg municipal councillor (Savoy) was involved from the beginning to get municipal approval for a re-zoning for development of Old St Boniface.
- Residents association attempted to block the decision (to build the condos) on the basis that a municipal councillor had been involved from the start in moving the proposal through the municipal approvals process
    - Councillor advocated for condo development (great econ opportunity, enhance urban density, bring more residents into a more established neighbourhood

I/H: Did the municipal councillor's lobbying in favour of the project demonstrate a RAB? → **NO.** Fails the closed mind test (i.e., is amenable to persuasion)

A:
- In the course of such a process, a councillor can and often does take a stand either for or against the development. This degree of prejudgment would run afoul of the ordinary rule which disqualifies a decision maker on the basis on reasonable apprehension of bias. Accordingly, it could not have been intended by the legislature that this rule apply to members of council with the same force as in the case of other tribunals whose character and function more closely resemble those of a court.
- The party alleging disqualifying bias must establish that:
    - 1) The councillor has a personal interest in the project, or
    - 2) There is a prejudgment of the matter in fact to the extent that any representation at variance with the view which has been adopted, would be futile. **Threshold for judicial review is high in this case.**

Compare to NL Telephone:
- Baker 1: Nature of decision
    - Municipal council exercising their legislative powers to rezone a neighbourhood
- Baker 3: Importance of impact
    - NL Telephone: tons of people are impacted in an undifferentiated manner
    - St Boniface: fewer people

Save Richmond Farmland Society v Richmond (closed mind test)

R: Closed mind test applies in municipal zoning decisions by councillors.

F:
- Zoning situation (like Boniface)
- 1 Councillor quite involved & outspoken about the development project.
    - Previously in media interviews, "he allegedly said that, although he would listen attentively… he would not change his mind"
    - "While public hearings were under way [he said that] it would take something significant for him to change his mind, although he would be interested to see what emerged in the balance of the hearings."

I/H: Is the hearing unfair b/c there is an RAB by the 1 involved councillor? → **NO RAB**. Hearing is fair.
Sopinka (majority) applies closed-mind test.
Laforest (concurring minority) applies modified test wherein a councillor may have a closed mind so long as it is based on 'honest opinions strongly held'.

A:
Majority (Sopinka J): applies the closed mind test from St Boniface to **dismiss** the appeal.
Concurring (La Forest J): applies modified test wherein a councillor may have a closed mind so long as it is based on 'honest opinions strongly held'.

- Argues that we should just say that RAB doesn't extend to municipal bodies b/c it's unrealistic to expect councillors, who have jobs revolving around advocacy and election, to claim they are amenable to persuasion"
  - If we tell municipal councillors they can accept development projects like this so long as they don't make outward statements they support projects, our political process will be harmed (if they claim they'll keep their mind open even if they won't, this would undermine the current political system).
- Proposed test has a very high threshold for establishing bias → decision maker is entitled to bring a closed mind provided that the "closed mind is not the result of corruption, but of honest opinions strongly held."

Seanic Canada, 2014 NLTD rev'd by NLCA (closed-mind test for discretionary decisions)

R: In discretionary decisions by municipal councils, the closed-mind test applies; here, the closed mind exists when someone refuses to consider the necessary considerations to make the decision. Councillors are entitled to listen to constituents (this is a valid consideration), agree with their constituents/tell their constituents they agree with them, declare their opinion before the vote occurs. None of these factors undermine the legitimacy of a councillor's participation in debate or a councillor's vote in a discretionary decision.

F:

- A councillor who took part in the decision of council indicated at an earlier public meeting that he'd made up his mind to oppose the Application.
- Proc Hist (NLTD):

I/H: Did the Councillor have a closed mind such that any representations to the contrary would be futile? → **NO**.

A:
NTLD (rev'd)

- Applied closed mind test & concluded RAB.
  - Councillor's mind was closed primarily b/c of the opposition of electors, not b/c of legitimate planning considerations.
  - NLTD points to regulatory regime's necessity for independent judgment; despite being elected, they should not just do what their electors want.

NLCA (rev'g NTLD)

- NLCA overturns the decision, stating that the closed mind test **needs to be applied in a way that accords with the realities facing elected officials**. In discretionary decisions, this means…
  - Bias ≠ opposition or support in line w/ constituents
  - Bias ≠ listening to constituents
  - Bias ≠ taking constituent views into account
  - Bias ≠ stating their opinion any time before the moment a vote takes place.
- Bearing in mind views of constituents does **not undermine legitimacy** of a councillor's vote or participation in debates when a discretionary decision is at play.

Pelletier *v CA*, 2008 (commissioner of public inquiry (post-investigation); cumulative effects)

R: Cumulative effects of comments may be taken into account in finding a RAB.
R: A public inquiry, even if confirming the findings of an investigation, requires higher PF. RAB is found where the decision maker… 1. Prejudged issues 2. Not impartial toward a party "Comments revealing impressions and conclusions related to the proceedings should not be made extraneous to the proceedings either prior, concurrently, *or even after* the proceedings have concluded."
R: Factors that weigh toward a higher duty of PF/ higher likelihood of finding a RAB in light of Commissioner's comments: ● A mandate to investigate and report on *all* levels of the management & advertising of a program. ● Publicly concluding an outcome before hearing all of the evidence (here, Commissioner said mismanagement was "catastrophic" before he'd heard all evidence)
RAB test is NOT subjective (i.e., merely stating "I have not closed my mind" is NOT sufficient. Rather, the test is based on an objective reasonable person.
F: ● Retired judge appointed as commissioner of an inquiry & was all over the media talking about how he had made his mind up 3 months into 9 months of hearings.
I/H: Was there a RAB on the part of the Commissioner? → **YES**. Cumulative effects indicate that commissioner (1) prejudged issues; (2) was <u>not</u> impartial toward the applicant.

Impartiality & Independence

Does RAB prohibit judicial institutions from distributing labour in a particular way? → YES. Avoid the same people being involved in investigative & adjudicative situations
Do they same principles of judicial independence apply to tribunals as to courts? → NO. Contextual.
RAB re judicial independence may arise where:

1. **Blurring of functions**: (see ***Brosseau; Régie***) Would a reasonable person conclude that an administrative official involved at the investigative stage should be disqualified from adjudicating charges stemming from that investigation? → YES (*but* see *Brosseau* for the exception) → overlap of functions that is permitted by statute
    a. **GENERAL RULE: If an official is an investigator, prosecutor, and adjudicator, the decision-making process may be rendered fundamentally unfair**.
    b. **EXCEPTION**: When enabling statute permits overlap of functions (investigatory/adjudicative) → there's no RAB (UNLESS decision maker acted beyond the statutory overlap)
2. **Lack of administrative independence from Executive**: (see ***Ocean Port***) Should administrative institutions that perform adjudicative functions be protected by a Constitutional-level principle of institutional independence to prevent political influence?
    a. The principle of **judicial independence is an unwritten Constitutional principle** — Could a similar argument be made for administrative bodies (ie. Do we want the executive branch to exert influence on administrative decisions?)

b. ***Vriend v Alberta***: LGBTQ discrimination; HRC members were replaced by executive to allow for this discrimination

Prior Involvement in the Proceedings (276-279)
Statutory Authorization:
Brosseau v Alberta (302-305)
2747-3174 Quebec Inc v Quebec / Régie (306-312)
Independence:
Ocean Port Hotel Ltd v British Columbia (314-316)

Prior Involvement in the Proceedings & Independence

→ NO unwritten Constitutional principle of adjudicative independence in administrative law
Bias can be **individual** or **institutional.**

Brosseau v Alberta (prior involvement → blurring of roles in statutory context)

General R: blurring of roles creates a RAB that destroys the integrity of proceedings
Exception: BUT where the overlap of functions has been authorized by statute (& constitutionality of that statute is not in issue), you must show an Act of the Commission that goes beyond its statutory duties (investigate & then adjudicate whether this happened). Once you've shown evidence of involvement "above and beyond the mere fact of the Chairman's fulfilling his statutory duties" a RAB affecting the Commission as a whole may exist.

F:
- Allegation that chair of securities commission was disqualified from sitting in an adjudicative capacity b/c the chair had instructed commission staff to investigate a company.
- Brosseau was the company's lawyer & an adjudicative hearing was called to resolve allegations that Brosseau made misleading statements in the company's docs that were filed with the commission.
    - The chair was designated to sit on the panel & Brosseau argued this blurred the lines of his role (is he the person who instructs commissions or the arbiter for misleading statements?)

I/H: Did the Chair's involvement (i.e., the referral to an investigation) at the investigative stage raise a RAB wrt his ability to sit on the adjudicative hearing? → **NO**. Overlap of functions was authorized by statute & chair did not act outside of his statutory duty.

Statute: **Securities Act** enabling legislation gives chair **broad authority** in overseeing operations of the commission & **formalities** wrt to an investigation, such that his involvement at the investigative stage didn't raise a RAB

A:
- Factor 1: Securities Commissions serve a **protective role** → they regulate the market & protect the general public (looks more policy-like)
    - "It is clear from the empowering legislation that… the Commission is not meant to act like a court, and that certain activities which might otherwise be considered 'biased' form an integral part of its operations."
    - The investigation that took place was a more informal internal review, not like the later hearing.
- Factor 2: legislation gives chair broad authority & stipulates formalities for investigation that protect from RAB

QB Inc v QB/ Régie (blurring roles/prior involvement + institutional impartiality/bias test + security of office factors)

R: "impartiality, like independence, has an institutional aspect"

R: Test for institutional bias: a well-informed person, viewing the matter realistically & practically – and having thought the matter through – would have a RAB in a substantial number of cases. Consider all factors, with particular attention to whether the guarantee provided for in the legislation to counter the prejudicial effects of certain institutional characteristics is sufficient. Look at: nature of the dispute, the other duties of the admin agency, and the operation context as a whole.

R: Security of tenure is a key to ensuring adjudicative independence. Factors:
- Holding office for life = sufficient (but uncommon for directors who make decisions)
- Fixed term appointments = sufficient AS LONG AS removal of adjudicators isn't simply at the pleasure of the exec.
- No safeguards against Executive interference in a discretionary or arbitrary manner ≠ sufficient.
- Arbitrary/discretionary Exec interference in appointments/terms ≠ sufficient

F:
- Company had their liquor permits revoked.
- Company challenged the QB liquor licensing Act on the basis of its operation & structure.

I/H: Is the blurring of roles of the lawyers such that it creates a RAB? → **YES**. AND this is a structural (not individual impartiality/independence issue)

Statute: ***Quebec Charter of Rights and Freedoms*, s 23:** Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him
Act [**blurring of roles**] EEs can participate in the investigation, filing of complaints, & presentation of the case to the directors, & the decision.
Tribunal may decide to sit ***in camera*** in the interests of **morality or public order**.

A:
- Support staff involved at several levels of each case which raises a RAB in a large number of cases →
  - "leave[s] open the possibility of the same jurist performing these various functions in the same matter"
  - No measures taken to separate the lawyers involved at different stages of the process.
  - "...prosecuting counsel must in no circumstances be in a position to participate in the adjudication process. The functions of prosecutor and adjudicator cannot be exercised together in this manner."
  - EEs leading evidence, advising lawyers how to lead evidence re complaints, vet the decisions rendered by the QB Alcohol Commission → this institutional structure (i.e., division of labour) raises a RAB at the **institutional level**.
    - *De minimis*: infringement on rights happened on an institutional level, far more than *de minimis*.
- Needed to change structure of QB Liquor Comission to comply w/ duty ⇒ "A form of separation among the directors involved in the various stages of the process is necessary to counter" the RAB.

Contrast to Brosseau:
- Relevant legislation
  - *Brosseau*: Statute implies the power to instigate investigation
  - *Quebec/Régie*: *QB* ***Charter*** is referenced in addition to the statute which implies different legal context, speaks to **rights of affected party**.
- Argument that ***Brosseau*** was wrongly decided: They could have followed the "regular process", not phoning up the ADM.

Advising the Commission on how to avoid RAB from blurring lines:

- A form of separation.
  - E.g., Different physical structures (different floors, buildings) to mitigate interaction between different functions.
  - Expensive to institute, but preferable to systemic challenges to Commission

Ocean Port Hotel v BC (impartiality, security of tenure, & degree of independence req'd)

P: Whereas prov & sup courts tenure & remuneration are constitutionally guaranteed in preamble of CA 1867 which ensures impartiality, the same principle does not extend to admin agencies. "While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts."

TEST: DETERMINE DEGREE OF INDEPENDENCE REQ'D FOR ADMIN DECISION MAKER…

- *IF* enabling statute *SPECIFIES* degree of independence → **follow** what **statute** says (b/c it's Parliament's intention) **UNLESS constitutional constraints** exist.
  - R: where the intention of the legislature is unequivocal, there is no room to import CL doctrines of independence, no matter how inviting it is for a court to do so.
- *IF* enabling statute is *SILENT* or *AMBIGUOUS* on degree of independence → **assume** legislature intended decision-maker to be **independent & impartial UNLESS** assumption is ousted by **express statutory language** or **necessary implication**

F:

- Constitutional argument raised Ocean Port= Constitution preamble includes administrative independence & the Board lacked sufficient security of tenure to ensure independence)Board had part-time, fixed-term appts, & members could be removed at pleasure).
- BC Liquor Commission appoints Commissioners for a 1 year term at the **pleasure** of the gov't ⇒ argue that Commissioners are at risk of losing their appointment, which renders them vulnerable to gov't influence. Threatens adjudicative independence.
- Raises a constitutional arg: there should be a const principle of adjudicative independence to insulate admin agencies from gov't influence. They argue this would require BC Leg to amend enabling legislation to include security of tenure & remuneration consistent with the idea of judicial independence.

I/H: Is there a constitutional principle to adjudicative independence in admin tribunals? → **NO**. Admin tribunals' powers flow from the executive, so the constitutional principle does not apply here since admin tribunals ≠ courts.

Statute: Provisions about security of tenure, remuneration, terms of employment that are more than 1 year, and a based salary that cannot be tampered with during the period of employment.

A: The argument of constitutionally guaranteed admin independence ultimately fails

- McLachlin J distinguishes adjudicative independence from administrative independence
  - Legislature can structure and populate a wide range of administrative decision makers in ways they see fit
  - Judges should not impose restraints on legislative bodies that restrict their ability to do this
- To what extent can a constitutional argument be made for admin independence? Does constitution require arms-length bodies have structural guarantees of independence from the exec branch and what would that look like? → exec tenure, security of remuneration,

What if the administrative agency did make decisions that infringed on Section 7 of the *Charter*? Would the same analysis of the Preamble apply?

- Hypothetical: What if in *Charkaoui*, a Minister or the Cabinet made the decision about the reasonableness of security certificates instead of a federal judge?

- It may be that fairness concerns are heightened in that context → *Ocean Port* may not be the "last word" that there is no adjudicative independence in administrative law.
    - Maybe a Section 7 argument might be more persuasive, if it comes up again

If you change circs of Oceanport case such that s 7 arguments are engaged, would the argument be changed? E.g., if an agency (instead of liquor commission) exercised rights over LLS, what would happen?

- Singh: deportation to country of origin → argument for wellfounded fear of persecution, prison, torture, death. This engages s 7 rights, but the Q is **do the principles of fundamental justice include a principle of adjudicative independence? Would that principle of adjud indep prevent parl from altering the structure of refugee boards in such a way that they lack security of tenure and remuneration?**

Institutional Consultations

Relates to adjudicative independence & admin

International ***Woodworkers*** *of America v Consolidated-Bathurst* (pp. 328-342)
Tremblay *v Quebec* (pp. 344-349)
Ellis-Don *Ltd v Ontario* (pp. 349-353)

Guiding question: What happens if an adjudicative panel adjourns a hearing & the panel members consult w/ their peers within that agency (and the peers are not party to the hearing)?

- Does this raise concerns about fairness? Lack of impartiality? ⇒ contested/controversial questions
- **R** of the trio of cases we'll read today → no bright line rule about consultation with panel members and their peers. Instead, **institutional consultations permitted as long as certain conditions are abided by (i.e., don't take notes, don't take vote, don't discuss findings of fact, only talk about questions of law)**. When the conditions are followed, institutional consultations are allowed.

Institutional consultations: situations wherein admin decision-maker who hears the parties consults outside of a hearing admin peers to discuss the policy implications of a decision.

Fairness concerns w/ inst consultations:

1. Allows **people who have not heard the evidence** or the parties' submissions can nevertheless **influence the outcome** (*Audi alteram partem* problem)
2. **May consider evidence** or submissions **not raised at the initial hearing** (*Audi alteram partem* problem).
    a. One should have the right to know case before one and respond to it. How can one know the evidence and submissions raised and respond to them, if the discussion is happening without one's knowledge and presence
3. Raises a concern that people who have not heard the parties (especially those with power/are higher ranking administrative officials) can **compromise the independence of the decision-maker** who is seized with the case (*Nemo judex* problem)

All of the above concerns reflect the fact that the person being adjudicated isn't there so can't confront & have discussion with the person deciding their case (which is the entire point of having a hearing).

Int'l Woodworkers v Consolidated-Bathurst (benefits of consultation; PF safeguards in consultations; No breach of PF)

R: Majority identifies several **benefits of consultation**:
1. Allows a tribunal to **access collective expertise**/experience/insights to evaluate the practical consequences of its decisions
2. Facilitates **understanding of policy developments**
3. Facilitates **coherence, certainty, equality and consistency** in decision making
4. Ensures **stability for litigants** (***Tremblay***)
5. Achieves policy objectives with **less litigation** because it allows for promulgation of standards & tests such that parties know what has to be met, thereby leading to less need for parties to litigate.

R: Consultation is PF when it complies w/ following conditions:
1) Consultation must be **initiated by panel** that sees the manner (i.e., not imposed on the panel)
2) **Discussion restricted to policy** considerations (i.e., no findings of fact, no discussion of evidence; any new policy args raised will lead to reconvening the hearing and telling the parties of these new policy arguments that have arisen and allow the respective parties to respond to them)
3) **No** findings of **fact** & no discussion of **evidence**
4) **No minutes** are taken
5) **No vote** at the conclusion of the consultation

If an issue comes up in the process of institutional consultations that hadn't come up during the hearing, the admin decision maker should go back & invite the parties to provide submissions on that new issue.

F:
- TU & ER have dispute over the duty to bargain in good faith by disclosing information.
  - ER didn't disclose a certain piece of information that would've dramatically changed agenda for CB (e.g., would've included whether backwages should've been paid in full, how long EE benefits should subsist after plant closes, etc.)
  - TU claims ER breached duty to disclose
  - Duty triggered when ER makes a firm decision to close the plant (current test). BUT TU says test should be relaxed to encompass situations when ER contemplates plant closure during CB.
  - Question TU brought to Board: Is the test for duty to disclose information re plant closure during CB sufficient or should it be expanded?
- Tripartite panel (consists of chair, permanent member, & ER representative) adjourns and decides to consult all members of the board to determine whether to change the law.
- Panel holds that the test shouldn't be changed, but decides in favour of the TU. ER challenges decision of judicial review, arguing that PF was violated by the institutional consultation b/c the discussions deciding the decision took place outside of a formal hearing.

I/H: Have the rules of PF been violated by the "institutional consultation" of the panel? → **NO.**

A:
How were the consultations initiated?
- The panel's chairman brought the consultation forward. The panel initiated the consultation – it was not imposed on the panel

What was the purpose of the meeting?
- **Consultation** was used as a **sounding board** to stimulate the deliberative process & gain insight on **policy concerns**, not usurp the adjudicative role of the panel by deciding the issue (i.e., **no vote** took place)

What was discussed at the consultation?
- Findings of fact were **not** discussed/not permitted to discuss.
- Only discussed **policy ramifications** of changing the board's position on the duty to bargain in good faith

and **previous case law**/past experiences of other Board members in CB situations.

What wasn't discussed?

- **Findings of fact**. No comment on what evidence was compelling was given. No comment on which witness was believable. No votes were done. No minutes were kept. At the end of the consultation, it was said that the panel itself will reach its own decision.

Dissent (Sopinka J): strict PF approach

- Leans toward a **bright line rule** (from perspective of parties): there was exclusion of parties from discussion/deliberation, there isn't complete confidence that the deliberations were limited to questions of law & that no majority vote was taken. I.e., leaning towards right to FULL disclosure and defence. Fairly strict procedural approach
  - Goal is to give parties all the info so that they can respond to the case in the fullest possible way.
  - Others should not have input in regard to the matter if they were not present. Should just be the panel that decides.
  - Need to prioritize fairness over institutional consultation.
  - Questions whether evidence was discussed since no minutes were officially kept.
  - Should be able to cross-examine board members who bring up these new policy arguments.
- If consultation is to be permitted, there should be a legislative statute allowing it (absent statute, we should stick to the strict procedural approach that evades PF concerns).

Majority (Gonthier J): consultations permitted so long as fairness concerns can be minimized (interest balancing approach)

- Considered the fact that there was **no minutes**, **no vote**, **no** discussion of **findings of fact**, and **panel initiated the consultation**.
- Consultations may actually enrich this body of law → identifies benefits of consultation (see R)
- Safeguards can ensure PF in consultation procedure. In this case, safeguards were met. Safeguards include:
  - 1) Must be **initiated by the panel** that sees the manner (i.e., **not** imposed on the panel)
  - 2) Discussion **restricted to policy considerations** (i.e., no **findings of fact**, **no** discussion of evidence; any new policy args raised will lead to reconvening the hearing and telling the parties of these new policy arguments that have arisen and allow the respective parties to respond to them)
  - 3) **No findings of fact & no discussion of evidence**
  - 4) **No minutes** are taken
  - 5) **No vote** at the conclusion of the consultation

Tremblay v Quebec (breach of PF)

Many of the same judges from *Consolidated-Bathurst*, but different outcome.

R: Applies rule from Consolidated-Bathurst, relaxed opinion on cross examination of agency staff

F:

- Social security panel in QB.
  - Admin agency's mandate is to determine whether medical expenses may be reimbursed.
- Q is whether bandages are reimbursable medical expenses.
- Panel ultimately decides not to reimburse Tremblay despite initial draft permitting reimbursement.
  - Panel consists of 2 members & drafts unanimous decision that Tremblay should be reimbursed.
  - Draft opinion reviewed by president of the admin agencies (which happens to be a judge). Judge did not agree with panel's finding and called a meeting to discuss panel's interpretation of the enabling legislation.
  - At meeting, votes were taken and one of the panel members switches their vote, resulting in a split decision. In these cases, a third person votes (i.e., the president). President votes to deny the bandage decision.

- Factual differences from ***Consolidated-Bathurst***: here, consultations brought by the president (not the panel members), president casts the deciding vote.
- Another interesting Q emerges in the case about whether to cross examine agency staff

I/H: Did the consultation breach procedural fairness? → **YES.** Did not meet the standard set out in Consolidated-Bathurst. Decision quashed & sent back.

A:
Fails to meet the conditions in ***Consolidated-Bathurst***:
- President (who was also a judge) **imposed the meeting**, **votes were taken**, and a decision that was already made was changed.
- Raises a RAB (along the lines of *Newfoundland* and *Pelletier*).
- Gauthier seems to relax his opinion on cross examination of agency staff (he seems to now think it absurd that staff could be cross examined)
- Balances ⇒ Administrative secrecy & duty of PF (which requires a degree of transparency).

Ellis-Don Ltd v Ontario (no breach of PF, no info/minutes taken)

R: Absent evidence to the contrary, **Courts will assume that the process was PF/met the Consolidated-Bathurst conditions**, and **panels will not order cross-examination of agency staff members** without strong evidence to the contrary (b/c this would undermine the principle of deliberative secrecy). Here, the conditions (i.e., lack of information but concern that there was improper institutional consultations) were insufficient to successfully bring an application to cross-examine.

F:
- Ellis commits ULP (breach of CB) by hiring non-TU tradespersons.
- ER's defence: states TU failed to properly renew a CB by omitting "Ellis" as an ER in their CA documentation. ER argues failure to include them in the schedule of designated ERs, they'd abandoned their CB rights.
  - TU argues this was an error, not a conscious decision & no weight should be placed on the 'filing error'
- Q to ON LRB: Should the test for abandonment of CB right be relaxed?
  - Current test: must write to LRB to abandon CB right.
  - ER proposed test: unconscious error tantamount to abandonment of CB right.
- Draft decision made by LRB in favour of ER.
  - Dissenting members of panel requests consultation.
  - After consultation, 1 panel member flipped, and the decision was in favour of TU.
  - At this point, draft letter leaked to ER's legal counsel. ER applies for judicial review, arguing that this is like Tremblay b/c an institutional consultation changed the outcome.

I/H: Is the consultation in breach of procedural fairness? → **NO**. Matched the Consolidated-Bathurst conditions. Can Ellis cross examine? → **NO**. Total lack of information about consultation ≠ right to go on a fishing expedition.

A:
Consultation didn't breach PF
- No evidence of votes
- No evidence that consultation was imposed on the panel.
- No minutes were kept in this case, & no evidence available that the Consolidated-Bathurst conditions were breached.

Ellis applies to cross examine members to get evidence, but court denies the application
- Since there was a total lack of information on what happened during the consultation, Ellis argues wants to subpoena this evidence from the board members – get members to testify the accounts. Court says no.
- Cannot use this application of judicial review to go on a "fishing expedition" b/c it would be a **profound**

breach of deliberative secrecy

- Court assumes the process was PF UNLESS there is evidence to the contrary.

Affirms Consolidated-Bathurst by saying that constitutions are not, per say, unfair. BUT Ellis prohibits cross-examination of agency staff and makes it difficult to prove that the conditions from Consolidated-Bathurst were breached.

Trio Summary

- Effectively affirms the concerns Sopinka identified in Consolidated-Bathurst. At this point, now, **unless** you evidence that the Consolidated-Bathurst conditions were met, you can't really prove that PF was breached.
- **Trio shows tension b/w PF and principle of deliberative secrecy**.
  - Deliberative secrecy favours consistency by protecting a consultative process, but it causes difficulties for parties to prove inappropriate tampering.
  - This "No" may be supported by creating consistency in ruling and ensuring efficiency and that resources are not wasted.
- Refusal to let Ellis subpoena members to get an accurate account, it shows that there are rules but very little transparency to show that these rules have been complied with.
  - Few evidentiary means to know whether the board complied with Consolidated-Bathurst safeguard rules.
  - **If rule in Ellis is valid, by default Agencies can just not keep minutes and disclose virtually nothing during consultation**.
  - This renders the safeguards essentially useless as there is no way to confirm whether they have been adhered to or not (+ there's nothing to check the consultation process adheres to PF)
  - **Paradox: agency established to ensure fairness between parties may not adhere to the principles of fairness**.
    - This is at odds with ROL which ensures procedural fairness → Courts should not hold a presumption of fairness since parties who are not in the process are not privy to information regarding the process. Only indivs present in the consultation process will be able to give an account and therefore the responsibility should lie on the members to take minutes or be subject to testify
- Opinion re cross-examination relaxes from the first to third → Ellis-don says that we won't allow cross-examination in the absence of strong evidence
- **General principle**: We have a duty to parties impacted by our decisions and we must treat them fairly.
  - **R emanating from general principle**: If issue comes up in the process of institutional consultations that hadn't come up during the hearing, we should go back & invite the parties to come back and provide submissions on that issue.

II. SUBSTANTIVE REVIEW

- Substantive grounds for review differ from procedural grounds.
- Substantive review starts from the assumption that the procedural background complied with law (vs procedural review which starts w/ the Q of whether there was PF). Here, we focus on **whether the reasons for the decision were problematic**, insofar as they weren't supported by **evidence** or **relevant law**.
  - ***Baker***: unreasonable on basis of <u>evidence</u> ⇒ reasons given by immigration officer were contrary to the facts/evidence. E.g., immigration officer's reasons said Baker would not work another day in her life *but* psychiatrist said she could be employable.
  - ***Baker***: unreasonable on basis of <u>law</u> ⇒ concerns about the children/saying that Baker should leave Canada is contrary to the Dept of Immigration's policy stance that families should be kept

together & contrary to International Convention on the Rights of Children that says that BIOTC has primary significance. Here, the reasons given were contrary to the law.

- **Lewan's unreasonableness test**: When decision-makers (1) make factual inferences that they can't provide an evidentiary basis for or (2) provide reasons that can't be reconciled with law, they are acting unreasonably.
    - **Principle**: Unreasonable decisions are those that are arbitrary, can't be legally justified.
- Judicial role of review in matters involving administrative decision makers:
    - Historical case law says that judges shouldn't review on a correctness standard. Reasons for this stance include:
        - Creation of administrative bodies to deal with certain matters is meant to deal with policy problems that emerge from judicial decisions. E.g., labour boards exist b/c judicial decision-making has typically protected ERs & harmed EEs.
        - Over time, the admin bodies developed expertise to deal properly with decisions of these matters. When judges do deal with these issues, they must do so in line with the principle of deference b/c they don't have the same insight & expertise to deal with the scheme.
        - Complication: While judges have a role in ensuring the legality of admin decisions substantively through review of decisions, they also have to comply with the principle of deference that's emerged in the case law when dealing with decisions of admin bodies.

Vavilov Framework

Introduction (458-459)
The Vavilov Framework (493-499)
Canada (Minister of Citizenship and Immigration) v Vavilov (458-493)

What is good about the "rule of law"?

(1) ROL enables people to plan their lives in accordance with the law;
(2) ROL acts as a safeguard against arbitrary political power;
(3) ROL treats people with concern and respect (dignity), which entails a degree of due process and reasons.

Tldr; ROL preserves personal liberty, puts legal constraints on administrative action, enables us to plan our lives as we can get legal advice in advance, guards against arbitrary public power, treats people with dignity.

ROL & Substantive Review

- Substantive Review has similar practical implications to the ROL insofar as it requires a supporting rationale that meets the law. If the reasons aren't consistent with law, decision can be reviewed on substantive grounds

History of Substantive Review

- **Doctrine of Jurisdictional Error**: judges are entitled to quash an administrative decision whenever the judge disagrees with an administrative decision regarding "jurisdictional" issues or questions of law.
    - Problem #1: arbitrariness. Judges never explained what constituted a "jurisdictional" error, so it was unclear what would be a jurisdictional error. The result is that the ambit and intensity of judicial review seemed arbitrary.

- Problem #2: elitist bias. Doctrine assumes that judges have a monopoly on interpreting & determining questions of law. This raises concerns about the democratic legitimacy of judicial review and institutional expertise (since democratic principles value involvement of all people in democracy, not just judges).
- Problem #3: frustration of operation of progressive statutory regimes. Judicial review in Canada was initially interventionist with respect to "new" forms of administrative law, like collective bargaining, worker's compensation, and human rights regimes.
    - E.g., ***Bell***: Black man in TO turned away & treated rudely by a landlord with whom he was trying to rent from. The man gets his white girlfriend to go & try to rent the apartment and the landlord gives the gf the rental. Man goes to human rights tribunal &, before the investigation even starts, landlord brings application for judicial review on the basis that the house wasn't a living quarters under the ON human rights legislation. This was upheld by the SCC :(. Outcome is that CL says that freedom of contract overshadows human rights legislation in ON.

- The problems are reasons why the doctrine of deference starts to develop in the 1970s.

Defining ROL in Admin Decisions from the Laskin Court (1973-1984):

1) ***Nicholson*** *v Haldimand-Norfolk Board of Police Commissioners*: A general duty of PF = implied **unless** expressly excluded by statute.
2) ***CUPE v NB*** *Liquor Corp*: Court moves away from doctrine of jurisdictional error, saying that judges should respect administrative decisions, so long as those decisions are rationally defensible in light of relevant legal standards.
3) ***Crevier*** *v AG (Quebec)*: citizens have a constitutional right to judicial review, but administrative officials are entitled to exercise a broad range of adjudicative power. (aka judges SHARE their interpretive license with admin decisions, and should uphold admin decisions so long as they are fair and reasonably justified)

CUPE v NB Liquor, 1979, SCC (deferential, contextual approach)

Shift from jurisdictional error doctrine toward something more contextual in its orientation (deferential approach); similar to the shift in *Baker* to the 5 factors.

CUPE v NB suggests that judges shouldn't be the be all end all.

R: Judges can only overturn an administrative decision where the decision is "so **patently unreasonable** that its construction **cannot be rationally supported by the relevant legislation** and demands intervention by the court". This is different than saying that judges can overturn an administrative decision whenever they disagree with it.

Reasons:

1. When meaning of a statute is **ambiguous or unclear**, admin officials have a **legitimate role in determining meaning** of the statute.
2. Judges "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."
3. Judges should **consider different reasons** for deferring to administrative interpretations of law:
    i. Legislature has designated the **admin officials** to be the **primary decision-maker**;
    ii. Admin officials have **relevant expertise and experience** interpreting and applying the enabling legislation, expertise which generalist judges do not possess.

Contextual argument for judicial relevance that looks similar to the Baker argument.
Standard of review depends on the circumstances.

Supreme Court shifts focus away from conceptual analysis towards practical consequences and contextual considerations such as institutional expertise. See e.g. *Pezim v British Columbia, Canada v Southam, and Pushpanathan v Canada*.

Contextual factors (the Pragmatic Approach, 1990s)

(1) Privative Clause or Statutory Right of Appeal
  (a) Privative clause = limits judicial review; statutory signal that courts should exercise restraints
  (b) Statutory right of appeal = less limiting to judicial review, courts can have less restraint
(2) Expertise: Does the decision maker have expertise on the issue (that gives them a certain level of legitimacy)?
  (a) E.g., decision-maker is on-the-ground and can take water samples
(3) Purpose of the Act as a Whole, and the Provision in Particular (broader policy aims of this regulatory regime)
  (a) Admin agencies w/ significant resources to address the particular issue = signal to courts to exercise restraint
(4) "Nature of the Problem": A Question of Law or Fact? (distinction between fact and law, and on questions of fact judges should be particularly cautious as they haven't heard the facts firsthand. On questions of law, judges can roll up their sleeves.)
  (a) Questions of fact: suggests judicial restraint (judges aren't hearing the evidence, can't question it, etc.)
  (b) Questions of law: suggests (potentially) less judicial restraint.

This contextual framework became known as the pragmatic approach and reached its height in the late 1990s (when ***Baker*** was decided).

Dunsmuir v New Brunswick (pragmatic, contextual approach)

R: Test for whether to apply the contextual analysis

(1) Ascertain whether an **existing line of precedent has already determined the SOR** with respect to a particular legal question or issue;
(2) **If** existing precedent is **not determinative**, then identify the appropriate SOR by applying the "**SOR analysis**":
  (a) The presence or absence of a **privative clause** (or statutory right of appeal);
  (b) A **purposive understanding of the tribunal** as set out in the enabling legislation;
  (c) The **nature of the question** at issue (question of law, fact, or mixed law and fact); and
  (d) The **expertise** of the tribunal.

R: When to use a correctness review vs when to use a reasonableness review

Correctness	**Reasonableness**
(1) Constitutional questions; (2) "True" questions of *vires*; (3) General Qs of law that are "of central importance to the legal system as a whole and outside the adjudicator's area of expertise"; (basically like constitutional questions); (4) Qs regarding the jurisdictional lines b/w two or more competing specialized tribunals.	(1) Questions of fact; (2) Questions of law arising from interpretation of the enabling legislation; (3) Discretionary decisions (e.g., "decision maker *may*") (4) Public policy matters; (5) Mixed questions of law and fact.

Lingering Questions Post-Dunsmuir:

- Issue with Dunsmuir's categorization of type of review ⇒ difficulty in determining whether a question is really one that falls under correctness or reasonableness.
- To the extent that there is still a presumption, it is that decisions concerning the interpretation or application of an administrator's "home statute" or enabling legislation will be reviewed on a reasonableness standard. (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.* [2016] 2 SCR 293; *Wilson v Atomic Energy of Canada Ltd* [2016] 1 SCR 770.
- In the years after Dunsmuir, courts adopted a presumption of reasonableness regime. Anytime an administrative decision maker was interpreting their statutes, assumed that it was reasonableness, even if it was a constitutional question.

Canada v Vavilov, 2019 SCC 65 (presumption of reasonableness)

R: Presumption: SOR for admin decisions = **reasonableness UNLESS**

1. **legislature states** the **standard of review** in the enabling legislation;
2. there is a **statutory right of appeal** in the legislation; or
3. the **ROL requires correctness** oversight, which occurs in the following situations:
    a. **Constitutional** Q (federalism, s 35 rights, other constitutional matters)
    b. Decision raises **general Qs of law with central importance** to legal system as a whole
    c. **Jurisdictional boundaries** b/w 2 or more agencies
    d. Other circumstances (Court notes that this is not a closed list and SCC may add more in the future).

In absence of reasonableness in judicial review, there are two other possible standards to apply:

- Fact and mixed fact/law Qs ⇒ Palpable & overriding error
- Law Qs ⇒ Correctness

I/H: Should this admin decision be reviewed according to a 'correctness' or 'reasonableness' standard? → **PRESUME REASONABLENESS unless:** legislation states standard of review; statutory right of appeal; ROL requires correctness (i.e., a constitutional Q, general Qs of law w/ central importance; jurisdictional boundaries, other circs).

A:

Reasonableness review:

- a revamped method for conducting reasonableness review;
- a catalogue of errors which render an administrative decision unreasonable.

Comments on **expertise**:

- "…it is the very fact that the legislature has chosen to delegate authority which justifies a default position of reasonableness review."
- "…because these reasons adopt a presumption of reasonableness…**expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis**."
    - **Rejection of expertise is problematic** because it literally results in death – e.g., covid parties.
    - Casual obiter comments about proving you're bona fide to be an expert is novel in legal decisions; **saying that admin decision-makers don't have expertise undermines the role of decision-makers and strengthens the role of judges**.
- Abella (concurring) suggests that the rejection of expertise is a step backward wrt the CL

Exceptions on a correctness standard:

- Qs of law on a correctness standard overturns 30+ years of case law that said even if there's a stat right of appeal, if the decision maker has relative expertise, judges should review on reasonableness standard →

- **Post-Vavilov: no restraint, no deference on qs of law – just use correctness standard.** Higher court just asks whether the lower court determined the law correctly. Thus, higher court doesn't need to pay any attention to what the lower court did. They just ask themselves "what would i do?"

Constitutional Qs (correctness)

- Some Qs require a heavier judicial head, particularly when dealing with const Qs
- Effectively, SCC says that the only way to get clear answers on const Qs is to have judges make decisions on a correctness basis.

General Qs of law w/ central importance to legal system as a whole (correctness)

- SCC leaves this loosely defined in contrast to stat right of appeal & const Qs
- **General questions of law with central importance to the legal system as a whole** (takeaway def'n): If it's a Q of law that could arise in a large number of cases across multiple jurisdictions in CA, then it is the type of Q that's of general importance to the legal system as a whole.

Jurisdictional dispute (correctness)

- Arises where enabling legis gives 2 bodies concurrent jurisdiction
  - E.g., WCB & HRC have concurrent juris under their enabling legis. WCB gives power to determine the amount of compensation permitted BUT person feels that the tariff is discriminatory. In these cases, where does the complainant go? HRC first? WCB first? Both concurrently?
- **Jurisdictional disputes should be decided on a correctness standard because** admin bodies might act in their own **self-interest & attempt to increase their jurisdiction** at the expense of another
- Prof comment: Looks like although we've abolished jurisdictional error but we've just invented a new version w/ juris disputes.

Discussion:

- How rigorous should a court be in their review of an admin decision? ⇒ "buyer's remorse" among SCC members
- Judicial tension b/w constitutional role *vs* lack of expertise
  - (1) Judges feeling that they **lack expertise** & owe deference to admin decision makers b/c they are unfamiliar with the content
  - (2) Judges feeling that they have a **constitutional role** in reviewing regulatory decisions in an admin context
- In ***Vavilov***, we see a break b/w the judicial tension constitutional role in the majority's reasons & lack of expertise in the concurring opinion (Karakatsanis, Abella)
- Determining reasonableness depends on facts, circumstances, relevant law, etc. & the SCC effectively tied themselves in knots attempting to define reasonableness in ***Vavilov*** ⇒ ***Baker*** can provide assistance here (use the 5 factors: nature of decision & its process; nature of stat scheme; importance to indivs impacted; legit expectations; deference to decision-maker).
  - Admin law intended to guard against unreasonable decisions
- ***Vavilov*** attempts to resolve conflicting statements of law in the earlier case law; effectively a rewrite of substantive review.
- ***AB Sovereignty Act*** (proposed by AB gov't): Judicial review of those decisions would be on a standard of patent unreasonableness (i.e., attempted to constrain judicial review to an extent)
  - 9(1) An originating application for judicial review in relation to a decision or act of a person or body under this Act must be filed and served within 30 days after the date of the decision or act.
  - (2) In an application for judicial review to set aside a decision or act of a person or body under this Act, the standard of review to be applied by the court is that of patent unreasonableness.
  - (3) Nothing in this section is to be construed as making a decision or act of the Legislative Assembly subject to judicial review.
- ***Admin Tribunals Act*** (BC): clauses say that standards of review constrained on qs of fact, but will be more searching on qs of law particularly when the q's are outside the area of expertise of the decision maker (tried to codify standard of review in the case law that was present at the time that BC made this statute)
- Will having supreme courts reviewing s 35 on a correctness standard actually result in better outcomes?

Possible exam Q: Consider whether an admin decision can be challenged on substantive grounds.
Step 1: Determine appropriate standard of review using the *Vavilov* framework (does reasonableness apply or are one of the exceptions at play?)
Standard of review is important b/c it can make it more or less difficult to challenge a decision

Palpable or overriding error → difficult to show; basically have to show no evidentiary reasons to support decisions & the law can't defend the decision at all (has to be a very egregious error)
Correctness → easier to show than palp/overriding error.

Note: *Dunsmuir* reserved correctness for true questions of *vires*, but it was still unclear what that category involved, so Vavilov got rid of *vires* altogether. I.e., jurisdictional error no longer a ground for substantive review, BUT they do create a new category, i.e., statutory right of appeal.

Exceptions to the *Vavilov* Presumption

Privative Clauses & Statutory Right of Appeal

Use the standard of review stated in the legislation

Bell *Canada v Canada* (543-559; companion case to ***Vavilov***)
Mahjoub *v Canada* (Citizenship and Immigration) (565-670)

Context pre-Vavilov

- 1980s-until *Vavilov*: **contextual analysis** of SOR. Considers: privative clause/stat right of appeal, decision-maker's expertise, nature of Q (fact? Law? Mixed fact & law?)
- **Privative clause = exercise restraint/deference**
  - E.g., "Board's decision is final and binding on all findings of fact"
  - e.g., Crevier → QB Nat Assembly set up tribunal & stated that its decisions should not be challenged in any court of law).
  - **R: Provisions like this can never be given literal effect by insulating decisions from judicial review (Crevier's R) BUT privative clauses are given *some* effect by applying restraint through reasonableness or patent unreasonableness (CUPE)**
- Statutory right of appeal
  - Even where stat right of appeal, judges should have restraint
  - Can appeal on Qs of juris or law
  - E.g., "Any party to the proceedings before the board under this Act may appeal from this decision or order to the Divisional Court in accordance with the rules of Court."
  - Should judges exercise restraint when reviewing administrative decisions that concern administrative expertise?
    - Pezim, Southam, Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd–reasonableness standard
    - Vavilov v Canada—appellate standards of review applicable to civil appeals (Housen v Nikolaisen)
    - Question of law=correctness
    - Questions of fact, mixed fact and law=palpable and overriding error

Pezim v BC Securities Commission, 1994 (insider trading, Commission has relative expertise)

- Issue: Duty to disclose relevant info to the public?
- B/G: companies do mining in BC to look for valuable minerals. Many of the companies who do this are pretty tiny with only a few geologist drilling core samples in mountains in the hopes of finding valuable minerals.
- F: field report returns from geologists w/ valuable minerals. Board of Directors keeps this on the DL, sells a bunch of shares to themselves, and then releases a report so that their share value skyrockets (i.e., insider trading). Commission revokes trading rights, citing duty to disclose due to material change in corp assets. Pezim argues that their assets are identical → they still merely have a small office in Vancouver and a few geologists. Commission argues that Pezim now knows that their mineral leases aren't mere empty leases, they know have actual material interests that they didn't have before. Pezim appeals.
- S: BC Securities Commission legislation attempts to guard against a material change in corp assets. Purpose → prevent abuse of investing public.
- PH: BCSC Court says that a material change needs to be something actually physical, material.
- A: this is an example relative expertise. Commission has expertise in conceptualizing specific terms like a 'material change in assets' to protect from investor abuses.
- **R: use deference when the admin body has some type of expertise**.

Bell Canada v Canada, 2019 SCC 66 (privative clause, stat appeal)

Prof's commentary: the legislation used by the CRTC seems to give them broad powers in regulation, but the SCC held that the CRTC incorrectly interpreted the legislation (but the dissent says that the CRTC acted within their powers → dissent doesn't use the expertise undermining that took place in Vavilov).

R: Questions of law = standard of correctness when there is a right of statutory appeal without the SOR determined *BUT* when SOR is listed, use the listed standard (contrast to dissenting judgment's call for reasonableness due to expertise). Here, stat right of appeal + identified correctness standard = majority applies correctness
*[**Correctness enhances counsel's chance of success** b/c reasonableness of past decision is inconsequential, just make arguments about proper interpretation/what's best for the CL]*

Dissent: Appropriate SOR = reasonableness
Specialized expertise necessary: complex regulatory schemes should be interpreted and applied by experts & courts should exercise discretion (agree with the FC). "Extensive statutory powers have been granted to this regulatory body, and an exceptionally specialized mandate requires the CRTC to consider and balance complex public interest considerations in regulating an entire industry. The need for an expert body to balance sensitive public interest issues in a highly technical context is particularly evident in this case, with the record containing a series of public notices, consultations and policies spanning almost three years." CRTC's reasons set out a "rational and persuasive line of reasoning which clearly outlines the consequences, operational implications and challenges that motivated its decision."

F:
- Context: Super Bowl is about football, half time show, and the elaborate commercials.
- In CA, Super Bowl commercials were substituted by local CA broadcasters/CA ads.
- CRTC (i.e., CA Radio-Television & Telecommunications Commission) has a comment box of sorts w/ several recommendations to remove protections for CA broadcasters & advertisers in the context of the Super Bowl
- CRTC exercices its power, pursuant to Broadcasting Act, to revoke the simultaneous substitution during the Super Bowl.

- Bell and NFL challenge this decision (they want ad revenue and argue CRTC is interpreting s 9 much narrowly – they cannot make more targeted content)

I/H: What was the appropriate standard of review? → Correctness

Statute: ***Broadcasting Act*, SC 1991, c 11**
9 (1) Subject to this Part, the Commission may, in furtherance of its objects,
(h) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.

31(1) [**privative clause**] Except as provided in this Part, every decision and order of the Commission is **final and conclusive**. *[dissent indicates that this clause suggests reasonableness, majority basically says privative clauses are of no use anymore; only statutory rights of appeal & express mentions of the SOR on appeal are relevant]*
(2) [appeal clause] an **appeal lies** from a decision or order of the Commission to the **Federal Court of Appeal on a question of law or a question of jurisdiction** if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.

A:
Majority: Correctness standard; CRTC incorrectly interpreted s 9 of the *Broadcasting Act*
- "Properly interpreted, s. 9(1)(h) **only authorizes** the **issuance of mandatory carriage orders** — orders that require television service providers to carry specific channels as part of their cable or satellite offerings — **that include specified terms and conditions**. It does not empower the CRTC to **impose terms and conditions on the distribution of programming services generally**. Accordingly, because the Final Order does not actually mandate that television service providers distribute a channel that broadcasts the Super Bowl, but instead simply imposes a condition on those that already do, its issuance was not authorized by s. 9(1)(h) of the *Broadcasting Act*."
- CRTC was trying to use their power on a piecemeal basis & s9 does not permit delving into the details of specific programs, **only the regulation of programming on a general–or macro–level**.
- SCC says that the way CRTC has tried to exercise their jurisdiction is contrary to the proper (or their) interpretation of s9 ⇒ application of correctness standard
- Questions of law: correctness. I.e., Court doesn't have to exercise restraint or deference to the other bodies. Instead, they interpret the questions for themselves in the abstract.
  - Not required to poke holes in reasoning or determine whether it was reasonable in light of the law & facts.
  - Just get to have a theoretical discussion re interpretation.

Dissent: Reasonableness
- "We are of the view that the applicable standard of review is reasonableness and that the CRTC's decision was reasonable. As we point out in our concurring reasons in *Vavilov*, the majority's framework disregards the significance of specialized expertise and results in broad application of the standard of correctness. It does so based solely on the premise that appeal clauses reflect the legislature's intention that all questions of law be reviewed by a court on the basis of correctness. Since there is an appeal clause in the Broadcasting Act, the majority says the Court is entitled to substitute its opinion for that of the CRTC. This case demonstrates the fundamental flaws of such an approach."
- Dissent says that reasonableness is the correct standard and, under reasonableness standard, CRTC's decision was valid ⇒ Responded to public concerns having regard to its powers under s 9.

Mahjoub v Canada (Citizenship and Immigration), 2017 FCA (exercise of discretion = POE)

POE distinguishable from reasonableness b/c POE is a much higher standard; pre-Vavilov, easier to challenge Qs of mixed law & fact b/c they used the reasonableness standard (which was lower.

R: Mahjoub shows the difficulty of success with Qs of law & fact due to the palpable & overriding error standard.

Housen: question of mixed fact & law = palpable & overriding error required (much more deferential than standard of reasonableness). Not enough to show errors in reasoning by decision-maker, must show the **cumulative effect** of the decisions is **so overriding** that the decision can no longer stand ("the entire tree must fall").

R: Test to satisfy the palpable & overriding error threshold:

1. "**Palpable**" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
2. "**Overriding**" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.

Both palpable & overriding bars must be satisfied. Even if an error is palpable, the judgment doesn't necessarily fail → error must also be overriding.

Absence of reasons ≠ sufficient to show POE.

Housen v Nikolaisen appellate standards:

- Qs of law = Correctness
- Qs of legal principle = Correctness
- Qs of mixed fact and law where there are extricable Qs of law or legal principle = correctness
  - Qs relating to **scope of a discretionary power** (incl what considerations are relevant to its exercise) = question of law = **correctness**
- Everything else = POE
  - **Qs of mixed fact & law (INCL EXERCISE OF DISCRETIONARY) = POE** (unless the legal principle/law is extricable from the Q of mixed fact & law)

R: Under the *Housen* framework, Qs of mixed fact and law, INCLUDING exercises of direction, can only be set aside by POE

F:

- Mahjoub detained under a security certificate stating Minister of Public Safety & Emergency Preparedness and Minister of Cizienship and Immigration thought he was inadmissible to CA on security grounds.
- IRPA certificates required to get confirmed by the Federal Court (i.e., statute calls for a review of decision, but doesn't specify the standard).

Proc Hist:

- Federal Court does a reasonableness analysis → upheld security certificate as reasonable.
- Security certificates ⇒ factual analysis (b/c the certificates are highly discretionary). As such, palpable & overriding error standard applies.

I/H: What standard of review applies? → **palpable & overriding error** (POE)

Statute: **IRPA** requires security certificates be confirmed by the FC.

A:

- Bell: searching, correctness oversight of CRTC decision that impacts large $ value of advert revenue for a publicly traded company in CA.
- Mahjoub: like in Singh, Charkoui, he's identified in security certificates & much of the info behind that issuance is not disclosed, no public scrutiny, no ability to challenge the information/evidence

- Concern: if you're subject to security certificate, you can be indefinitely detained. Mahjoub has a well-founded fear in persecution, torture, jail, death.
- In cases like this, standard of review is even more deferential than reasonableness. POE is effectively an insurmountable standard in cases like this ⇒ here, we may be better off with pre-Vavilov review that's pliable enough to correct admin decisions that aren't well-reasoned but still allows us to see deference to expertise.

Judicial review standards in Vavilov has made questions about security certificates nearly impossible to undo.

AB Sovereignty Act (proposed by AB gov't): Judicial review of those decisions would be on a standard of patent unreasonableness (i.e., attempted to constrain judicial review to an extent
- 9(1) An originating application for judicial review in relation to a decision or act of a person or body under this Act must be filed and served within 30 days after the date of the decision or act.
- (2) In an application for judicial review to set aside a decision or act of a person or body under this Act, the standard of review to be applied by the court is that of patent unreasonableness.
- (3) Nothing in this section is to be construed as making a decision or act of the Legislative Assembly subject to judicial review.

Interesting note on the ***AB Sovereignty Act*** ⇒ Patent unreasonableness was eliminated in Dunsmuir ⇒ strange that this legislation refers to it.

Review from last class:
1. Start with presumption of reasonableness review (Vavilov)
    a. BUT rebut the presumption using the 3 exceptions: legislature determines standard of review, stat right of appeal, rule of law requires **correctness** oversight (i.e., constitutional matters, Q of law w/ central importance to legal system as a whole, juris boundaries b/w 2+ agencies, other circs)
        i. Legislature states standard – applicable standard of rev: the standard stated in the legis.
        ii. Stat right of appeal – applicable standard of rev = appellate standards:
            1. Law: correctness
            2. Fact, mixed law & fact: palpable & overriding error
        iii. ROL requires correctness – applicable standard of rev: correctness

Statutory Right of Appeal (Appellate Standards)

Application of appellate standards → Standard of review is correctness for Qs of law, POE for Qs of fact or mixed law & fact.

Dr Q v BC CPS (pre-Vavilov, professional discipline case)
Al-Ghamdi v College of Physicians and Surgeons of Alberta (570-575)
Mayer v Superintendent of Motor Vehicles (575-583)

Context

Southam Distinction:
- **Qs of law**: require decision makers to think about the law in general, at a more abstract level.
- **Qs of fact**: require decision makers to determine what actually took place. When it comes to Qs of fact where judges weigh the evidence, judges should be particularly **deferential**.
- **Qs of mixed law & fact**: require decision makers to apply legal test to facts to reach an outcome.

- **Issue w/ distinction b/w Qs of fact vs Qs of fact & law**: purpose of the discussion is lost (we lose sight of the outcome & the impact on the individuals in favour of legalistic arguments).

Dr Q v BC CPS (pre-*Vavilov*; overturned)

Overruled by *Al-Ghamdi*. In essence, the SCC said that when the question is based on facts, we should exercise a high level of deference to the decision maker who weighed the original evidence. It's not the job of the reviewing court to reassess, weigh the evidence, and quash the decision on correctness grounds.

F:
- Dr. Q alleged to have been involved in sexual misconduct with a patient.
  - Have 2 accounts of diametrically opposed stories.
  - Problem of proof here ⇒ Dr. Q says never happened (testimony was unclear and contradictory at times). BUT patient was clear, detailed, and consistent in her story (even when you looked at reservation handbooks from the restaurants, she had dates & times correct)

Proc Hist:
- BC College finds Q guilty b/c
  - 1) patient was forthright whereas Dr. Q was evasive on questioning,
  - 2) patient's stories about their dates could be corroborated,
  - 3) there was documentary evidence stating Dr. Q went on date with patient,
  - 4) Dr. Q's stories changed. College states the evidence standard is clear and cogent and was not based on standard of balance of probabilities.
- Dr Q appeals as of right under *BC Medical Professionals Act*.
- BCSC finds that College erred in law, stating standard of proof should be PBARD – Koenigsberg reassess the facts. Decision quashed.

I/H: Was a correctness review appropriate by the BCSC? → **NO**. BCSC erred in reviewing the College's facts, weighing the evidence herself, & therefore quashing the decision. She should not have done a correctness review. She only should have intervened if the College's decision was **unreasonable**.

A:
- "As Koenigsberg J. noted, the reviewing judge's task is not to substitute his or her views of the evidence for those of the tribunal, but to review the decision with the appropriate degree of curial deference. However, having said this, Koenigsberg J. engaged in a wide-ranging review of the evidence and in effect substituted her views on the credibility of the witnesses for those of the Committee."
  - SCC states Koenigsberg reassessing the facts was inappropriate. SCC considers the purpose of the College. States the College has expertise on what the fiduciary duty is between Doctor and patient, what constitutes professional misconduct, and implications of a violation of this duty. States the question is a finding of fact. College should be owed deference.
  - *ie this case turns on questions of fact (contingent on listening to the parties firsthand etc) so SCC said we should adopt a highly deferential standard of review
  - Koenigsberg J could have asked: were the evidentiary standards met; did the College articulate sufficient findings of fact which could rationally support their conclusion. Was it reasonable to come to that conclusion based on the findings of fact.
- "This approach appears to have been connected to two assumptions which were **wrong**:
  - (1) "... since the standard of proof was the intermediate standard of clear and cogent evidence, the reviewing judge was required to review the evidence and make her own evaluation of whether it reached this standard."
  - (2) "... because the Act expressly confers a right of appeal, the review was not to be treated like the usual review of the decision of an administrative tribunal, which requires the reviewing judge to first determine the appropriate standard of review and then apply that standard to the decision."
  - "As a result of their application, the reviewing judge applied the wrong standard of review and interfered unduly in the Committee's findings of credibility and fact."

- SCC says judges shouldn't weigh the evidence to come to their own decision, but just ask if it's reasonable → i.e., was the decision supported by the evidence?
  - Here, complainants testimony was consistent & there were significant inconsistencies in Dr Q's testimony. Therefore, College was entitled to make the decision to find Dr. Q guilty.

If this case was decided under the *Vavilov* framework, the SOR would've been POE.

Al-Ghamdi v College of Physicians and Surgeons of Alberta, 2020 ABCA 71 (professional disciplinary appeals; stat right of appeal ⇒ appellate standards ⇒ POE)

R: In **professional disciplinary appeals**, **interpretation of** the governing **statute** is reviewed for **correctness**.

R: In **professional disciplinary appeals**, questions of **mixed fact and law** calling for deference by a reviewing court will often include:

1. The **standard of practice** the profession expects **in any particular case**
2. **Whether**, on the facts, the **professional** subjected to discipline has **met that standard of practice** the profession expects in that particular case.

R: Restates Vavilov's SORs on a statutory appeal (i.e., restates appellate standards) (Al-Ghamdi at para 9):
The standards of review on a statutory appeal from an administrative tribunal are the same as those on other appeals: Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para. 49. Those standards of review can be summarized as follows:

(a) conclusions on issues of law are reviewed for correctness: Housen v Nikolaisen, 2002 SCC 33 at para. 8, [2002] 2 SCR 235. That includes questions of statutory interpretation, including interpretation of the tribunal's "home statute".
(b) findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error: Housen at paras. 10, 23; H.L. v Canada (Attorney General), 2005 SCC 25 at para. 74, [2005] 1 SCR 401.
(c) **findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity"**: Housen at paras. 28, 36. **A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole**, but a correctness standard can be applied when the error arises from the statement of the legal test: Housen at paras. 33, 36.
(d) issues of fairness and natural justice are reviewed, having regard to the context, to see whether the appropriate level of "due process" or "fairness" required by the statute or the common law has been granted: Vavilov at para. 77.
(e) the test on review for bias is whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking things through, would have a reasonable apprehension of bias.

F:

- Al-Ghamdi was subject to several complaints from various colleagues, nurses, etc.
- Misconduct in question ⇒ identified over a dozen categories of conduct, incl: failure to cooperate with colleagues to make sure medical procedures were done according to need, cultivating fear & distrust through making various complaints to AB HRC, threatening legal action, not following dispute resolution processes, having nurses open sterilised surgical instruments not required to make them unavailable to others.

Proc Hist:

- Tribunal finds that Al-Ghamdi's conduct= **unprofessional** under *Health Professionals Act,* s 1(1)(p)

Statute: ***Health Professions Act***
s 1(1) In this Act, …

(pp) "**unprofessional conduct**" means on more more of the following, whether or not it is disgraceful or dishonourable:

(i) displaying a lack of knowledge of or lack of skill or judgment in the provision of professional advice;
(ii) **contravention** of this **Act**, a code of **ethics** or **standards of practice**;
(iii) contravention of another enactment that applies to the profession;…
(xii) conduct that harms the integrity of the regulated profession.

s 90 statutory right of appeal to ABCA

I/H: What is the appropriate SOR? → bifurcation of appropriate SOR.

1. Question of statutory interpretation = Q of law = **correctness**.
2. Question of whether the specific conduct falls under the def'n = Q of fact/law = **POE**

A: Court upholds tribunal's decision. College was correct, there is no palpable & overriding error.

- Al-Ghamdi argues that reasonableness doesn't apply because there's an exception here (statutory), therefore, he suggests that this is a question of law and so correctness is the appropriate standard. He argues it's a question of law because it's a question about statutory interpretation – i.e., a determination about how "unprofessional conduct" means in the Health Professionals Act & therefore should be reviewed on a correctness standard.
  - Strategic value here is that correctness is an easier standard to meet & so Al-Ghamdi has a bigger likelihood of success.
- College concedes that reasonableness doesn't apply due to the exception, but suggests that the question is a mixed question of law and fact & therefore subject to the standard of palpable & overriding error.
- Court breaks the question into two issues, and has two standards:
  - (1) Question of law at play ⇒ statutory interpretation of "unprofessional conduct"
  - (2) Question of mixed at play ⇒ apply that stat interpretation to the facts to find if Dr did unprofessional conduct
  - Prof notes that we're, again, "losing the thread" → devolving into legalistic arguments that aren't really looking at the reasonableness of the decision.

Mayer v Superintendent of Motor Vehicles, 2020 BCSC 474 (exercise of discretion = POE)

R: Courts hearing appeals from admin tribunals may continue to apply an appellate approach to reasons

R: Exercises of discretion are Qs of mixed fact & law ⇒ SOR = POE (same finding as in ***Mahjoub***)

F:

- Superintendent issued notice prohibiting D from driving for 4 months when she received & didn't dispute a ticket for using an electronic device which was contrary to *MVA*.

I/H: What standard of review is appropriate when applying discretionary legislation? → holding

Statute: **Motor Vehicle Act**

s 93(2) In forming an opinion as to whether a person's driving record is unsatisfactory the superintendent **may** consider all or any part of the person's driving record, including but not limited to any part of the driving record previously taken into account by a court or by the superintendent in making any order prohibiting the person from driving a motor vehicle.

93(3) If under this section the superintendent prohibits a person from driving a motor vehicle on the grounds of an unsatisfactory driving record, a prohibition so made must not be held invalid on the grounds that the superintendent did not examine or consider other information or evidence.

94 statutory right of appeal
94(3) a reviewing court may dismiss the appeal or order the Superintendent to terminate the prohibition imposed
[*Mayer* argues this indicates a correctness SOR should be used b/c legislature intended to have the Court intervene by substituting its own view; Court disagrees – it supports 93(2) b/c the court can uphold decision or find it to be so unsupportable that it must be terminated is consistent with deferential standard)

A:

- Like in Al-Ghamdi, BCSC separates the standard of review into multiple Qs:
  - Q of Fact: substance of Mayer's driving record
  - Q of Fact/Law: whether appellant's driving record is unsatisfactory → involves application of a legal standard to a set of facts
  - Q of Fact/Law: whether Superintendent considers it to be in the public interest to impose prohibition → involves application of legal standard to facts.

We're complicating the SOR question when there are statutory right of appeal questions at play ⇒ when statutory right of appeal arises, the appellate SORs arise.

Question of law ⇒ correctness, easier bar to meet, greater likelihood of success
Questions of fact, mixed law/fact ⇒ palpable & overriding error, harder to meet, lower likelihood of success.

Practical impact ⇒ Litigation strategy emerges whereby lawyers will try to frame the issues either as a single Q of law, or two Qs (one of law, one of mixed law/fact).

Issue: we're no longer looking at whether interpretations of enabling legislation is reasonable in the sense used in Baker, instead we're looking at protracted questions about what the SOR is which leads to things being complicated.

Upshot? ⇒ think carefully through the Vavilov framework. If there's a stat right of appeal, know immediately that presumption of reasonableness does not apply. Here, there will be a further issue about the appropriate SOR (the "appellate" SORs → is there a Q of law? Q of fact? Q of mixed law/fact?). At this stage, the analysis needs to be crystal clear so that we get the SOR that will benefit our CL the most.

Review from last class:

- Vavilov attempts to simplify SOR by creating a general presumption of reasonableness in Qs of admin law subject to 3 exceptions:
  1. when the legislature determines the standard of review;
     a. E.g., ***AB Sovereignty Act***: calls for a standard of patent unreasonableness (i.e., must be very bad before courts do anything)
  2. when there is a statutory right of appeal; or
  3. the rule of law requires correctness oversight:
     a. the decision concerns federalism, the scope of s 35 Aboriginal and treaty rights, or "other constitutional matters";
     b. the decision raises general questions of law of central importance to the legal system as a whole;
     c. jurisdictional boundaries between two or more agencies; or
     d. other circumstances.
     e. Last class, we found that distinguishing b/w Qs of fact & law is difficult. The best we can do is make arguments & use our best judgment to define how the decision should be characterized
     f. Qs of law ⇒ correctness ⇒ significantly improves chances of being able to argue for review.
     g. Qs of fact or mixed fact/law ⇒ palp & overriding error ⇒ decreases chances of being able to argue for review (b/c then we need to prove both palp and overriding error)
- Cases from last class:
  - Where professional decisions require weighing evidence → **more deference** (***Dr Q***)

- Def'n of what is 'unethical professional conduct' → **more deference** (***Dr Q***)
- Driver's licence revocation = fact laden inquiry requiring **substantial deference** by court to admin decision maker (***Mayer***)

Juris to Decide Constitutional Qs

Introduction (761-766)
Alberta Administrative Procedures and Jurisdiction Act, ss 10–12
Designation of Constitutional Decision Makers Regulation (TWEN)
R v Conway (771-776)

- Constitutional issues are **important legal Qs ∴** require clear answers ⇒ arguments re deference less compelling here than in ***Dr Q*** or ***Mayer***.
- Concern w/ lack of deference for constitutional Qs (i.e., concern emerging from Vavilov's exception to the reasonableness standard) ⇒ judges tend to be less progressive than admin tribunals who are on the ground. SO there's a good case to say that judges should only intervene where the results are unreasonable; shouldn't assume that judges should be the final arbiter on questions of rights. Notwithstanding the outcome of ***Vriend***, judges are some of the last people to really get on board with progressive recognition of human rights.

Three Key Issues in Jurisdiction to Decide Constitutional Qs

1. Do administrative decision-makers have the legal authority to determine whether their enabling legislation is unconstitutional? (***Cooper***, ***Martin*** & ***Laseur*** gives us the framework, s 11 of the ***APJA*** and regulations)
    - If decision maker has juris, they could refuse to enforce/apply a provision of their enabling legislation. While they can't strike the legis down, they could still refuse to apply if they think it's unconstitutional.
    - Cooper, Martin, & Lasseur deal with the issue
    - AJPA s 11 also deals with this, talking about the role of admin decision makers in the constitution
2. Do administrative decision-makers have the authority to grant constitutional remedies? (***Conway***)
    - If admin decision makers have juris to decide const issues about whether enabling legis is constitutional, can they provide a const remedy? ⇒ Const says that ppl subject to unconstitutional laws can apply to a "court of competent jurisdiction" for a remedy. SO are admin tribunals courts of competent juris?
    - One school of thought: tribunals = courts of competent juris, SO const remedies should be easy to access, efficient, & broad application
    - Other school: only actual courts are courts of competent juris, SO const remedies should be reserved for courts & not tribunals.
3. What is the appropriate SOR for administrative decisions concerning constitutional issues? (***Dunsmuir***, ***Doré***)
    - **Doré** = when reviewing an admin decision that balances Charter rights with legislative objectives in professional discipline legislation, when the Charter right is necessary to maintain public confidence in the administration of justice, courts should <u>not</u> use the Oakes analysis, but should review the admin decision for reasonableness. Here, that reasonableness standard looks like proportionality in the Oakes test, but also requires some respect for admin

decision makers b/c those decision makers have special insight into the purposes of the enabling legis & how the policy objectives must be pursued (i.e., these admin decision makers have expertise that judges should respect)

Supremacy Clause, CA 1982, s 52(1)

***CA 1982*, s 52(1)**: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

- ➢ This provision says nothing about the courts, but does talk about laws, SO supremacy clause applies very directly to admin decision makers.
  - "Any law… inconsistent with the constitution… [has] no force or effect" ⇒ clearly tells people not to enforce unconstitutional laws, notwithstanding what type of decision-maker they are.

Remedies Clause, CA 1982, s 24(1)

***Charter*, s 24(1)**: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

- ➢ If Charter remedies are hard to obtain, legal issues get bifurcated → person may have to go to an admin tribunal to argue their case and then (or concurrently) go to a court and try to get a remedy.
- ➢ Ppl looking for Charter remedies are often subject to human rights infringements (and are often ppl who are already marginalized & therefore have difficulty in obtaining legal assistance generally)

Cooper v Canada (Human Rights Commission), 1996 (prelude to Martin/Lasseur re juris to hear constitutional Qs)

R: (majority) enabling legislation must explicitly give admin body the power of review otherwise no juris. (dissenting) s 52 supremacy clause applies to anyone exercising legal authority, so admin decision-making bodies have jurisdiction unless legislation explicitly states no juris
(LaForest) juris depends on whether the tribunal has expertise, training, etc.; juris on a case-by-case basis **this middle ground gets approved in Martin/Lasseur

F:

- Mandatory retirement policy in Air Canada & claim under *Charter* for discrimination on the basis of age.
  - Recall ***McKinney***: mandatory retirement policy does not infringe Charter b/c it was a *private* university policy & therefore not subject to the *Charter*.
  - Here, *CA Human Rights Act* allows for mandatory retirement policies according to industry standard SO for the human rights claim to succeed, they first have to get over the first issue of that provision.
    - Have to show that *Charter* s 15 is infringed by *Human Rights Act* & then invalidate *Human Rights Act* using the supremacy clause under s 52(1)
  - Tribunal says that it doesn't have the jurisdiction to find the provision re mandatory retirement age is unconstitutional

I/H: Does the Human Rights Tribunal have the jurisdiction to decide issues about the constitutional validity of its enabling legislation? → **NO**.

A:
Lamer, CJ (majority) – the *don't let admin tribunals touch this w/o explicit direction otherwise* argument

- **Canada is a Parliamentary democracy** in which the legislative branch is supreme and primarily accountable to the electorate for its decisions;

    - Direct accountability through democratic process necessary for ROL
- While legislation is also subject to judicial review under the *Charter*, that practice is inherently controversial because it **gives unelected officials the power to strike down democratic decisions**;
    - This is a special exception to sovereignty. Patriation of CA 1982 that allows courts to determine constitutional validity of legislation is something the court does NOT take lightly b/c they are, in effect, scrutinizing decisions made through a democratic process.
- Therefore, the **power of reviewing legislation for *Charter* compliance should be reserved exclusively for the judiciary**. Do **not** assume admin officials have this authority **UNLESS legislation explicitly states** otherwise.

McLachlin, J (dissenting) – the *all admin tribunals have duty to deal w/ this unless explicit direction otherwise* arg
- **s 52 is not limited to courts**; it applies to any body that has decision-making authority.
    - The majority approach disregards the constitutional significance of s. 52 of the Charter, makes it more difficult for the HRC to fulfill its function, and places additional burdens on victims of discrimination;
- Every administrative tribunal which has the **duty to decide questions of law has the concomitant power to review enabling legislation for *Charter* compliance** unless the legislature expressly withholds that power;
    - As part of their delegated authority, every decision maker (including tribunals) have a duty to make decisions like this **UNLESS** the legislature **explicitly excludes** this duty.
    - **Prof**: allowing the legislature to take away this type of authority sets up a framework in which its easier to circumvent Charter rights → wouldn't it be inconsistent to allow the legislature to allow decision-makers to *not* use the Charter.
- ***Charter* should be made more accessible**: "The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All law and law-makers that touch the people must conform to it."

LaForest, J ("running up the middle of Lamer & McLachlin") – the *admin tribunals can make these decisions w/ either an express or implicit permission* argument (**modified later by Martin/Lasseur**)
- **Administrative agencies do NOT have any "freestanding" jurisdiction to engage in Charter review** of enabling legislation by virtue of s. 52;
- Admin agencies **only have authority to engage in *Charter* review** of enabling legislation if the legislature has given them **express or implied power to determine questions of law**;
    - **LaForest's test/considerations for determining if there's an implied authority to engage in Charter review**:
        - (a) the **composition and structure** of the tribunal;
        - (b) the **procedure** before the tribunal;
        - (c) the **appeal route**, if any, from tribunal decisions; and
        - (d) the **expertise** of the tribunal.
- While there may be some practical advantages for giving administrative agencies the power to engage in Charter review, the primary consideration remains whether the legislature intended to give this power to administrative officials.

Martin & Lasseur, 2003 SCC 52 (ruling on the constitutionality of enabling legis)

- What was the Charter problem with the enabling legislation and regulations in this case?
- What practical advantages are associated with empowering administrative tribunals to engage in Charter analysis? What dangers or disadvantages might be associated with this practice?
- Do you think the Charter enables the legislature to rebut the presumption that administrative officials have jurisdiction to interpret the Charter?
- What is the current analytical framework for determining whether an administrative tribunal has jurisdiction to decline to apply its enabling legislation on Charter grounds?

R: Where given authority to decide questions of law, part of that legal authority extends to the **jurisdiction to**

make constitutional findings respecting their enabling legislation **UNLESS** legislature **explicitly withholds/rebuts that jurisdiction**. (NOTE: *AJPA* explicitly withholds jurisdiction for const Qs unless regulations say otherwise).

F:

- Chronic pain: impacts of injury long surpass the actual injury
- Workers Comp gives ability to claim benefits under the Workers Compensation Act (WCA).
- Nova Scotia passed amendment to WC Regulations that acts as a carve out to ppl suffering from chronic pain → instead of having benefits calculated in the typical way pursuant to the WCA, there's a brightline rule in the Regulations that excludes chronic pain: if one is suffering from chronic pain, they get a four week restorative program beyond which no further claims are available.
- Charter, s 15 claim raised: Discrimination on the basis of disability.
    - Requests lost wages on the basis of the legislation instead of the 4 week program instead of the new Regulations that instead mandate the 4 week program.

I/H: Does the WCB tribunal have jurisdiction to make constitutional findings respecting their enabling legislation? → **YES**. If admin body can decide legal issues, this includes juris to make const findings wrt enabling legislation UNLESS legislature explicitly withholds that juris.

A:

Gonthier J:

- Can consider this Q b/c WCB has the jurisdiction to decide Qs of law, generally & that's not rebutted by any other provision explicitly withholding the power to make that decision.
- Advantages:
    - Charter issue is raised in the regulatory context where the complaint is embedded → allows for recognition of how the legislation functions in the context of the complaint
    - More timely for people suffering from chronic pain → making their lives more difficult is just a barrier to A2J.

TEST: Cooper, Martin/Lasseur Framework

1. Does the admin tribunal have **explicit or implicit jurisdiction** to decide **questions of law** in relation to the impugned provision?
    a. Explicit jurisdiction includes provisions which give the tribunal the power to determine questions of law;
    b. Implicit jurisdiction may arise when considering the purpose, function, and capacity of the administrative tribunal
2. If the tribunal has jurisdiction to decide questions of law it will be **presumed to include jurisdiction to determine the constitutional validity** of the impugned provision.
3. The party alleging lack of jurisdiction may **rebut the presumption** by
    a. **Asserting explicit withdrawal of authority** to consider the Charter; or
    b. Asserting that a **holistic interpretation of the enabling legislation "clearly leads to the conclusion that the legislature intended to exclude the *Charter*** …from the scope of the questions of law to be addressed by the tribunal."

APJA, s 11 & APJA Regulations

***APJA*, s 11** Notwithstanding any other enactment, a 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.

- Explicitly precludes admin decision makers to decide const Qs
- S 11 uses the Martin Lasseur framework to withhold const issues.

- **Concern:** is this not in conflict with CA 1867 s 52 supremacy clause?

***APJA* Regulations**: Which boards can determine questions of constitutional law in AB?

- Boards that can consider all Qs of constitutional law:
  - Alberta Labour Relations Board
  - Alberta Energy and Utilities Board
  - Law Society
  - labour arbitrators
  - Alberta Securities Commission
  - Alberta Utilities Commission
  - Energy Resources Conservation Board
- **Division of powers issues**: Boards that cannot consider Qs of const law: Alberta Human Rights Tribunal (AB HRT) & WCB
  - AB HRT & WCB cannot decide Qs
  - Pre-***Vriend***, AB HRT was pushing for *Charter* compliance; Premier Ralph Klein just fired everyone on the AB HRT lol.

Admin Jurisdiction to Grant Charter Remedies

- When it comes to s 24 analysis about whether admin decision makers are 'courts of competent jurisdiction', they typically align with Martin-Lasseur (i.e., jurisdiction to decide UNLESS excluded by legis) AND we get a bit of a 'fence sitting exercise'
- *Mills v The Queen*: a "court of competent jurisdiction" within the meaning of s 24 must have jurisdiction over the person, the subject matter, and the remedy sought.
- *Slaight Communications v Davidson*: any exercise of statutory discretion is subject to the *Charter* and *Charter* values.
- *Nova Scotia v* ***Martin and Laseur***: **expert administrative tribunals which have authority to decide questions of law are in the best position to hear and decide questions regarding the constitutionality of their statutory mandates**.

Admin tribunals can't strike down/declare legislation of no force/effect under s 52, but **can refuse to apply provisions they think are unconstitutional** b/c they are still considered courts of competent jurisdiction, so they can provide s 24 remedies

R v Conway, 2010 SCC 22 (Martin framework applies to *Charter* remedies)

- How did *Conway* change the law concerning whether administrative agencies have the power to grant remedies under s. 24(1) of the Charter? ⇒ extended Martin/Laseur law re *Charter* validity to *Charter* remedies
- What is the relevant test for determining whether an administrative agency has the power to grant constitutional remedies? Does s. 24(1) jurisdiction give any additional remedial powers to administrative officials? → power to decide Qs of law = power to decide constitutionality of enabling legislation & subsequently grant s 24 remedies UNLESS the power has been explicitly withheld by the legislation.
- Why did the SCC conclude that the Ontario Review Board did not have the authority to grant an absolute discharge in this case? → enabling legislation (i.e., CC) prohibits absolute discharge if the person is a risk to public safety.

R: If decision maker has been given implicit or explicit authority to assess Qs of law, they have authority to determine *Charter* issues with enabling legis UNLESS legislation explicitly withholds the authority. The **same**

framework applies to *Charter* remedies under s 24(1), i.e., if the decision maker has authority to assess questions of law, they have the authority to grant *Charter* remedies UNLESS legislation explicitly withholds that authority.

F:

- Conway is NCR, currently held in a mental health facility.
- Conway makes *Charter* argument in his annual review.
  - Argues that continued detention goes against his Charter rights (s 12: cruel & unusual punishment) and asks Mental Health Review Board for a s 24 remedy → requests **absolute discharge as a remedy**.
  - Claims not getting the access to healthcare needed for reintegration into society, and his room his adjacent to construction site – the noise exacerbates his mental condition.
- Admin board says they don't have juris to grant s 24 remedies & can't give absolute discharge as a remedy.

I/H:

1. Does the Mental Health Review Board have the power to grant a s 24(1) remedy? → **YES**, generally.
2. Does the MHRB have the power to grant **absolute discharge** as a s 24(1) remedy notwithstanding the CC? → **NO**. CC explicitly excludes absolute discharge if the NCR person is a risk to public safety.

A:

- Abella says that the Board *does* have the jurisdiction to grant a s 24(1) remedy, BUT cannot give absolute discharge in a remedy in this case because the CC says that you can only give an absolute discharge if the NCR person is not a risk to public safety. Here, Conway was determined to still be a risk to public safety, so the Board could not grant absolute discharge as a s 24(1) remedy.

Charter rights = important & should be broadly accessible, so we shouldn't lean on s 96 judges to exercise them exclusively.
If you think the enabling legislation isn't Charter compliant, say so. If someone thinks you're wrong, they can just apply for appeal. If you avoid the question altogether, though, this raises significant A2J concerns.

Admin Law & Constitutional Rights (Reasonableness Modified)

Guiding Question: **What is the appropriate SOR when assessing admin decisions that strike a balance b/w Charter rights & public policy objectives?** Main schools of thought:

1. **Lamer** in ***Martin*** camp → Justices should not defer. Instead, use a strict form of certainty by using strict Oakes test.
2. **McLachlin** in ***Martin*** camp→ apply flexible Oakes test: everyone exercising legal authority in CA should consider Charter rights when interpreting and applying their legis & if they strike a balance b/w Charter rights & public policy objectives, courts should treat those pronouncements w/ a degree of deference & respect. I.e., don't apply strict Oakes analysis, but ask – in a general way – whether the decision is reasonable in proportion.

Note: while the Courts seem to have taken the McLachlin camp in Doré, it seems like this is changing. Doré's days are likely numbered.

Doré *v Barreau du Québec* (780–793)
Trinity *Western University v Law Society of British Columbia* (794–803)

Context

Review Post-*Dunsmuir* (2009)

Correctness review required in following issues..	**Reasonableness** SOR in following issues…
1. Constitutional questions; 2. "True" questions of vires; 3. General Qs of law which are "of central importance to the legal system as a whole and outside the adjudicator's area of expertise"; and 4. Qs re the jurisdictional lines b/w two or more competing specialized tribunals. Note: many of these issues repackaged & added to the *Vavilov* exceptions.	1. Questions of fact; 2. Questions of law arising from interpretation of the enabling legislation; 3. Questions involving the exercise of administrative discretion; 4. Public policy; 5. Mixed questions of law and fact. This is a more *deferential* or *restrained* SOR.
In Doré, we have issues that deal with both constitutional and public policy questions → so we're left in a place where we aren't really sure if reasonableness or correctness is more appropriate	

Correctness review post-*Dunsmuir*:

Constitutional Questions	• ***Doré*** v Barreau du Québec, 2012 SCC 12 • ***Loyola*** High School v Quebec [2015] 1 SCR 613
"True" questions of jurisdiction	• Alberta (Information and Privacy Commissioner) v ***AB Teachers***' Association, [2011] 3 SCR 654; • ***Halifax*** (Regional Municipality) ***v NS*** (Human Rights Commission), 2012 SCC 10
General questions of law	• ***Nor-Man*** Regional Health Authority Inc. v Manitoba Association of Health Care Professionals, [2011] 3 SCR 616.
Concurrent authority	• British Columbia (Workers' Compensation Board) v ***Figliola*** [2011] 3 SCR 422.

Recall: s 1 & Oakes analysis

s 1: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Oakes Test:

**at each stage of the test, context matters*

1) Does the limit have a "**pressing and substantial" objective**? (See Big M Drug Mart, [1985] 1 S.C.R. 295)
    a) This seems to speak to the public interest objective/public policy objective
    b) E.g., What is the pressing and substantial objective the law society has to the public interest?
2) Are the limits **reasonable and demonstrably justifiable**? (**proportionality**)
    a) Are the limits **rationally connected** to the achievement of the state's objective? (See Benner v. Canada, [1997] 1 S.C.R. 358)
        i) E.g., to what extent is disciplining lawyers rationally connected to the public interest objective?

b) Do the limits "**minimally impair**" the claimant's Charter rights? (From "as little as possible" to "as little as reasonably possible" to "margin of appreciation")
   i) E.g., what are the options that Law Societies should consider when disciplining lawyers? Disbar? Suspend? Reprimand?
c) Do the **positive benefits of the limits outweigh the negative impact** on the claimant's Charter rights? (See Dagenais: "even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects…")

Example of importance of context: judge wouldn't rule on reasonableness of lifting COVID restrictions b/c there wasn't enough evidence about impacts of COVID, impacts on children, etc. Without that, judge refused to consider. **This highlights that context is very important b/c we have to balance the pressing & substantial objective**

The *Charter* & the CL

- ***Dolphin Delivery***, = *Charter* does not apply to private law.
  - SCC says things like "Charter doesn't apply to everything the Court does, but only when state actors rely on the CL as licence to do something"
  - RWDSU v Dolphin Delivery [1986] 2 SCR 573—Charter applies to legislative, executive, and administrative branches of government. To the extent that governmental action is justified by the common law, the constitutionality of the common law can be scrutinized.
- ***Hill*** = in private law situations, person challenging CL can do so on the basis that the CL is inconsistent w/ *Charter* values. Here, *Charter* values should be weighed against the principles which underlie the CL, with *Charter* values providing guidelines for any modification to the CL that the Court feels is necessary.
  - Soon after, in *Hill*, SCC rolls the rule from *Dolphin* back →traditional Oakes framework not appropriate in CL situations (onus issue: who will forward s 1 justifications on part of the CL?). Here, **balancing must be more flexible than traditional Oakes analysis**.
  - Hill v Church of Scientology [1995] 2 SCR 1130, para [97], per Cory J: "The party challenging the common law cannot allege that the common law violates a Charter right because, quite simply Charter rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with Charter values.
  - "When the common law is in conflict with Charter values, how should the competing principles be balanced? In my view, a traditional s 1 framework for justification is not appropriate. …[T]he **balancing must be more flexible than the traditional s 1 analysis** undertaken in cases involving governmental action cases. **Charter values**, framed in general terms, **should be weighed against the principles which underlie the common law**: The **Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary**."

Doré v Barreau du Québec, 2012 SCC 12 (Abella's test for discretionary decision balancing *Charter* w/ public policy)

R: On judicial review of Qs where a **discretionary** decision strikes a balance b/w *Charter* rights & public policy, the question is "**whether, in assessing the impact of the relevant charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play**"? ⇒ Abella replaces the typical reasonableness test for discretionary decisions with an

Oakes/reasonableness combo

Reasonableness test for Discretionary Decision Balancing Charter & Public Policy: (flexible Oakes test_

1. Does the decision **outline an attempt to balance *Charter* values with statutory objectives**?
   - ➢ Did the decision state statutory objectives, explain them, & provide reasons outlining those objectives?
   - ➢ Did they explain how their decision would forward the statutory objectives?
   - ➢ Did the decision state that there was a Charter right? What are the underlying Charter values?
2. Does the decision ask **how the *Charter* value** at issue can be **best protected in view of the statutory objectives**? I.e., did they engage in a proportionality exercise, balancing the severity of the interference of the *Charter* protection with the statutory objectives?
   - ➢ Are there alternative options? Balance of the 2. (i.e., baby Oakes application)
   - ➢ Did they acknowledge & consciously engage with the Charter right being limited?
   - ➢ Did the decision maker disproportionately and therefore unreasonably limit a Charter right?
   - ➢ Here, look for **whether there is an appropriate balance between *Charter* rights and policy objectives/purposes such that the rights in issue are not unreasonably limited**.
     - **If the decision disproportionately impairs the *Charter* guarantee, it is unreasonable.**
     - **If the decision reflects a proper balance of the statutory mandate with *Charter* protection, it is reasonable.**

F:

- Doré appears before superior court on a bail application & judge effectively calls him an idiot repeatedly. Bail application denied.
- Doré writes a personal letter to the presiding judge & sends a copy to the chief justice, requesting never to be put in front of that judge again on the basis of a RAB (judge won't listen to his legal arguments, keeps interrupting, isn't acting like a judge).
- Doré disciplined by law society for making "public" statements that bring the admin of justice into disrepute ("public" insofar as it was a private letter to a judge but then got around).

Proc Hist: Law society formally disciplines Doré for his "immoderate comments".

- At Disciplinary Council, Doré claims that the *Code of Ethics* breaches s 2(b) & the Council rejects saying that this is a limitation that is "entirely reasonable, even necessary, in the CA legal system, where lawyers & judges must work together in the interest of justice."

Doré raises *Charter* challenge on the basis of breach of freedom of expression. Here, Doré claims the Association's **interpretation** of the Code breaches his *Charter* rights (contrast to last class where we are concerned about constitutionality of a provision itself, not interpretation of a provision).

I/H: Should the Court review the Society's interpretation of the *Code* using a strict *Oakes* analysis?→ **NO.** Use the more **flexible Oakes analysis**.

Code of Ethics: conduct of an advocate must bear the stamp of objectivity, moderation (not explicit about restricting speech, absent explicit language it's not possible to make an argument that the Code breaches s 2(b))

A:

Abella calls for a more **flexible** *Oakes* analysis.

- Context: Abella was the first SCC judge pregnant & having a baby. Youngest appointed SCC judge.
- Disciplinary Council has a better understanding of stat objectives, better understanding of the facts = context is more accurate that what a reviewing judge may be able to reproduce.
  - There is an increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation.
- Abella **proposes a high degree of deference**, **even on *Charter* issues**.
  - These types of decisions that involve Charter values should be given some degree of deference. The standard of review should be reasonableness.
- By adopting a correctness review standard in every case that implicates the *Charter* values this will essentially lead to courts "retrying" a range of administrative decisions that would otherwise be subjected to

a reasonableness standard
- "administrative decisions are always required to consider fundamental values." [para. 35]
- "When Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference…." [para 36]
- "An administrative decision-maker exercising a discretionary power under his or her home statute has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing Charter values."
- "We are… balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise." (at para 66)
    - "in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not." (at para 69)
    - "It was also "conscious" of the fact that art. 2.03 may constitute a restriction on a lawyer's expressive rights (para. 79). But where, as here, the judge was called [translation] "loathsome," arrogant and "fundamentally unjust" and was accused by Mr. Doré of "hid[ing] behind [his] status like a coward"; [etc.], the Council concluded that the [translation] "generally accepted norms of moderation and dignity" were "overstepped."" (para 70).
    - "In light of the excessive degree of vituperation in the letter's context and tone, this conclusion cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives" (para 71).

Abella's Test to determine whether an admin decision dealing with *Charter* values is reasonable (see R above):
1. The decision should outline an attempt to balance Charter values with statutory objectives. [para 55].
2. The decision-maker should ask how the Charter value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives." [para. 56]

Abella doesn't turn her mind to the reasonableness of the penalty
- Claims that the penalty wasn't challenged, only the ability of the tribunal to make the decision.
- Prof claims that minimal impairment (i.e., step 2) should be part of the inquiry, or should've been considered by the court

- While the Barreau did talk about the statutory objectives (i.e., fulfilled step 1), the penalty seems like it likely wasn't minimally impairing. Suspension for 3 weeks is pretty significant for a truly private letter.

Trinity Western University (TWU) v Law Society of BC, 2018 SCC 33 (reinforces flexible Doré approach)

R: Reinforces Doré approach:
"The [Doré framework]... is not a weak or watered-down version of proportionality––rather, it is a robust one."
"For a decision to be proportionate, it is not enough to [simply balance]. Rather, the **reviewing court must be satisfied that the decision proportionately balances these factors**, that is, that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate…. Put another way, the ***Charter* protections must be 'affected as little as reasonably possible' in light of the statutory objectives**" (para 80, citations omitted)
"When a decision engages the *Charter,* **reasonableness and proportionality become synonymous**" (para 80).

Doré Step 1: Were rights engaged in the context of a statute?
Doré Step 2: Did the decision proportionately balance statutory goals w/ Charter rights?

- I.e., Did it give effect to the *Charter* rights as fully as possible given the particular statutory mandate? ⇒ *Charter* protection must be affected as little as reasonably possible in light of the stat objectives.
    - Were there reasonable possibilities that would give effect to protections more fully in light of the objectives? (not necessary for decision maker to choose the least limiting option, just whether the decision falls within a range of reasonable outcomes)
    - How substantial was the limitation on the *Charter* right compared to the benefits of furtherance of stat objectives in the particular context?

F:

- Christian Uni in BC wants to open a law school. In so doing, it pursues regulatory approval from Law Societies across CA.
- Law Societies must decide whether they'll recognize the education from Trinity Western in their province.
- Trinity Western required signing of a covenant including a code of conduct informed by Christian ethics, which explicitly included a requirement for no sexual relations outside of a heterosexual marriage.
- Some law societies viewed the covenant as discriminatory toward LGTBQ students and other students whose family status didn't fit the mold.
    - E.g., Law Society of ON refused recognition of Trinity Western on the basis that their public mandate includes forwarding the public good, which includes making sure that admissions policies at law schools are not discrminatory.
    - BC has a benchers meeting & decides to **approve** Trinity Western. Huge & immediate blowback. BC decides to hold a referendum wherein each Law Society member gets a vote.
- Trinity Western brings a Charter challenge.

Proc Hist:
Does the legislation enable the Law Society to consider TWU's mandatory covenant? → arguable.

- Yes: public interest in admin of justice is about (a) preserving & protecting rights and freedoms to have sexual relationships with whoever ppl want.
- No: public interest is about protecting the freedoms for administration of justice, not concerned with who gets let into law schools.

2(a) claim: does refusing accreditation interfere with religious freedom?

- Ps claimed that going to law school with ppl of the same faith is the most preferred option & they don't see a distinction b/w being a lawyer & being a Christian. Want to go to a law school where law is taught & learned by ppl practicing the same faith.
- BCCA holds that there is a 2(a) breach b/c there's a practice-belief nexus with religion that's being interfered with in a way that is **substantial**.
    - Note that some argue that there isn't actually a breach here b/c the law society's decision has no interference with personal beliefs, just with where to go to school.

SOR issue ⇒ Difference b/w ONCA & BCCA: can the referendum in BC satisfy the Doré SOR?

- BC's referendum: Quashed the LSBC decision as unreasonable
    - Referendum: having a vote gives us a majority result. But can this satisfy the proportionality analysis?
        - BUT we can also look at the debates and discussions that preceded the referendum, recognizing all the args for & against in the proportionality reference.
    - Court says that the infringement was substantial (SCC disagrees)
- ON's Parliamentary-style debate: ONCA
    - Minutes of debates helped demonstrate the proportionality arguments at play.

I/H: Can the BC Law Society refuse accreditation to TWU on the basis of its anti-LGBT covenant? → **YES**. So long as it complies with the Reasonableness/Proportionality Analysis in Doré.
What's the appropriate SOR when law societies balance public policy objectives against *Charter* rights (i.e., public good & freedom of religion)? → Reasonableness i.e., proportionality analysis.

Statute: **Legal Profession Act, SBC 1998, c 9, s 3:**

3 It is the object & duty of the society to **uphold & protect the public interest in the administration of justice** by
- (a) preserving and protecting the **rights and freedoms of all persons**,
- (b) ensuring the **independence**, **integrity**, **honour** and **competence** of lawyers,
- (c) **establishing standards** and programs **for the education**, **professional responsibility** and **competence** of lawyers and of applicants for call and admission,
- (d) **regulating** the practice of law, and
- (e) **supporting and assisting** lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

A:

- Majority: Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to approve TWU's proposed law school represents a proportionate balance… the decision made by the LSBC 'gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate'.... Therefore, the decision amounted to a proportionate balancing and was reasonable."
- Doré Step 1: Were rights engaged in the context of a statute? ⇒ YES
  - Interpreting public interest in a way that precludes approval of TWU's law school, LSBC interfered with TWU's ability to maintain an approved law school as a religious community defined by its religious practices.
  - Effet = religious rights engaged (limitation on right of TWU's community members to enhance spiritual development by studying law in an environment defined by their religious beliefs).
- Doré Step 2: Did the decision proportionately balance statutory goals w/ Charter rights?
  - I.e., Did it give effect to the *Charter* rights as fully as possible given the particular statutory mandate? ⇒ *Charter* protection must be affected as little as reasonably possible in light of the stat objectives.
    - Were there reasonable possibilities that would give effect to protections more fully in light of the objectives? (not necessary for decision maker to choose the least limiting option, just whether the decision falls within a range of reasonable outcomes)
      - "Given the LSCB's interpretation of its statutory mandate, approving TWU's proposed law school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to *Charter* protections more fully in light of the statutory objectives."
      - Stat objectives included equality, fairness, access to legal educ, etc.
    - How substantial was the limitation on the *Charter* right compared to the benefits of furtherance of stat objectives in the particular context?
      - LSBC reasonably balanced the severity of the interference against benefits to stat objectives
      - Did not limit religious freedom to a significant extent: did not deny approval in the abstract, but denied a **specific** proposal with a mandatory covenant (asked them if they'd remove the covenant and TWU said no).
      - Interference limited to prevent prospective students from studying law at TWU with a mandatory covenant.
      - Decision not to approve significantly advanced LSB's stat objectives ⇒ promotion of public interest in admin of justice by preserving & protecting rights and freedoms of all persons and ensuring the competence of the legal profession.

If reasonableness review requires a contextual assessment of the LSBC's decision, how should the Law Society balance religious freedom against discriminatory impact?

For next class, does a referendum satisfy the proportionality requirement? Can a parliamentary-style debate satisfy the requirement?

Review from last class:
SOR for admin decisions engaging Charter has longstanding drama

- Judicial disagreements on defining "reasonable justification" for limiting Charter rights & what the Charter might mean
- **Doré**: *flexible* Oakes framework/flexible reasonableness analysis → judges can strike reasonable & prop balance b/w **public policy objectives** & **Charter** rights even if they don't go through the Oakes analysis explicitly
    - Test/required: see the decision maker explicitly understands the public policy objectives in their enabling legislation & addresses the problem of *Charter* rights. THEN look at how the right can be best protected given the statutory mandate.
    - Reasonableness analysis looks similar to proportionality analysis, but we don't necessarily look for the citation of Oakes & the four steps set out in Oakes.
- Will **Doré** have a short shelf-life post Vav?
    - Vavilov says: More flexible approach to substantive review doesn't apply in some circs (e.g.,, const Qs)
    - Vavilov also says it's not modifying Doré atm, but some scholars have argued that the logic used in Vavilov is not compatible with Doré.
- **TWU**: reinforces Doré's more flexible approach to reviewing admin decisions that impact/limit Charter rights.
    - TWU: judiciary has broad consensus that Law Society limited freedom of expression BUT this was minimally impairing.

Conducting a Reasonableness Review

STEP 1: What SOR Applies? (describe *why* reasonableness is the applicable SOR)
STEP 2: Conduct a reasonableness review

- Guiding Question: How do we determine whether an admin decision was reasonable in a particular case?

Today is effectively a "how to conduct a reasonableness analysis" guide

Canada (Minster of Citizenship and Immigration) v ***Vavilov*** (583-621)

Prof Discussion

- When reading Vavilov excerpt, ask yourself:
    - Why was the specific decision held to be unreasonable?
    - Why was it held to be unjustifiable under the law?
    - Being able to explain the unreasonableness is a very important skill to have
- Reasonableness analysis (like the SOR) analysis can lead down a bunch of 'rabbit holes'
    - Be mindful to **discuss the facts at hand**, and not the irrelevant hypotheticals
    - **Ground reasonableness analysis in the facts** of the particular case
    - Does the chain of reasoning acknowledge the relevant facts in the case?
    - What's the relevant law?
- ***Baker* example**: admin official used the facts/evidence with bias → disregarded evidence from the doctor who said that Baker would be okay.
    - Legislation: the legislation in question said that keeping families together was important.
    - Policy: restated the legislation's importance placed on keeping families together

    - International commitments: also stated importance of keeping fams together.
    - "Admin decision went in a different direction for no good reason"
- **Unreasonable**: the facts & the law, when put together, don't make sense.

Recall: *Vavilov* SOR Review

R: presume administrative decision should use "reasonableness" SOR **UNLESS**

- when the **legislature determines** the standard of review; (use the SOR stated in leg)
- when there is a **statutory right of appeal**; or (determine whether its a Q of fact/mixed OR Q of law)
- the rule of law requires **correctness** oversight:
    - the decision concerns **federalism**, the scope of **s 35** Aboriginal and treaty rights, or "**other constitutional matters**";
    - the decision raises **general questions of law of central importance** to the legal system as a whole;
    - **jurisdictional** boundaries between **two or more agencies**; or
    - other circumstances.

Recall: Correctness Review

Dunsmuir: "When applying the correctness standard, a reviewing court **will not show deference to the decision maker's reasoning process**; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct."
→ Correctness review effectively means de novo determination on the facts & law (i.e., court will make findings of fact & determine any legal issues)
→ Does the court agree with the decision, all things considered?

Court to **directly consider how it would've assessed the case** based on these facts. This analysis **does NOT require the court to develop a detailed understanding of the administrative decision maker's conclusion and rationale**.

Instead, the court just asks the facts and relevant law, and will decide the case as if they were the primary decision maker. The court will make its own findings of fact (e.g., *Dr Q*: the initial court judge took this approach). If the court reaches a different outcome than the admin decision maker, they conclude that the court makes the correct conclusion.

Correctness review on findings of fact: the **reviewing court is entitled to engage in de novo fact finding** on the basis of the record.

Correctness review on questions of law: the reviewing court is **entitled to disregard the administrative decision and proceed directly to determine the meaning of the relevant law** (e.g., the enabling legislation, common law doctrine, Charter jurisprudence, etc.). The court is not constrained by the admin decision and may just proceed to consider what is the meaning of the relevant law. The court is to weigh and assess the relevant legal considerations for itself.

Basically a do-over by the court.

Reasonableness Review

General def'n & test:
Dunsmuir: "Reasonableness is a deferential standard animated by the principle that underlies the

development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, **reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process**. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."
→ Once we have basic intelligibility (i.e., one can just understand the decision), THEN we look at the justification.
→ **Justification**: look at the **facts**, **CL principles/doctrine**, **legislation**, sources of **soft law** (guidelines, policies, decision maker handbooks), **int'l law**

Applicable scope of reasonableness:
Reasonableness review of findings of fact: the court is only entitled to intervene where the conclusion **cannot be supported by the evidence**. I.e., we need to see that there is **no evidence** or the evidence is **contrary to the findings of fact** relied upon in the decision.
→ e.g., ***Baker***: nothing in the evidence suggested Baker would be a burden on the CA healthcare system for the rest of her life (finding was completely unsupported)

Reasonableness review on questions of law: the court is only entitled to intervene where the conclusion is **unjustifiable** in light of the **enabling legislation**, **regulations**, **CL doctrine**, Charter **jurisprudence**, departmental **guidelines**, **int'l law**, etc.
→ show that no one has ever interpreted it in that way *or* that the interpretation doesn't make sense by juxtaposing it to the law, guidelines, soft law, CL principles, etc.

Practical considerations/principles to determine whether an admin decision is reasonable:

- ☐ "In judicial review, reasonableness is concerned mostly with the **existence of justification, transparency and intelligibility** within the decision-making process" (***Dunsmuir***)
- ☐ The decision must demonstrate that the **decision-maker was** "**alert**, **alive** and **sensitive**" to the **relevant law** (statutes, CL, regulations, guidelines, treaties, etc.). **Examine the reasons** and ask **whether they articulate an adequate justification under the circumstances**, in the sense they indicate appropriate regard for relevant law and do not ignore or discount important legal considerations (***Baker***)
- ☐ The decision does not have to include all the arguments, statutory provisions, jurisprudence or other details that a reviewing judge would have preferred. It **just has to provide a reasonable justification for the outcome**. TLDR: doesn't have to be perfect, there's some fluidity as long as there is a reasonable justification for outcome. (***NL Nurses***)
- ☐ Because reasonableness "takes it colour from the context", consider **whether the onus of reasonableness review becomes more demanding when the practical consequences of the decision become more significant for the individual** (***Khosa***) *(this kind of looks similar to how PF is contextual or how DTC requires more onerous consultation when there's more impact, seems like maybe reasonableness could be a bit contextual too – result is that we may look for a stronger evidentiary basis* or *more consideration)*

Canada v Vavilov, 2019

Reasonableness Standard: Principles & Checklist

P 1: Vavilov **strengthens** link b/w PF and substantive reasonableness

P 2: Reasonableness review concerns both the decision-making process and the outcome
- Consider both the **reasons** and the **outcome** in tandem.

P 3: Reasonableness review is a **single standard**, which is informed by the relevant context
- Reaffirmation of the idea that reasonableness is **informed by circs** in every case.
- **On exam: carefully consider how to incorporate relevant facts into the reasonableness legal analysis.**

P 4: A reasonable decision is based on a **coherent chain of reasoning and is justified in light of the relevant facts and the law.** Reasons given should be **coherent**, or have **internal consistency.** Considerations include:
- **Governing stat scheme** (admin bodies have role of elaborating the content of schemes w/o disregarding or rewriting the laws enacted by legislatures & must properly justify interpretation).
- **Other statutory law or CL** (must be consistent w/ CL principles *but* must adapt CL to admin context; precedents constrain decisionmakers; international law)
- **Principles of statutory interpretation** (formalistic operation not req'd *but* have to match substance of the role of stat interp–text, context, & purpose of provision; not considering an element of the statute alone ≠ sufficient for review *but* failure to consider element resulting in different result = unreasonable).
- **Evidence before the decision maker**
- **Submissions of the parties** (actually *listen* to the parties → must meaningfully grapple with key issues/arguments raised by the parties)
- **Past practices & past decisions** (not bound by internal precedent in the same way as courts, but where tribunal *does* depart, must explain the departure in its reasons or its decision will be unreasonable).
- **Impact of decision on the indiv** (severe impact on rights & interests = reasons must reflect the stakes i.e., principle of responsive justification)

P 5: burden of proof lies on the **party challenging the decision**

FACTORS that challenge reasonableness/point to LACK of reasonableness: (not closed, but can help us see how reasonableness may not be met; below list based off of Vavilov, but not all are demonstrate in Vavilov)

- ☐ Decisions which **conflict with the purposes/principles** of the enabling **legislation**, **CL** doctrine, **statutory guidelines**, **regulations**, **int'l law**;
- ☐ Decisions which are **not justified by the evidence**; *(carefully watch out for prejudice related to race/gender/sex/etc. for these ones & explain why the reasoning is problematic from an evidentiary perspective)*
- ☐ Decisions which do **not respond to the parties' central submissions**; *(e.g., claimant says "I'm concerned about X" but the decision does not mention X)*
- ☐ Decisions which inexplicably **depart from past practice**; *(recall legitimate expectations, although here it's for substantive review)*
- ☐ Decisions which are **disproportionate** or **fail to adequately justify the outcome** in light of the **impact on the individual**; *(recall **Doré**: need to see a conscious attempt to address the issue in a proportionate manner → i.e., demonstrate a rational connection b/w the decision & the limits imposed on rights, and then choosing the minimally comparing option AND finally use an analysis that shows that the social policy analysis outweighs the cost to the indiv's rights)*
- ☐ Decisions without **reasons** that **cannot be justified** in light of information contained on the **record**;

- ☐ Decisions motivated by **prejudice**, **ad hominem** reasoning, **hasty generalizations**, **appeals to force**, **tradition**, or **popular opinion**;
- ☐ Decisions that **conflate correlation with causation**;
- ☐ Decisions based on **visceral reaction or emotional appeal**, instead of a rational assessment of facts and law; *(e.g., decision maker is horrified or offended but doesn't look to reasons)*
- ☐ "**Box-ticking**" or pro forma decisions; *(e.g., boilerplate decision from the decision maker)*

Bottom line: decisions that violate basic standards of evidentiary proof and/or legal argument are unreasonable.

Application of Reasonableness Standard

F:

- Vavilov born in Toronto & therefore legally entitled to CA citizenship.
- Vavilov's parents arrested in US & deported to Russia b/c it turns out they're spies.
- Vavilov goes to Russia & gets his citizenship certificate in Russia.
- BUT then the Registrar advises the certificate he obtained was a mistake & he's actually not a CA citizen.
- He appeals to the registrar, who responds citing the act:
  - This decision was based on the Registrar's view of the Citizenship Act which stated that while the general rule is that all people born in Canada were citizens, there was an exception for children of a diplomatic or consular officer or other representative or **employee in Canada of a foreign government**. The Registrar said this applied in V's case as his parents, as spies, were employees in Canada of another foreign government
  - Parents were not lawfully in CA & both were EEs of the Russian gov't, so Vavilov doesn't get citizenship.

I/H: What is the relevant SOR for admin tribunals? → **REASONABLENESS**.
Was the decision to revoke Vavilov's citizenship reasonable? → **NO**.

Statute: ***Citizenship Act***
3(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**;

A:
Reasonableness applies

- No exceptions in play → no legislative statement of SOR, no stat right of appeal, no requirement for correctness (no competing agencies, no const Qs, no Qs of central importance.

Majority & concurring find that registrar's decision was unreasonable:

- **Governing stat scheme; Principles of statutory interpretation**: "the wording of s. 3(2)(c) provides clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) — including those who are "employee[s] in Canada of a foreign government" — must have been granted diplomatic privileges and immunities in some form"
  - Vavilov born in CA & therefore CA citizen. BUT exception under the *Citizenship Act* for children of EEs in CA of a foreign gov't.
    - Textual approach vs purposive approach
      - On a brute textual analysis, it is possible to find that Vavilov isn't a citizen.
      - **Purposive analysis**: looks at the objectives & purposes
        - Why was the provision included in the statute? What objectives was Parliament trying to achieve?
    - Purposive approach reveals that the exception for children of EEs are because diplomats & consular officers have very special privileges & immunities.
      - "s. 3(2)(a) **was intended to apply only to those individuals whose parents have been**

granted diplomatic privileges and immunities" (at para 183).

- **Other statutory law or CL; Past practices & past decisions**:
  - CA's int'l law obligations consistent with narrow reading of "EEs of a foreign gov't" (*jus soli*: citizenship from being born on CA soil; *jus sanguinis*: citizenship from parent)
  - jurisprudence on s 3(2)(a) has never dealt with a non-diplomatic children; demonstrates reasons required to explain *why* Registrar applied this def'n to Vavilov.
- **Impact of decision on the indiv**: impact on Vavilov was very severe
  - **Impact on Vavilov** to have citizenship revoked: Vavilov would be stateless and would be unable to get the Russian gov't to give him citizenship.
  - "the Registrar's decision in this case had the same effect as a revocation of citizenship — a process which has been described by scholars as "a kind of 'political death'" — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada" (at para 193)

III. REMEDIES

Rules 3.15-3.24 Alberta Rules of Court (TWEN)
*Air Canada v **Toronto Port** Authority* (815-825)

Alternative Remedial Options

REMEDIAL OPTIONS: Assuming that there are cogent procedural or substantive grounds for challenging an administrative decision, **how should those defects be remedied?** *[Prof underscores that we do not need to go to Court – it's expensive and is often remitted to the original decision maker & not redecided on the spot… is there a cheaper, more efficient way to get the CL what they want?]*

- Request a **reconsideration** of the case
  - Procedural grounds: contact the decision-maker & point out the issues, ask if they can fix them.
  - Substantive: contact decision-maker & ask for complete reconsideration in light of the issues.
- **Lobby** for **legislative amendment** or **executive intervention**
  - AKA political activism.
- Refer the matter to the **ombudsman**
  - Most provinces have an office of the ombudsman whose mandate is to investigate complaints re gov't operation
  - Benefit: costs of the investigation & recommendation are borne by the gov't
- **Statutory right of appeal** to appellate tribunal or court
  - Does the legislation include a statutory right of appeal? If so, to which court?
  - If there's no stat right of appeal or a privative clause, then you need to apply under the Rules of Court
- **Application** for **judicial review**
  - If no stat right of appeal *or* there's a private clause in the legislation, you need to apply under the relevant court for appeal & at the right time
    - E.g., *AB Rules of Court*
    - E.g., *Federal Courts Act*
  - App should be clear about grounds for challenging the decision

Issues to keep in mind when advising your client:

- Some methods of challenging an administrative decision are more **expensive** than others;
- Consider **which appellate tribunal or court has jurisdiction** over the case and what the legal grounds of your appeal/application for judicial review are;
- Even if you succeed, an award of court **costs is rare**;
- the **usual remedy** for most defects **is to quash the decision and remit it back** to the original decision-maker for another determination;
- **if** your client appears before an administrative tribunal frequently, you might also have to **weigh other political factors** regarding the continuing relationship with that agency.
    - How might my representations before the body impact my relationship with the agency into the future?

Historical Overview

Superior court judges have access to ancient **CL remedies** which used to be known as "**prerogative relief**" or "**prerogative writs**":

1. ***Certiorari***: remedy used to quash, nullify, or set aside an administrative decision (originally meant bringing up the record to London so it could be reviewed)
2. ***Prohibition***: remedy used to order a tribunal not to proceed with a matter (a type of injunctive-style relief wherein tribunal must not proceed/stop their decision-making process)
3. ***Mandamus***: remedy used to compel an administrative official to perform a public duty (popular earlier in the 20th century, but rarely used; courts don't like granting it; it's a **mandatory court order** that requires an admin body to do something → courts don't like this b/c there's a **separation of powers concern**). Only two times when *mandamus* is really available today:
    a. Time pressures: may be appropriate if remitting back to original decision-maker would result in an unjust delay
    b. All other routes for remedy have been satisfied (and unavailable)
4. ***Habeas corpus***: a remedy used to compel an administrative official to justify a person's detention or imprisonment.
    a. Common in prison & immigration law.
    b. Assesses legal basis for one's detention.

Problems with CL Remedies:

1. **Problem #1**: CL relating to prerogative relief was both **highly technical and discretionary**, leading to private law remedies being used to supplement the public law, prerogative remedies leading to **mass inefficiencies**
    a. Up until the early 20th C, these were the only CL remedies available in admin law. BUT it was incredibly technical, which led to several issues (e.g., litigant must come to court with clean hands & something as small as using unprofessional language with an admin body could result in the court withholding prerogative relief).
    b. **Result**: litigants begin **exploring other forms of relief** associated with private law remedies, especially applications for declaratory and injunctive relief
2. **Problem #2**: sometimes government would **contract out public functions** in order **to devolve cost and escape judicial review**. The result is that courts begin **extending judicial review to private bodies that exercise "public" functions through prerogative and declaratory relief**.
    a. Big question=which types of institutions or decisions are subject to "public" law remedies, and which are subject to "private" law remedies?

b. Do public law remedies still exist when dealing with institutions that have been privatized? I.e., can you have access to public law remedies or prerogative writs?
    i. Prof gives example of Sask Crown Corps & contrasts to AB wherein there's been significant privatization. Can people dealing with privatized bodies have access to admin law remedies?
c. Can we use prerogative writs to challenge things like government procurement processes?
    i. Judiciary gives mixed responses – some judges think that these types of processes are public & so admin law remedies are available while other judges say these organizations are not, by nature, public & so judicial review & admin remedies aren't available.
    ii. Leads to Qs about **scope of admin law remedies** in CA.

Alberta Rules of Court, R 3.15–3.16, 3.18, 3.23–3.24

ROC develops one unified application process for all forms of relief (i.e., both the private options & the prerogative writs)

File an **originating app** in KB (3.15): 1. **Specifying** which **remedies** you're seeking a. E.g., want to quash? → apply for certiorari b. E.g., want admin to do something → apply for mandamus c. E.g., Want prohibition for decision-maker to proceed in the process? → apply for prohibition d. E.g., Declaration that the decision is unreasonable → apply for habeas e. Very important to be specific here!!!!! 2. Comply with the **filing deadlines** (R 3.15(2); 3.16) a. EXCEPTION: Habeas corpus	**3.15(1)** An originating application must be filed in the form of an originating application for judicial review if the originating applicant seeks from the Court any one or more of the following remedies against a person or body whose decision, act or omission is subject to judicial review: (a) an order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus; (b) a declaration or injunction. **3.15(2)** Subject to rule 3.16, an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act, and rule 13.5 does not apply to this time period. **3.16(1)** An originating application for an order in the nature of habeas corpus may be filed at any time and must be served under rule 3.15(3) as soon as practicable after filing.
Service: AB Minister of Justice & AG *or* AG for CA *or* both	**3.16(1)** The Minister of Justice and Attorney General or the Attorney General for Canada, or both, as the case requires, is entitled as of right to be heard on an originating application for judicial review.
Notice to send record of proceedings is required	**3.18(1)** An originating applicant for judicial review who seeks an order to set aside a decision or act must include with the originating application a notice in Form 8, addressed to the person or body who made or possesses the record of proceedings on which the decision or act sought to be set aside is based, to send the record of proceedings to the court clerk named in the notice.

BUT if you can't send the record, indicate as much in the **notice**	**3.18(2)** The notice must require the following to be sent or an explanation to be provided of why an item cannot be sent: (a) the written record, if any, of the decision or act that is the subject of the originating application for judicial review, (b) the reasons given for the decision or act, if any, (c) the document which started the proceeding, (d) the evidence and exhibits filed with the person or body, if any, and (e) anything else relevant to the decision or act in the possession of the person or body.
	(3) The Court may add to, dispense with or vary anything required to be sent to the court clerk under this rule.
Just b/c you apply for judicial review doesn't mean that the decision won't be enforced in the meantime. If you don't want the decision to be enforced while you challenge, you have to let the decision-maker know & hope that they'll decide to **stay enforcement**	**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.
Court may decide to **set a decision aside** instead of making a declaration.	**3.24(1)** If an originating applicant is entitled to a declaration that a decision or act of a person or body is unauthorized or invalid, the Court may, instead of making a declaration, set aside the decision or act.
Court has **wide discretion** to make any order is thinks fit.	**3.24(2)** The Court may (a) direct a person or body to reconsider the whole or any part of a matter, (b) direct a person or body to reconsider the whole or any part of a decision if the Court has set aside the decision under subrule (1), and (c) give any other directions it considers necessary.
If the Court doesn't think there's been a substantial miscarriage of justice, they can decide to **refuse a remedy**	**3.24(3)** If the sole ground for a remedy is a defect in form or a technical irregularity, the Court may, if the Court finds that no substantial wrong or miscarriage of justice has occurred, despite the defect, (a) refuse a remedy, or (b) validate the decision made to have effect from a date and subject to any terms and conditions that the Court considers appropriate.

Federal Courts Act, ss 2, 18

Federal board, commission, or other tribunal def'n: body/person with **powers conferred by an *Act* of Parliament** or	**2(1)** … "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise

order pursuant to Crown prerogative.	jurisdiction or powers conferred by or under an Act of Parliament by or under an order made pursuant to a prerogative of the Crown….
Federal court has **exclusive juris** over the specified list of relief available for any proceeding against a **federal board, commission, or tribunal**	**18(1)** …the Federal Court has exclusive original jurisdiction: to **issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against <u>any federal board, commission or other tribunal</u>; and** **to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph** (a)…. 18.1(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
Filing deadline much tighter than KB – here, it's **30 days** after the decision has been communicated. Court may extend, but don't take that for granted. Missing limitation period is a big problem.	**18(2)** An application for judicial review in respect of a decision or order of a federal board, commission or other tribunal shall be made within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, or within such further time as a judge of the Federal Court may, either before or after the expiration of those thirty days, fix or allow.
Broad remedial powers to order an act or declare invalid or unlawful, quash decision, set decision aside, set decision aside & refer it back	**18.1(3)** On an application for judicial review, the Federal Court may (a) **order** a federal board, commission or other tribunal **to do any act** or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or (b) **declare invalid or unlawful, or quash, set aside or set aside and refer back** for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
Grounds for challenging admin decision (prof thinks that this should be updated b/c we don't talk about jurisdictional error or natural justice anymore)	**18.1(4)** The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission, or other tribunal acted without jurisdiction… (a) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (b) erred in law in making a decision or an order… (c) based its decision or order on an erroneous finding of fact… (d) acted, or failed to act, by reason of fraud or perjured evidence…. (e) acted in any other way that was contrary to law.

Scope of Public Law Remedies in Canada

- Procedural & substantive grounds for review don't exist in private law.
- You can challenge contracts where they're unconscionable, but <u>not</u> unfairness

Volker Stevin NWT v Northwest Territories (Commissioner), 1994 (gov't procurement decision here = subject to public law)

Here, the Court finds that gov't procurement decisions are subject to public law remedies & therefore admin review. Contrast to *TO Port* where the Court finds that gov't procurement decisions are NOT subject to public law remedies and therefore NOT subject to admin review.

General R: purely commercial decisions relating to the procurement by government of goods and services generally not eligible for judicial review

BUT if the decision affects its ability to effectively carry on business (i.e., impacts its rights, privileges, & interests), **judicial review is available**.

- E.g., ability of the business to compete for gov't procurement contracts generally
- E.g., Ability of business to complete for contracts with organizations funded by the gov't.
- E.g., availability of financial assistance through government departments

F:

- Establishes Advisory Committee to label businesses as northern businesses which will have priority & eligibility in the award of gov't contracts (gov't contracts have big money)
- Volker has been delisted from the catalogue of northern businesses.
  - People who work at the office fly in every few weeks & when they're on site doing work, they still appear to be EEs from AB.
  - Under contract law, Volker has no claim to challenge the decision b/c contract law's big principle is freedom of contract. SO there's no private law remedy available.

I/H: Notwithstanding the unavailability of a private law remedy, can Volker challenge the decision by applying for public law relief (i.e., a form of prerogative relief)? → **YES**. Gov't procurement decisions have direct impact on Volker's rights, interests, & privileges & so the duty of PF is triggered and Volker can challenge the decision to apply for public law relief.

A:

What was the practical function or role of the business advisory committee?

- To designate businesses as "northern businesses" to be eligible for gov't initiatives, including preference in the award of gov't procurement contracts.

How did the chambers judge characterize the legal function of the committee? Why did the CA disagree with the chambers judge's characterization?

- Advisory committee didn't hold a hearing, notify Volker, or give them a chance to be heard, PF duties weren't met. BUT should these duties apply to the exercise of gov't procurement powers?
- "Judicial review is available not only to public bodies exercising statutory duties but also of those administrative bodies which obtain authority from prerogative powers…"
- "The committees, the business incentive policy and authority exercised by virtue of the policy go beyond mere decisions by civil servants regarding procurement of goods and services.
- The Advisory Committee is a public body exercising a power which affects the status of business enterprises, and their ability to compete effectively in the NWT. The decisions affect the right of a business to contract not only with the Government of the NWT but also with organizations funded by it and others who have adopted the policy."
- Big impact on the material interests of Volker ⇒ decision-making process should be <u>fair</u>.
- "While I agree with the learned chambers judge that purely commercial decisions relating to the procurement by government of goods and services generally do not fall within the class of cases which will be subjected to judicial review, the decisions here go beyond this category. **This is not a simple procurement decision which deals with the acceptance or rejection of a specific tender or a bid**. … The decision of the Advisory Committee to reject an application or to revoke a designation **affects**, not the individual contract, but **the ability of the business to compete with others in contracting with the**

government generally and with organizations funded by the government. **The decision also affects the availability of financial assistance through government departments**. The business incentive policy creates a central registry for businesses designated as Northern Businesses. Government departments and organizations funded by government must apply the policy in determining, who the successful bidder will be. The decisions deal with and affect the status of the business and its right and ability to compete with other business in contracting generally with the government, and with organizations funded by the government, with others who have adopted the policy. **It affects its ability to effectively carry on business in the Northwest Territories**. It is this aspect that brings in the public duty and fairness component"

Do you think that public procurement powers should be governed by "public" law principles (duty of fairness, substantive reasonableness) or "private" law principles (no duty of fairness, but right to compensation for breach of contract)?

- Gov'ts spend a ton of money on the open market, should they be subject to the safeguard of PF so that the decisions are made fairly? Do they have to treat competitors fairly by holding a hearing (even just one on paper)?
- One student suggests that gov't decisions take forever to be finalized, so adding another layer of judicial review would be onerous, expensive, and too time consuming.
- On the other hand, decisions behind closed doors could lead to corruption (gov't hiring friends)

- Gov't Procurement Decisions (see *Volker*, *TO Port*)
- Where private institutions provide services that are traditionally public
    - Privatization of healthcare
        - Discriminatory client screening policies ⇒ could you challenge the private clinic's decisions for being unreasonable or unfair in a regulatory framework?
            - For a public hospital, you very clearly could use admin law arguments.
            - BUT with private hospitals, this would be difficult.
- Private religious organizations and/or clubs
    - Highwood Congregation v Wall
        - Jehova's Witness (JW) community near Calgary. Wall was a JW & real estate agent who relief heavily on his fellow JWs for his business. His daughter developed a substance absue problem & the church directed him to shun his daughter. Wall said no. JWs expelled him. Wall applied for judicial review in relation to the Church. ABCA split on decision. Dissenting thought this was a good case for judicial review since it's about fairness. Another opinion was horrified that courts could review decisions made by private religious organizations.
            - Grounds: unfair, didn't have a hearing, no opportunity to state case.
        - This debate is longstanding – can you apply for judicial review if the only ferry operating in town refuses to take you and your 100 horses across the river?
    - E.g., Hutterite communities have seen this type of arg too.

These types of cases start a "checkerboard doctrine" wherein some judges say "yes, public law remedies are available" & others say "no, public law remedies not available"

Air CA v TO Port Authority (factors to determine whether private action is subject to prerogative relief; gov't procurement decision ≠ subject to public/admin law)

Justice attempts to reconcile the "checkerboard doctrine" by creating a list of factors to help courts determine what is a private or public decision → BUT Lewans suggests that the factors could really go either way lol.

This case gives us the most elaborate statement of these issues & a way to frame our arguments in these issues, *but* also shows us how two lawyers may reach very different conclusions.

R: An application for judicial review under the *FCA* can only be brought against a **federal board, commission, or other tribunal** (***FCA*, s 18**)

R: **Factors to consider** (in determining whether admin law review is available? I.e., whether private actors & private action may attract public law remedies – are there sufficient public elements such that the private action may be subject to CL prerogative relief?)

Factor	**Weighs toward Admin Rev**	**Weighs Away**
Character of the **decision** being challenged	Matter has broad import to members of the public	Private, commercial matter
Nature of the **decision-maker**	Public in nature: Crown agent or stat-recognized admin body charged w/ public responsibilities. Is the matter under review closely related to public responsibilities?	Private in nature
Extent to which decision is **founded in** and **shaped by law** *or* public discretion	- Decision authorized by or emanates directly from public source of law (e.g., statute, reg, order) - Heavier weigh: Public source of law provides **criteria** for making the decision	Pwr to make decision comes from something *other* than legis (e.g., general contract law, business consids)
Relationship between the **decision-maker** and other parts of **government**	Decisionmaker is **woven** into network of gov't, exercising powers as part of that network	Mere mention of body in a statute w/o more *may* not be sufficient to make it public.
Extent to which decisionmaker is **agent of gov't** or is **directed, controlled, significantly influenced** by a public entity	- E.g., Private person retained by gov't to investigate public oficial's misconduct - Req't for approval/review by gov't for policies, bylaws, or other matters *may* be relevant	
Suitability of **public law remedies**	Nature of matter is such that public law remedy would be useful	
Compulsory power	Compulsory power over public at large or defined group	Parties consensually submit to jurisdiction
Whether conduct has **serious public dimension**	- Matter = very serious, exception effect on rights or interests of broad segment of public - Watch for fraud, bribery, corruption, HR violation that transforms the matter from private significance to great public significance	

Importance: boundaries of public/private are in constant flux.

- **Privatization example: Privatization of health care/doctors offices**
    - Are you entitled to PF in these institutions?

- Can you challenge their decisions on the basis of substantive reasonableness?
- **Make these arguments by looking at the Air CA factors**

F:

- Institution–Billy Bishop airport (BBA)–created by statute & deciding how to exercise its contractual powers.
- BBA is in the middle of TO! Super crazy location. Landing spots are a limited commodity in CA, so there are lots of competition to get the spots.
- Toronto Port Authority (TPA) deciding who will get landing spots at Billy Bishop Airport. Fight between Air Canada and Port Airlines. TPA issues to Port. AC unhappy – states allocation was biased and unreasonable.
- AC argues that TPA is operating Federal powers under the *Federal Courts Act*. AC takes a public law perspective and states this deals with spots which are a scarce resource. How they are allocated is based on a public license. There is an elaborate regulatory framework and it is NOT based on contracts – therefore, is public.
- PA argues that this is a commercial decision by TPA. It is a private law managerial decision on how to effectively run an airport and is not subject to judicial review. States AC can get private remedy for breach of contract, if there was even a breach.

I/H: Is BBA bound by the principles of admin law (procedurally fair, fairness, reasonableness)? → **NO**. BBA is a private industry & not a federal board, commission, or other tribunal under the ***FCA***

Statute: **Federal Courts Act:**
2(1)…"**federal board, commission or other tribunal**" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act or Parliament by or under an order made pursuant to a prerogative of the Crown…
18(1)…the Federal Court has exclusive original jurisdiction:

a) To issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or write of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a)…

*under the FCA, you can access the same prerogative writ remedies that you can under the Alberta Rules of Court. BUT, please keep in mind that there are time limits/restrictions under 18.1(1) and (2) are quite different from the provincial one. (and missed time limitation periods are the stuff of professional negligence claims…)

FCA s 18.1(4) outline what the different grounds are for challenging the administrative decision

A:
Do you think the Port Authority is a "private" or "public" actor in this case? Explain?

- Stratas says **private** – doesn't fall within "federal board, commission or other tribunal" in *FCA* s 2

Why did Stratas JA conclude that the Port Authority's decision to allocate landing slots was not amenable to judicial review? ⇒ He applies factors that he says point to the fact this is a private law decision (but Lewans argues that you could easily apply the factors in this case and find the opposite)

- **Character of the decision** being challenged → character is private because it's made by a private body (i.e., not a fed board, commission, or other tribunal in FCA s 2
- **Nature of the decision-maker** → TO Port Authority is NOT a federal board, commission or other tribunal. *Marine Act* states TO Port may pursue private purposes at its own expense/be financially self-sufficient.
- **Extent** to which the decision is **governed by law or (conversely) private discretion** → not founded/shaped by law. TO Port shapes its own views re how to proceed
- **Relationship** between **decision-maker and other branches of government;** Extent to which the decision-maker falls under **governmental control** → Marine Act & letters patent suggest separation, no interwoven relationship.
- Compulsory power → None at play here
- **Suitability of public law remedies**; Conduct has a **serious public dimension** → No serious public dimension, public law remedies not the most suitable.

What is the practical effect of the decision in this case? What other remedies, if any, does Air Canada have to challenge the decision?

- If we say nature of the decision is private, the practical result is they can distribute spots however they want. Unless AC can point to some tort, UE, breach of contract, they have very limited remedies at its disposal. In fact, may not have any remedies at all. Coining TPA private also allows for less transparency on how TPA conducts themselves.

Federal and Provincial Superior Court Jurisdiction

What's the boundary b/w federal court jurisdiction & provincial superior courts?

Introduction (841-851)
Canada (Attorney General) v Telezone Inc (861-864)

Jurisdiction

Prov Superior Courts	**Federal Courts**
• Constitutional Status: appointed under CA 1867, s 96 • **Inherent CL jurisdiction** (flowing from s 96): can order prerogative writs	• Statutory courts: power from the Federal Court Act or enabling legislation that direct applicants to the federal court • No inherent CL jurisdiction to grant prerogative relief ⇒ can only adjudicate matters specified in The Federal Courts Act or delegated to it by federal legislation. • Federal Court has **exclusive jurisdiction** over judicial review of **federal boards, commissions, and tribunals**. In addition, federal administrative agencies often have the authority to refer questions of law to the Federal Court for a ruling. (i.e., **no choice** when reviewing fed boards, commissions, tribunals)
Concurrent juris b/w prov & fed courts wrt civil claims against the Crown (i.e., party can elect to apply in either court) • Benefits of filing SOC in prov superior courts: Accessibility (therefore easier), Faster (meets more often, tons of judges) • Benefits of filing SOC in fed courts: Fed courts may have more experience with particular types of claims using particular types of administrative decisions	

Federal Courts Act: Concurrent Jurisdiction

17(1) Except as otherwise provided in this Act or any other Act of Parliament, the **Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown**.
(2) Without restricting the generality of the subsection (1), the **Federal Court has concurrent original jurisdiction**, except as otherwise provided, **in all cases in which**

(a) the land, goods or money of any person is in the possession of the Crown;
(b) the claim arises out of a contract entered into by or on behalf the Crown;
(c) there is a claim against the Crown for injurious affection; or
(d) the claim is for damages under the Crown Liability and Proceedings Act.

Federal Courts Act: Federal Board, Commission, Tribunal Def'n

2(1) "**federal board, commission or other tribunal**" means any body, person or persons having, exercising or purporting to exercise **jurisdiction or powers conferred by or under an Act of Parliament** or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under s. 96 of the Constitution Act, 1867; [i.e., NOT seeking civil damages]

Federal Courts Act: Exclusive Jurisdiction

18(1) Subject to section 28, the Federal Court has **exclusive original jurisdiction**

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ or quo warranto, or grant declaratory relief, **against any federal board, commission or other tribunal**; and
*[note: habeas corpus is omitted from this list – habeas is **concurrent** juris b/w fed & prov superior. Rationale: serious impact on physical freedom is severe – ppl should have choice of venue – habeas is a timely remedy]*

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

18(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under s. 18.1

CA (AG) v Telezone Inc (if seeking civil damages, can elect to file claim in prov sup court)

R: If a party seeks monetary compensation or damages in a claim against a Crown, the matter is one to which **concurrent jurisdiction** applies pursuant to section 17. Therefore, Applicant may choose venue (FC or Prov Superior)

F:

- TeleZone sued Canada in ONSC in contract, negligence, and unjust enrichment when it failed to secure a licence to provide telecommunications services from Industry Canada.
  - Gov't argues that in order to establish those breaches in contract, TeleZone must prove that the Minister's decision was unlawful. (so there would be two claims – first, must prove the Minister was unlawful subject to s 2(1) of the FCA, THEN argue that breach of contract happened).
    - Main allegation is that minister acted unlawfully ⇒ this person qualifies as a "federal board, commission or other tribunal" in the meaning of s 2(1) of the *Federal Courts Act*. SO, need to go to federal court first

I/H: Is this a case where "relief is claimed against the Crown" as per FCA s 17 *or* a case in the nature of prerogative relief as per FCA s 18? → **s 17**. SCC holds that when seeking monetary compensation or damages, this is a case of relief claimed against the Crown & therefore subject to s 17 so concurrent jurisdiction is at play (applicant can choose venue)

Statute: **FCA, ss 17–18**

A:

- SCC rejects federal crown's argument. SCC says that when seeking monetary compensation/damages for breach of contract, tort, or unjust enrichment, applicants can choose venue.
  - Rationale: FCA should be interpreted in such a way that applicants have **efficient access to justice**
  - FCA S 17 applies b/c this is a claim seeking relief in the form of damages

Do you think this lawsuit should be characterized as one "in which relief is claimed against the Crown" (s 17 Federal Courts Act) or one in the nature of prerogative relief (s 18 Federal Courts Act)?

Stays of Proceedings

When may a judicial decision-maker be inclined to order an **interlocutory stay of proceedings**? (court order for admin decision maker not to enforce a decision until the judge or court has the chance to render a decision)

Manitoba v Metropolitan Stores (869-881)

Application for judicial review does **not** automatically stay proceedings. **Must apply**. The administrative board can enforce their decision if you do not apply for stay. Note: sometimes administrative boards will stay if you tell them you are applying for judicial review – but not legally obligated to unless you applied for stay of proceedings.

Alberta Rules of Court, R 3.23

3.23(1) [juris for KB to stay operation of a decision pending judicial review] 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.
3.23(2) [court can refuse app if the stay would be detrimental to public interest] 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 Courts Act, s 18.2

18.2 [Federal Court also has juris to stay operation of a decision pending jud rev] On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

MB v Metropolitan Stores (test for interlocutory app for stay of proceedings)

When is it appropriate to grant interlocutory application for stay of proceedings? ⇒ see test in R.
When is it appropriate for a court to issue an interim order staying the enforcement of the first contract imposed by the MB LRA?
What's the standard of proof? → Serious issue to be tried.

R: Test to grant interlocutory application for stay of proceedings:

1. Satisfy a **serious issue to be tried** threshold (i.e., plausible chance of success on its face, but evidence not required like in the *prima facie* threshold)
2. Applicant must show **irreparable harm** (i.e., harm/damage that can't be compensated by an award of damages – here by a *Charter* s 24 remedy)
    a. ***RJR*** sets out **test for irreparable harm**: "The test [for demonstrating irreparable harm] will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."
3. **Balance of convenience** must **require** a stay of proceedings *(this is where most cases are decided)*

a. Not sufficient to focus solely on CL's interest, must look at the **broad public interest** & how it would be **advanced or undermined** through the granting of a stay of proceedings
    i. ***RJR*** defines "Public interest" → includes both the concerns of society generally and the particular interests of identifiable groups
b. If there are compelling public interest reasons not to stay proceedings, then the court is unlikely to grant a stay.

F:

- TU membership drive at Metro Stores. Certification vote. Attempt to reach first CA = high intensity.
- Grounds on which ER sought to challenge the *Labour Relations Act* (*LRA*)?
    - *LRA* (in MB) gives the Board the power to impose the first CA in situations where it's unlikely that the parties will reach one on their own.
    - Board imposes a first CA & ER argues it's **unconstitutional** insofar as it…
        - **Violates freedom of expression** b/c it forces ER to consent with things they don't agree with
        - **Violates freedom of liberty** to not be in contract/not come to a CA
        - **Violates freedom of association** as don't agree with union representation
        - Note: these style of freedom of contract arguments are largely unsuccessful, so we don't see a lot of them today; however, this case among the first *Charter* cases & so there was a lot of uncertainty.
- ER seeks a **stay of proceedings** while they pursue the constitutional challenge to the *LRA*.

I/H: Can a stay be granted? → **NO**. While serious Q & irreparable harm are satisfied, balance of convenience precludes the granting of a stay of proceedings.

Statute: MB ***Labour Relations Act***: Board has power to impose first CA where parties can't reach one.

A:

Burden of proof: What practical difference, if any, is there between the "prima facie case" and "serious question" thresholds? Which threshold did the SCC adopt?

- SCC adopts the **serious Q threshold.** Needs to be plausible on its face.
- Prima facie threshold: At English CL, there were various holdings that *prima facie* cases = standard of proof for apps for stays of proceedings. Evidence required to show arguable case.
    - Court says the *prima facie* threshold is more **demanding**, or challenging to meet.
- Serious question to be tried threshold: less demanding than the *prima facie* threshold, but eliminates cases that are **clearly vexatious or w/o reasonable chance of success**.

What is "irreparable harm"? What evidence might be submitted to establish the prospect that an administrative decision might cause "irreparable harm"?

- Applicant must show **irreparable harm** will occur if stay isn't ordered.
    - BUT monetary harm ≠ irreparable harm (Court says that you can seek to remedy monetary harms with s 24 remedies)
    - Irreparable harm = harms that can't be resolved by s 24 remedies, such as complex workplace issues (e.g., health insurance, max hours of work, etc) which can't be undone/fixed by s 24 remedies.
- In this case, it is clear that the ER does not want to enter in contract with union → wants to keep this a non-unionized workplace.
    - **BUT** tough to show/quantify the harm to the employer.
- If the Board throws a boilerplate CA on the ER/EE/TU, there will be **complex workplace issues that will be extremely difficult to unwind** (e.g., health insurance, maximum hours of work, holidays, benefits, etc.). **A s 24 remedy cannot fix harms that could result**. Therefore, irreparable harm is satisfied.

What factors should one consider when attempting to determine whether the "balance of (in)convenience" requires a stay of proceedings? How did the court assess the balance of convenience in this case?

- **Balance of convenience must be satisfied** (balancing of broader public interest and CL's interest).

- **Relevant factors in this case re balance of convenience:**
  - Private Interest:
    - ER has interest in not having a CA/TU in place
  - Public interest (in context of cert vote in favour of TU)
    - Status quo w/o contract is unsustainable
    - LAbour disagreement would escalate if stay granted in a way that would harm public interest
    - Business may have to shut down which would harm public interest
    - ER hiring scab labour = harm public interest
    - If continues to deteriorate will lead to strike, lock out, people will be harmed, and on a broad public interest analysis (there will be public disturbance, picketing, people would be out of work). There will be negative consequences in a public interest perspective – outweighs the harm to employer.
- "...when the constitutional validity of a legislative provision is challenged, the courts consider that they ought not to be restricted to the application of traditional criteria which govern the granting or refusal of interlocutory injunctive relief in ordinary private or civil law cases. Unless the public interest is also taken into consideration in evaluating the balance of convenience, they very often express their disinclination to grant injunctive relief before constitutional invalidity has been finally decided on the merits.
- Lower Court, Krindle J:
  - "It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained." → high conflict, unresolved negotiation situation can't be maintained for two years. Issue is that you may have wildcat strikes, more labour relations drama, shop floor will be extremely tense & possibly unworkable. One of the main objectives of *LRAs* are expeditious solutions to make workplaces workable.
  - "In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found."

RJR MacDonald Ltd v CA (AG) (restates *Metro* test + clarifies 'public interest')

R: Reaffirms MB v Metro. Requirements for a stay of proceedings in cases involving constitutional challenges to enabling legislation:

1. Applicant must establish that the constitutional challenge "is not frivolous or vexatious; in other words, that there is a serious question to be tried";
2. Applicant must establish that failure to grant a stay of proceedings will result in "irreparable harm", which cannot be compensated by money damages;
3. Applicant must establish that the balance of convenience, which includes consideration of the public interest, weighs in favour of a stay of proceedings.
    a. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups (RJR)
    b. "The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action." (RJR)

IV. (PUBLIC INTEREST) STANDING

Introduction (894-896)
Finlay v Canada (896-903)
Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society (905-909)

Courts trying to expand scope of public interest standing in CA public law → easier to intervener groups to qualify for standing than it once was.

Public Interest Standing Context (linked to DTC)

- Corps exist to shield indivs from liability → can't pierce corp veil to go after SHs/directors in their personal capacities for wrongs of the corp
- Trend in admin law to afford corps greater protections than marginalized indivs (we see this a lot in what we've read so far)
- However, another trend in favour of recognizing more public interest standing
- **Challenge in public interest standing**: who's going to be the litigant?
    - E.g., in *Downtown Eastside*, Sex work increasingly dangerous through criminalization of SW → s 7 claim. But *who* is going to be the litigant?
    - Costs of litigation = **expensive**
    - Time of litigation = **onerous**
    - Further, ppl who bump into public interest standing already have significant barriers that have made life hard for them & may not want to go through the time/money/emotional resources necessary to litigate
- Giving NGOs, non-profits, etc. the ability to challenge law that makes life more difficult for marginalized ppl offers the ability to have issues heard w/o requiring a key litigant to do all of the work.
    - These don't require corporate backing.
- Law re public interest standing increasingly **liberalized**
    - Prof argues that if you start giving more voices opportunity to speak out re legality of gov't power, there can be concrete effects that lead to changes in the way our case law develops.

Theoretical Dilemma: Is a liberal approach to standing a good thing?

- **Pro-liberal perspective**: liberal approach to public interest standing enhances public accountability through judicial review
    - Gives a voice to these issues in CA public admin law that tends to skew toward material, corp interests.
- **Nuanced perspective**: argues that liberal approach to public interest standing:
    - imposes **additional burdens on superior courts**,
        - Unreasonable delays already on fair trials. What happens if we introduce more ppl to appear in courts? Wouldn't this slow things down more?
    - **favours** those **parties who have superior resources** to launch court actions, and

        - Non-profits, NGOs, & orgs with scarce operating budgets now have to dedicate more money to going to Court. This is demanding on already tight resources. Would this mean that they can't dedicate as much $ to the community-driven work they do?
            - NGOs & similar groups need to be careful in how they frame their arguments about draining court resources & how their involvement in the case will lead to a principled outcome, not wasting the court's time, trying to make meaningful difference in the way CA interest law is understood.
    - makes the administration of public programs l**ess efficient and cost-effective**.
    - E.g., *Vavilov*: tons of interveners. Result was that things "unravelled" insofar as the court loses the thread in the analysis (seems to become detached from the facts & the real reason we were there – a person was stateless)

Finlay v Canada, 1986 (public interest standing test – initial criteria, changes in DT Eastside)

My Q: Why doesn't he have a *Charter* claim re the clawback of benefits? → He could, but courts don't really like *Charter* arguments that impose positive obligations on gov'ts (tend to reject them since Charter provides negative rights)

R: Two types of interest standing → (1) private; (2) public *[note: you don't really need to differentiate b/w the two types on the exam, you're fine to just apply. He'll prob ask anyways]*

R: first iteration of public interest standing test:
(1) **Serious justiciable issue** (i.e., Serious legal question that needs to be determined)
(2) **Applicant must have a genuine interest** in the Q
(3) **No other reasonable way to bring the issue before the court**

F:
- Finlay is private MB citizen receiving social benefits.
- Manitoba creates an **overpayment clawback regime for social security**.
    - If MB deems a recipient of social benefits to be working or obtaining income via other means, they can **clawback the overpayment in future payments** (can't do a garnishee summons b/c ppl receiving social benefits don't have cars, savings accounts, etc from which repayment money can be drawn)
    - CA and MB have an agreement that sets a baseline for welfare.
- Finlay claims the clawback policy is illegal under the CA Assistance Plan (CAP) b/c it violates the baseline for necessities of life.
    - Fed gov't transfers money to the provinces to maintain programs like social security.
    - Claims that the clawback **violates** the terms of the CA Assistance Plan ⇒ CA Assistance Plan is supposed to set baselines for social program & in implementing a clawback, recipients no longer have the ability to afford the necessities of life (which is the baseline for the Plan).
- Finlay can't challenge the legislation against the prov gov't b/c it's exclusive prov juris.
    - Basically, the CAP exists as a contract b/w prov & fed gov't, so Finlay can't just sue as a TP. Instead, he approaches it indirectly.
    - Instead, he brings the case against the federal gov't for failing to make sure that prov doesn't offend its obligations under the CA Assistance Plan.
    - **Effectively asks Minister of Finance to enforce the CA Assistance Plan by withholding transfer payments until MB changes the policy.**
    - Argues Minister of Finance has a duty to withhold payments b/c MB is violating benchmarks in the CA Assistance Plan
- Under the traditional line of standing, Finlay would need to show that he has a personal interest in the case (I.e., personal damage or prejudice). A private individual may not sue for declaratory or injunctive relief unless he can show what amounts to a sufficient private or personal interest in the subject matter of the

proceedings.

I/H: Does Finlay have a private right to seek judicial review? → **NO**
If not, does he qualify for public interest standing? → **YES**

A: Finlay does not have private standing, but has public interest standing.
Two ways to qualify for standing:

1. **Private Interest Standing**: private right directly & negatively impacting by gov't action or inaction →
   - Finlay claims private interest standing b/c failure of the Fed gov't to maintain standards leads to a negative impact to his security benefits.
   - Finlay isn't a party to the CAP funding arrangement → he's a beneficiary, not a party. Court says that his claim for private interest standing is **too remote**
   - Court also says Finlay **doesn't have a right to social security payments** (recall *Webb*: PF expanded to benefit recipients when prior to *Webb*, gov't could just take bennies back)
   - Court says it's just not the type of right that gets private interest standing (he's just too far removed)
2. **Public Interest Standing**: applies when a private right is not directly & negatively impacted, but the claim advanced is in the public interest so a court should give standing in light of public interest.
   - Balances considerations:
     - Expansion of scope of public interest standing to allow concerned citizens to bring apps like this BUT balance w/ scarcity of judicial resources (prevent vexatious litigants, floodgates issues).
     - Don't want everyone who's upset about judicial decisions to just run to the courts crying
     - Principle/idea/belief that CL develops in the context of a *specific* dispute involving *contending* POVs → i.e., ppl directly involved put together the clearest, most cogent arguments when in contention
   - **Test for public interest standing/to bring claim**:
     - (1) **Serious justiciable issue** (i.e., Serious legal question that needs to be determined)
       - Court won't grant public interest standing unless it's properly a judicial question – CANNOT be a political Q
     - (2) **Applicant must have a genuine interest** in the Q
       - Has the person been advocating for these interests for a long time?
       - Does the applicant not qualify for private interest standing, but still have some sort of direct interest impacted by the outcome of the Q?
     - (3) **No other reasonable way to bring the issue before the court**
       - Traditionally, AG had first crack at bringing a public interest claim to Court. BUT if AG refuses to take action, there's no other reasonable way to do that then

What facts or factors did the Court highlight to demonstrate that Finlay had satisfied the requirements for public interest standing?

- Serious justiciable issue – the issue is plenty serious
- Has a genuine interest – it impacts him directly (he lives on social assistance)
- No other reasonable way – there is no one with a more direct interest in a position to challenge the statutory authority to make the federal cost-sharing payments than Finlay

CA (AG) v Downtown Eastside Sex Workers Against Violence Society, 2012 (modification of public standing test to make it easier to bring a public interest claim)

R: Public interest standing test:
"factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as inter-related considerations to be weighed cumulatively, not individually, and in light of their purposes" (para 36).

1. Does the applicant raise a **serious, justiciable issue** regarding the legality of administrative action?
2. Does the applicant have a **genuine interest** in the dispute or are they a vexatious litigant or "mere busybody"?
3. Is there **another reasonable and effective** manner to bring this issue before the court? (application must be **purposive**, reflecting need to ensure full adversarial presentation AND conserve judicial resources) Is the Attorney General or another party with a direct personal interest likely to bring an application for judicial review? Courts should consider:
    a. P's **capacity to bring the claim**
        i. P's resources
        ii. P's expertise
        iii. Whether the issue will be presented in a sufficiently concrete & well-developed factual setting.
    b. Whether the case concerns a matter of "**public interest**" that transcends the interests of those affected most directly by legislation or administrative action (consider A2J)
    c. Whether there are **realistic alternative means** of bringing the matter before the court in a more efficient/cost-effective manner;
        i. does the org have capacity?
        ii. Sufficient evidentiary basis to adjudicate the issues?
        iii. Are there other proceedings with ppl directly involved already going on?
        iv. Whether the P brings any particularly useful or distinctive perspective to the resolution of the issues.
    d. The **potential impact** of the proceedings **on the rights of other persons who might be more directly impacted by the legislation/administrative action**.

F:

- Context: serial killer going after SWs in DT Eastside ⇒ stakes are very hgh.
    - Sex work increasingly dangerous through criminalization of SW → s 7 claim
- Non-profit org in Van intervenes in case challenging constitutionality of CC provisions criminalizing SW-adjacent activities in CA.
- Issue here is that no private interest standing → the former SWs are not charged with any offence. With a public interest group without any charges against them, they give anecdotal evidence and there are no facts in which the court can use to apply in section 1 analysis.

I/H: Does the former SW qualify for public interest standing?→ YES

A:

Altered Public Interest Standing Test at #3: "a pragmatic and holistic approach to the question of public interest standing—serious issue, genuine interest, a reasonable and effective manner to bring the matter before the court."

1. Does the applicant raise a serious, justiciable issue regarding the legality of administrative action?
    ➢ There is a serious issue to be tried here. ^This one is a fairly low bar. Is it a question of law that is appropriate for the court to decide.
2. Genuine interest: Whether the case concerns a matter of "**public interest**" that **transcends the interests of those affected most directly by legislation or administrative action**;
    ➢ The potential impact of the proceedings on the rights of other persons who might be more directly impacted by the legislation/administrative action.
    ➢ E.g., point to the mandate of the organization you're representing → is the org bringing the claim actively involved in pol & court-based advocacy in issues relating to the legality of the decision being challenged?
3. Whether there are **realistic alternative means of bringing the matter** before the court in a more efficient/cost-effective manner (is this a reasonable & appropriate way for the court to discharge its function

in upholding the ROL?)

- ➢ AG claims that the organization should get a current SW charged under the provisions in question to bring the constitutional challenge → tries to do a remoteness argument of sorts.
- ➢ Prof points out that many ppl charged w/ crim offences don't want any part of *Charter* challenges. Even if they do, they often don't have the resources to challenge the constitutionality of these issues. Requires a sophisticated form of advocacy.
  - Here, Court further **liberalizes the law of standing**
- ➢ Relevant factors:
  - Challenge = comprehensive (relates to nearly whole legis scheme)
  - Ps raised issues of public importance that transcend their immediate interests
  - This challenge may prevent multiple indiv challenges in the context of crim proceedings
  - No risk of rights of others w/ a more direct stake being adversely affected by a badly advanced claim
  - No suggestion others more personally affected have deliberately chosen <u>not</u> to challenge the provisions
  - Society = well-organized w/ considerable expertise wrt sex workers in downtown eastside
  - Ms. Kiselbach: former sex worker in the neighbourhood, supported by resources of society
  - Society brings concrete factual background
  - Society represents ppl most directly affected by legis (>90 Affidavits from current & past sex workers)
  - Society represented by experienced human rights lawyers & Pivot Legal Society
  - Has conducted research, generated various reports, & presented evidence it's gathered before various gov't committees.
- ➢ It's no longer a Q of whether there's NO other way, but whether this is a **reasonable way of bringing the issue to the court. Factors:**
  - Framing of legal arg → is it appropriate? Does it allow the court to benefit from a more sophisticated evidentiary foundation?
  - Resources available to the org? → P's capacity to bring the claim (resources, expertise)
- ➢ Clarifies that it is not whether there are no other means that this action could be brought about, but whether allowing this action to brought would let the court deal with the legal issues effectively. Essentially, are there realistic alternative means that might be more efficient or effective? – is this a reasonable way that this case should be brought about. *even if there's another reasonable way, you can still qualify for public interest standing if you can demonstrate that you can bring the issue effectively

In the future, will see more of this eg environmental groups and environmental standards and oversight

**DT ES: is this a reasonable method for which this issue can be brought to the court? Why do you need a public interest organization to bring this challenge? In DT ESSW, the court understands that someone criminally accused could bring the challenge but it's onerous on them and this public interest organization has this interest and has substantial support amongst this particular group.*