

450 Administrative Law

PART I: INTRODUCTION	7
CH1: ADMIN STATE + RULE OF LAW	7
What is administrative law? - SHOW ME THE POWER	7
Vavilov (Admin Law sneak peak)	7
Institutions	7
Oversight of Admin	8
Rule of Law	8
CH2: ROLE OF JUDICIAL REVIEW	8
Highwood Congregation of Jehovah's Witnesses v. Wall, 2018 SCC 26	8
Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817	8
PART II: PROCEDURES	9
CH3: FAIRNESS - SOURCES AND THRESHOLDS	9
Fairness – Sources and Thresholds	9
"Dr. Bentley's Case" (1723)	10
Cooper v Board of Works (1863)	10
Nicholson v Haldimand-Norfolk Regional Police Commissioners (SCC, 1978)	10
Knight v. Indian Head School Division No 19 (SCC, 1990)	11
Canada (AG) v. Inuit Tapirisat of Canada (1980, SCC)	11
Canadian Association of Regulated Importers v. Canada (AG), (1993, Fed CA)	11
Homex Realty v Wyoming (1980, SCC)	11
Tesla v Ontario (2018 ONSC 5062)	12
Cardinal v. Kent Institution (SCC, 1985)	12
Re Webb and Ontario Housing Corporation (1978, ONCA)	12
Abel + Advisory Board	12
Dairy Producers Cooperative v Saskatchewan HRC	12
Legitimate expectations	12
Canada (Attorney General) v Mavi (2011, SCC)	12
Jono Developments Ltd v North End Community Health Association, 2014 NSCA 92, leave to SCC ref'd	13
Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36	13
Constitutional/Quasi-Constitutional Thresholds of Procedural Fairness	13
Authorson v. Canada (Attorney General), 2003 SCC 39	13
Singh v Minister of Employment and Immigration, (1985, SCC)	14
Charkaoui v Canada (2007, SCC)	14
Blencoe (2000, SCC)	14
Statutory Thresholds of Procedural Fairness	14
CH8: D2CA	14
Overview	15
Guerin (1984)	15
Sparrow (1990)	15

Haida Nation (2004)	16
Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council	17
WHEN - Summary of Thresholds	17
Mikisew Cree First Nation v. Canada (Gov Gen in Council) - April 2012	17
WHO - is impact	17
R v Powley SCC 2003	17
Manitoba Métis Federation Inc. v. Canada (AG), SCC 2013	18
Daniels v Canada (Indian Affairs and Northern Development), SCC 2016	18
WHO has the D2C	18
Chippewas of the Thames First Nation v. Enbridge Pipelines Inc. (2017)	18
CONTENT of D2C	18
Tsleil-Waututh Nation v. Canada (AG) (2018)	19
UNDRIP	19
Final pre-written answer	19
CH4: LEVEL AND CHOICE AND PROCEDURE	19
Overview of process	19
Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1	20
Pre-hearing issues - LE	20
Pre-hearing issues - Notice	20
Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System), [1997] 3 SCR 440	20
Pre-hearing issues - Disclosure	20
May v Ferndale Institution, 2005 SCC 82	21
Ontario (HRC) v Ontario (Board of Inquiry into NW General Hospital) (1993), 115 DLR (4th) (Ont Div Ct)	21
Hearing issues - Oral vs Written	21
Masters v Ontario	21
Khan v University of Ottawa	21
Clifford v Ontario	21
Hearing issues - Open vs Closed	22
Hearing issues - Right to Counsel	22
Re Men's Clothing Manufacturers Association of Ontario and Toronto Joint Board, Amalgamated Clothing and Textile Worker's Union	22
New Brunswick (Minister of Health and Community Services) v G(J) [JG]	22
Hearing issues - Disclosure	22
Napoli v BC (Workers Compensation Board)	22
Mission Institution v Khela	22
Qikiqtaaluk Corporation v Nunavut (Commissioner)	23
Huerto v College of Physicians and Surgeons	23
Hearing issues - Cross examination	23
Re Toronto Newspaper Guild and Globe Printing	23
Innisfil Township v Vespra Township	23
Re County of Strathcona No 20 and MacLab Enterprises (Sandy MacTaggart)	23
Djakovic v BC (WCB)	23
Post-hearing	24
2127423 Manitoba Ltd o/a London Limos v Unicity Taxi et al	24
Wall v Independent Policy Review Director	24
CH5: BIAS AND LACK OF INDEPENDENCE	24
Bias in Administrative/Quasi-Judicial Decision Makers - General	25

1. Antagonism w/in hearing	25
Donn Larsen Development Ltd. v Church of Scientology of Alberta, 2007 ABCA 376	25
Munoz v. Canada (Citizenship & Immigration), 2006 FC 1273	25
Slawsky v Edmonton 2019 ABCA 302	25
Brett v Ontario	25
2. Personal association between party/DM	25
Marques v Dylex Ltd 1977, 81 DLR (4th) 554 (Ont Div Ct)	26
Terceira Melo v Labourers International Union of North America 2013 ONSC 3344	26
Institute of Chartered Accountants of Nfld and Labrodor v Cole 2017 NLRD(G) 73	26
Gedge v Hearing Aid Practitioners Board 2011 NLCA 50	26
United Enterprises v Saskatchewan (Liquor and Gaming Commission) (SKQB)	26
DeMaria v Law Society of Saskatchewan	26
3. Previous involvement by DM	26
Committee for Justice and Liberty v National Energy Board et al 1978 1 SCR 369	26
New Brunswick v. Comeau, 2013 NBCA 41	27
Vespra v Ontario Municipal Board, 1983 43 OR (2d) 680 (Div Ct)	27
4. Attitudinal bias	27
Cartwright v Rockyview County	27
Lee v. Canadian Kennel Club Appeal Committee, 2003 ABQB 51	27
Large v. Stratford (City) ONSC	27
Great Atlantic & Pacific Corporation Co of Canada v. Ontario (Human Rights Commission), 1993	28
Benedict v Ontario, 2000 (ONCA)	28
Pelletier v. Canada (Attorney General), 2008 FC 803	28
Pecuniary or other Material Interests	28
Energy Probe case	28
Canadian Pacific Ltd. v Matsqui Indian Band	28
Context is everything here	28
Kozak v. Canada (Minister of Citizenship and Immigration), 2006 FCA 124	28
Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 SCR 623	29
Bias in Legislative Decision Makers/Policy Makers	29
Old St. Boniface Residents Association v. Winnipeg (City), 1990 CanLII 31 (SCC)	29
St John's (City) v Seanic Canada Inc, 2016 NLCA 42	29
Save Richmond Farmland Society v Richmond (Township), [1990] 3 SCR 1213	29
Statutorily Authorized Bias	29
Brosseau v. Alberta Securities Commission	30
Alberta Securities Commission v. Workum, 2010 ABCA 405	30
EA Manning Ltd v Ontario	30
Institutional Bias	30
2747-3174 Quebec Inc. v Quebec (Regie des permis d'alcool)	30
Ocean Port Hotel Ltd. v. BC Liquor Control and Licensing Branch, 2001 SCC 52	30
Altus v. Calgary, 2015 ABCA 86	31
Lack of Independence...	31
CH6: INSTITUTIONAL DECISIONS	31
Overview	31
Vine v National Dock Labour Board [1957] AC 488 (Eng HL)	31
Delegating duty to hear	32
Local Government Board v Arlidge [1915] AC 120 (Eng HL)	32

Consultation among members	32
IWA v Consolidated-Bathurst Packaging Ltd. [1990] 1 SCR 282	32
Tremblay v Quebec [1992] 1 SCR 952	32
Ellis-Don Ltd. v Ontario (Labour Relations Board) [2001] 1 SCR 221	33
Soft Law	33
Canadian Association of Refugee Lawyers v. Canada (2020 FCA 196)	33
Thamotharem v Canada (Minister of Citizenship and Immigration), 2007 FCA 198	33
Agency Counsel	33
Venczel	34
Pritchard	34
Brett	34
Vavilov/Re Del Core	34
Hutterian v Starland	34
Weldevoid	34
Spring	34
Re Sawyer	34
Khan v College of Physicians and Surgeons of Ontario (1992), 94 DLR (4th) 192 (Ont CA)	34
Bovbel v Canada (Minister of Employment and Immigration) [1994] 2 FC 563 (CA)	34
CH7: Rulemaking	34
PART III SUBSTANTIVE REVIEW	35
CH9: STANDARDS OF REVIEW	35
Overview	35
Pre-Vavilov SOR process	36
Dunsmuir v. New Brunswick, [2008], 2008 SCC 9	36
Canada (Minister of Citizenship) v Khosa, 2009 SCC 12	37
Mowat, 2011 SCC 53	37
Newfoundland Nurses, 2011 SCC 62	37
McLean v. BC Securities Commission, 2013 SCC 67	37
Wilson v. Atomic Energy, 2016 SCC 29	37
Capilano Mall 2016 SCC 47	37
CH10: SELECTING SOR	37
Overview	37
Canada (Director of Research and Investigation) v Southam, 1997 CanLII 385 (SCC)	38
What did Vavilov create	38
Pushpanathan	38
Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63	38
Mouvement Laïque Québécois v Saguenay (City), 2015 SCC 16	39
Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53	39
**Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 - [Selecting SOR]	39
Society of Composers et. al v. Entertainment Software Association, 2022 SCC 30	40
What did Vavilov destroy	40
West Fraser Mills Ltd. v British Columbia (Workers Compensation Appeal Tribunal), 2018 SCC 22	40
1120732 B.C. Ltd. v Whistler (Resort Municipality), 2019 BCSC 984, aff'd 2020BCCA 101	41
Minority's epic criticisms/general concerns with of Vavilov	41
Neptune Wellness Solutions v. Canada (Border Services Agency), 2020 FCA 151	41

CH11: Applying the Standards of Review	41
Correctness	41
Bell Canada v. Canada (Attorney General), 2019 SCC 66	42
Canadian National Railway Company v Richardson International Ltd., 2020 FCA 20	42
POE	42
Housen v. Nikolaisen, 2002 SCC 33	42
Mahjoud v. Canada (Citizenship and Immigration), 2017 FCA 157	42
Al-Ghamdi v. College of Physicians and Surgeons of Alberta, 2020 ABCA 71	43
Mayer v. The Superintendent of Motor Vehicles, 2020 BCSC 474	43
POE v Reas	43
Patent unreasonableness	44
Ryan, 2003 SCC 20	44
Pacific Newspaper Group, 2014 BCCA 496	44
Team Transport Services Ltd, 2021 BCCA 211	44
Steadman v WCAT 2021 BCSC 477	44
Reasonableness	44
**Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 [Reasonableness analysis]	45
Patel v Canada (Citizenship and Immigration), 2020 FC 77	46
Romania v Boros	46
Longueépée v. University of Waterloo, 2020 ONCA 830	46
Zhang v Canada	46
Canada Post Corporation v. CUPE, 2019 SCC 67	47
Smith v Canada (Attorney General)	47
Minster Enterprises Ltd v City of Richmond	47
Kanthasamy 2015 SCC 61	48
Sadiq 2020 FC 267	48
Torrance 2020 FC 634	48
Mattar v Dental Board, 2020 ONSC 40	48
Service d'administration DCR Ltee c Reyes 2020 FC 659	48
AUPE v Alberta 2020 ABCA 284	48
Domtar re: discord	48
Vavilov re: discord	49
Canada (Public Safety and Emergency Preparedness) v Taino, 2020 FC 427	49
Canada (Attorney General) v. Honey Fashions Ltd., 2020 FCA	49
Labourers International Local 183 v GDI Services 2020 ONSC 1018	49
Khan v Canada (Citizenship and Immigration) 2020 FC 438	49
Lingering questions post-Vavilov	49
Law Society of British Columbia v Trinity Western University, 2018 SCC 32	50
CH12: Review of Discretionary Decisions	50
Defining a discretionary decision	50
Reviewing a discretionary decision	50
Halifax (Regional Municipality) v. Nova Scotia Human Rights Commission	50
Kathasmy	50
Forest Ethics v. Canada (National Energy Board), 2014 FCA 245	51
Review of bylaws/subordinate legislation	51
Shell Canada Products Ltd. v. Vancouver (City)	51
Catalyst Paper v North Cowichan (District), 2012 SCC 2	52

Green v Law Society of Manitoba, 2017 SCC 20	52
Non-Reviewable Discretionary Powers	52
Confining/structuring discretion	52
CH13: Tribunals	52
Basics	52
Nova Scotia v Martin, 2003 SCC 54	53
R. v. Conway, 2010 SCC 22	53
What if there's a Charter Violation	53
Doré v Barreau du Québec	53
TWU v BC	53
Considering Constitutional Issues in Alberta	54
Lethbridge and District Pro-Life Association v Lethbridge, 2020 ABQB 654	54
CH14: Remedies for Unlawful Administrative Action	54
Generally - Public/Private	54
Air Canada v Toronto Port Authority 2011 FCA 347	54
Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall, 2018 SCC 26	55
Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga, 2021 SCC 22	55
Ripley v Investment Dealers Association	55
Excluded Species of Administrative Action and Public Authorities	55
Democracy Watch 2020 FCA 69	55
Canada (House of Commons) v Vaid, 2005 SCC 30	55
Jurisdictional divisions between Federal Court/Superior Courts	55
Administrative reliefs	56
360Ads Inc v Okotoks (Town), 2018 ABCA 319	56
Brotherhood of Maintenance of Way Employees v. Canadian Pacific Ltd.	56
Bergman v Innisfree (Village), 2020 ABQB 661	56
Canada (Attorney General) v. TeleZone Inc, 2010 SCC 62	56
CH17: Money Remedies	57
Generally	57
Alberta v. Elder Advocates of Alberta Society	57
Hamilton-Wentworth v. Ontario	57
Tort Liability Generally	57
Cooper v. Board of Works for Wandsworth District	57
Canada v Saskatchewan Wheat Pool	57
Reversal re. Pearson Airport	57
Negligence and Nuisance Specifically	57
Wellbridge Holdings Ltd v Greater Winnipeg - zoning case	57
R v Imperial Tobacco Canada Ltd.	57
Paradis Honey Ltd. v Canada	57
Francis v Ontario	58
Injunctions baby	58
Generally	58
Equitable	58
Nova Scotia v Freedom Nova Scotia, 2021 NSSC 170	58
Statutory	58
Calgary v Bullock, 2011 ABQB 764 ("Occupy Calgary")	59

Vancouver v O'Flynn-Magee, 2011 BCSC 1647	59
Freedom Convoys	59

PRACTICE QUESTIONS **59**

PF	60
RAB	60
Rule-making (Oct 18)	60
Baker Analysis (Oct 25)	60
RAB (Oct 25)	61
Fact pattern - concern about participation re: bias (Nov 1)	61
Fact pattern - admissibility of evidence (Nov 1)	61
Fact pattern - post-hearing evidence sought by DM (Nov 1)	62
Fact pattern - Grounds of review	62

Pre-class discussions **62**

Power to appoint	62
------------------	----

PART I: INTRODUCTION

CH1: ADMIN STATE + RULE OF LAW

What is administrative law? - *SHOW ME THE POWER*

- Places legal limits on actions of delegated government authorities
 - Indi can do everything but UNPERMITTED
 - Gov't only does things PERMITTED to do
- Courts ensure legality fairness, and reasonableness of the process + outcomes
- Provides remedies to anyone affected by transgression of limits
 - Procedural remedies
 - Substantive outcomes

Impacts literally everything Happens most at point of delivery of legislation

ENTIRE EXECUTIVE BRANCH - e.g. Criminal (policing), property (development), business (regulation), Agencies who give rise to > litigation (Employment, Regulated industries, Economic activity, Profession and trades, Social control, Human Rights, Income Support, Public Services)

History - increasing due more redistributive programs/fairness and participation in programs, but Neoliberalism destroys
 Evolves to provide lower stakes, specialized DMs, > access/formality, distribute caseload, not enough judges

Vavilov (Admin Law sneak peak)

Analysis

- Seeks to navigate proper btwn decision makers, the courts and individuals in our society
- Evolves with law, number of decision makers increasing via stat deleg - >>> manifestation of state power

Institutions

Agency/board/commission/regulator/tribunal - empowered by gov't via "home statute" to perform function/fix issue

- i) Independent from gov't ii) impacted can participate iii) "sharp end" of policy iv) specialized

| A SPECTRUM OF TYPES DIFFERENTIATED BY DMs, case-load, membership, process

Insulated from gov't politics - implementations gov't policies

Legislatures - establish entity + set scope of its jurisdiction

Cabinet & Ministers - implement legislation ≈ set-up network of government have high degree of power

- Entity usually under ministry's mandate, though the minister is not responsible - members appointed by gov't

Municipalities - delegated authority and then delegate even more

Crown Corporations - mixture between public/private ≈ public function/decisions that relate to commerce+contracts
 Private bodies - political parities look quasi-governmental, NOT the world of administrative law UNLESS they are granted statutory powers - the line is blurred, hospitals/universities

Oversight of Admin

Some form of accountability is required - the rule of law must be shown

Legislature can snatch away

Ombudsman is appointed to review

Administrative remedies = internal appeals, appeal to another

Court remedies = inherent, but becoming codified (QFL)^o

Court's inherent juris / judicial review - prerogative writs

Other options outside Admin ≈ tort/contract

Rule of Law

Thing we all get, that we all get to control how power is exercised

Admin is all about getting healthy democracy by ensuring NO arbitrary exercise of power

Examples include - Roncarelli v Duplessis, Constitution Act 1982, quasi-constitutional documents (HRC, AR/TR)

Schools of thought	
Dicey and the Rule of Law - No one suffer EXCEPT breach law; - Government/citizens subj to law; and - Courts = supervisory (important).	Functionalism - > deference, accountable via democracy - Gov't is force for good that needs to be viewed differently - Dicey pushes complex systems thru the law, undermining - Dicey fails to understand difference between law/policy

CH2: ROLE OF JUDICIAL REVIEW^o

The role of the courts in administrative law is to ensure the legality, fairness and reasonableness of the...

1. Administrative process (procedural) - threshold/content

2. Administrative outcomes (substantive)

Public law concept that allows superior courts (ABKB) to exercise supervisory jurisdiction over tribunals/DMs

- JR comes from prerogative writs - originally developed to limit gov't power against individual
 - Certiorari - quashing a prior decision
 - Mandamus - requiring action to be taken
 - Prohibition
 - Habeas Corpus - legality of detention
 - Quo Warranto
- Statute cannot outright eliminate JR, but can codify
- Superior courts are creatures of constitution - retain ability to review

Review of PROCESS or CONTENT re: decision - review re: procedl impropriety, illegality (vires), unreas, unconst.

- Generally must align w/ principles (right 2 b heard, right 2 know evid ≈ charter), though broad latitude until exercising outside your authority
- Reasons req only where statute or CLaw says so (use Baker factors)

Reminder: SOR discussed apply to the substantive review, NOT PF review.

- Qs of PF reviewed re: particular situation to determine whether appro level of fairness req by CLaw afforded:

Highwood Congregation of Jehovah's Witnesses v. Wall, 2018 SCC 26

Ratio - Private law situation cannot seek JR to resolve b/c it is a public law concept

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

Facts

- Visitor visa, overstayed, worked informally - several children/challenges - ordered to deport,
 - Applles for PR re: H&C - Provides extensive documentation
 - Decision (discre as per legis) = insufficient H&C, no reasons (though subord officer's case notes are evil)
 - IA - applic for JR permitted only with leave of FC judge, appeal to FCA only re: certified srs q

Issue/Holding

- 1) Legal effect of a certified srs q? **NO ANSWER, SCC does not decide this matter**
- 2) Principles of PF violated? **YES, develops Baker factors to help determine this**
- 3) Was discretion improperly exercised regarding H&C? **YES**

Analysis

- Issue 2 - decision = admin + affects rights, privileges or interest of an indi, sufficient to trigger the DF
 - I. Nature of decision: > judi = > DF
 - II. Nature of statute: > final = > DF, no appeal = >>> DF
 - III. Imp to indi: >imp = >DF
 - IV. LE: *unfair* if DM acts *contrary to reps* [≈ DF ≈ DNJ], ≠ subst rights though
 - V. Choice of proced: factor in tribunal’s expertise in governing its own proced
 - List is non-exhaustive! Account for setting
 - III weighs heavily in the Baker result
- Result for issue 2
 - Req full/fair consideration of the issues - achieved here - Oral hearing ~~req~~
 - Req reasons, unfair if person ~~knows why~~ - not achieved here, though written notes suffice
- Issue 3
 - > discre, >reluctant for interference
 - Decision - free of reasonable apprehension of bias (impartial DM), based on reas/well-informed member of commu... more in Ch 5 - Subord’s evil notes - perception is everything, it seems like he’s biased
 - Also consider guidelines, which say maintaining family unit is a priority, consider H&C tradition
 - BUT, needs exercise properly and for the right reasons (e.g. Roncarelli)
 - ∴ reverse decision of FCA, decision is unreasonable

Ratio - Baker factors | Scope = circum where fairness reg (≈ CLaw, Statute) | Content = proceed to achieve reg

Notes: Key *procedural* review case, *substantive* review CLaw is within Dunsmuir/Vavilov

PART II: PROCEDURES

CH3: FAIRNESS - SOURCES AND THRESHOLDS

Fairness – Sources and Thresholds

Sources - where does oblig stem from (why must gov’t treat fairly)

Threshold - when will oblig apply (the line)

Sources first

- Historical precedents important as per “Dr. Bentley’s Case” (1723) + Cooper v Board of Works (1863)
 - *Audi alterum partem*
 - *Nemo iudex sua cause*
 - Seen to place limits on state powers
- Source can be written elsewhere too (statute/regulation)
 - In home statute (e.g. MGA s 680 - not req to hear from person other than notified + adj)
 - Statute delegates authority to create rules (e.g. BCATA)
 - Policies/guidelines could lead to LE
 - General procedure statutes (e.g. AAPJA)
 - Agency/principle concerns - legis can lim subordinate powers

Balance between CLaw/Statute		
STATUTE “OCCUPIES FIELD” Express statutory requirements will override any CL requirements (Singh (SCC 1985))	COMPLY WITH BOTH W/out express contrary lang, subord need to comply w/ both PF req (West Fraser Mills v. BC (WCAT) (2018 SCC))	CLAW WHERE STATUTE SILENT Addresses some, but remains silent on others, CLaw principles can apply to fill gaps (Nicholson (SCC 1978))

- Sources can ALSO emanate from Const/Quasi-const - seen to place limits on state powers (i.e. statute can override procedural safeguard unless conflict with const OR const can impose >)
 - BOR ≈ applies only federal undertakings/law -
 - S 1) right to ~~deprive~~ LLSPProp, except by due process of law.

- S 2e) law of Canada ~~construe/apply~~ to... deprive person of fair hearing in accord of PFJ re: determination of his rights/obligations
 - AbBOR
 - S 1a) the right of indi to LLSPProp, right ~~deprive~~ thereof except by due process of law
 - (e.g. expropriation, couldn't just send a check, need process)
 - Qb Charter - Codifies PNJ usually recognized (i.e. Imperial Tobacco)
 - Charter
 - S 7) right to LLSP, ~~deprive~~ LLSP, except PFJ
 - No guarantee to hearing (like BOR), only triggered if the decision engages LLSP
 - Proced ~~only~~, subst (BCMVA 1985) - Clear threshold LLSP (prison) + PFS (innocence)
 - S 8) Search/seizure, S 9) DM w/ detention powers, S 12) Cruel/unusual punishment
 - S 11) Jordan ≠ application to admin, only criminal/pena (LSS v Abrametz 2022 SCC 29)
 - S 15) Very limited application w/ PF, only purports to provide eq rights

"Dr. Bentley's Case" (1723)

"Even God Himself did not pass sentence upon Adam before he was called upon to make a defense"

Ratio - Natural law/justice = duty on a DM to act fairly

Cooper v Board of Works (1863)

Facts

- Legislation - req builder to give 7 days notice | Purpose re: proper drainage to avoid disease
 - Process ~~followed~~, board could demolish house
- Cooper (who knows req) gives 5 days notice → board DESTROYS house
 - Cooper brings action in trespass

Issue/Holding - **Board ought to give notice re: destroying, opportunity to respond prior to destroying**

Analysis

- Legislation has ~~positive words~~ around notice/response, "justice of CLaw will supply omission of legislature"

Ratio - Audi Alteram Partem - "Hear the other side" or "let the other side be heard"

Nicholson v Haldimand-Norfolk Regional Police Commissioners (SCC, 1978)

Facts

- ON Police Act has certain proced rights re: termination to an officer w/ > 18 months employment (silent on < 18)
- Officer dismissed at 15 months w/out reasons or opp to respond

Issue/Holding - Did 18 month bar CLaw procedural protections? (ie. *exclusio unius* argument)? **NO**

Analysis

- Pre-this case Courts concern re: formal process or government going about their day-to-day work
 - Judicial/quasi-judicial - attracted PF rights | Administrative - ~~attracted~~ PF rights
- All impacted by administrative DM = entitled to be treated fairly, ~~arbitrarily~~
- Dissent: Purpose of 18 month is for DM to make decision, nothing owed

Ratio - Audi Alteram Partem - "Hear the other side" or "let the other side be heard" | breaks the admin/quasi-j divide

Note: Nicholson evolves over Δt to baker - PF, LDF ≈ context

Threshold second - √ PF alleged and context

- CLaw NJ ≈ only to final, ~~prelim~~,
- Decisions that impact right, privilege, OR interest MAY engage PF (*Knight, Cardinal, Webb*)
- Situations where LE established by representations reflecting level of a private law contract
- Exceptions that ~~trigger DF~~
 - Legis - O/C legislation, bylaw (except RZ), UNLESS abuse discretion | Examples: Veterans decision (*Authorson*), const D2C (*Mikisew*), (*Inuit Tapirisat*)
 - Policy - diffuse, broad, undifferentiated impact | Examples: policy says consult re: closing, ~~re-allocation~~ ∴ ~~consult~~ (*Vanderkloet*), Though "minimum guidelines," ~~subordinate legislation~~, ∴ ~~bind~~ ∴ ~~consult~~ (*Bezaire*), (*Canadian Association of Regulated Importers, Homex, Tesla*)
 - Inspection/recommendations - b/c no finality, PF, obviously must not be improper reasons/bad faith (*Abel* exception, *Dairy Producers Cooperative*)
 - Emergency - < PF, especially if decision is temporary + open to reassessment

- Generally there is a right to PF → except legis decisions → except to this except legis decision w/ specific impact
- Going forward...
 - Fault as element in PF assessment mostly ≈ to direct conduct in CLaw (i.e. liability re: state's action)
 - But what if PF could be employed to situations where conduct of another entity was not prevent by the state (i.e. liability re: state's inaction)

[PRODUCE DIAGRAM SHOWING HOW CASES FIT TOGETHER Cardinal + Baker - building block]

Knight v. Indian Head School Division No 19 (SCC, 1990)

Facts

- School admin refuses renewal contract b/c shorter than original (had chance to negotiate) → laid off

Issue/Holding - Was PF owed prior to laying off? **YES**

Analysis

- Can't presume legislation would intend to treat unfairly
- General duty to act fairly ≈ 3 factors - here found
 - i) Nature of decision (finality)
 - ii) Relationship between 2 entities - employment vs. appointment *R2BH
 - Master/Servant - DF
 - *At pleasure - DF
 - *Remove, except cause - DF
 - iii) Impact of decision

Ratio - DF = variable ≈ 3 factors - turns on whether legit R2BH

Canada (AG) v. Inuit Tapirisat of Canada (1980, SCC)

Facts

- IT intervene in CRTC process - ask for condition of change to be improved service
- CRTC then recommends to Cabinet, who make final decision, IT could NOT submit directly to Cabinet

Issue/Holding - Cabinet decisions attract DF amounting to hearing? **NO**

Analysis

- Part of the narrow band that ~~attract~~ PF
 - Legislative exception, it's a policy decision (gather info + set public policy), it's an executive decision
 - > power, < PF (legislative) | ># imp, < PF (tough to facilitate)

Ratio - audi alteram partem will not be implied in every case, no hearing required

Canadian Association of Regulated Importers v. Canada (AG), (1993, Fed CA)

Facts

- Import quota set for hatching eggs by Minister - farmers want opportunity to submit responses re: allocation scheme (believe Minister is considering extraneous information)

Issue/Holding - Policy attract DF? **NO**

Analysis

- Minister's decision is highly discretionary - virtually unreviewable, will not interfere with legislation
- Looked at decision being made - quota decision, is general/policy (elements of economics, social (food supply))
- JR requires an interest to be engaged, nns a right → total # is >, ∴ PF < → they at least deserve a note
- They continue to hold remedial power via politics

Ratio - Policy is nns immune, review Nicholson factors to assess effect

Homex Realty v Wyoming (1980, SCC)

Facts

- RZ prevents developer from developing - specific application, aimed at limiting rights of individual

Issue/Holding - Policy attract DF? **NO**

Analysis

- B/c rights impact in a specific, direct, and individualized way - there are some rights ≈ notice/R2BG

Ratio - Policy is nns immune

Note: Most municipal decisions now have PF codified within process

Tesla v Ontario (2018 ONSC 5062)

Facts

- Doug Ford hates Teslas - legislation gave an extension to everyone to those caught up with process BUT Teslas - any electric dealership purchased thru a dealership (Tesla does not have dealership)

Issue/Holding - Policy attract DF? **YES, SPECIFIC IMPACT**

Cardinal v. Kent Institution (SCC, 1985)

Ratio - CLaw - DPF lies w/ pub auth making admin decision i) not policy/legislation ii) affects rights, privileges, interests

*Affirmed in Baker

Re Webb and Ontario Housing Corporation (1978, ONCA)

Facts

- Low-income housing tenant has rowdy kids and has been warned - OHC exercises power to evict
- Webb applies for review, dismissed, appeals

Issue/Holding - Decision attracts DF? **YES, AND MET HERE**

Analysis

- Webb says right being impact, Court reframes PF applying to this privilege - If you are receiving a benefit, cannot deprive benefit w/out PF - they fill the gap, meaning they are entitled to some PF, but here it was provided
- Webb is illiterate and may not have understood warning - she was verbally told and her rowdy kids were literate

Ratio - Extends DPF to privilege holder 7 years before Cardinal

Abel and Advisory Board Re, 1979

Facts

- Board considers patient next steps (NCRMD/CR), lawyer refused access to document

Issue/Holding - Document attracts DF? **YES, RECEIVE ACCESS**

Analysis

- Document could impact final outcome, there is an obligation to share - re: knowing the C2M
 - Even though the final DM is not bound to board recommendation, it is very influential ∴ share

Ratio - Law is evolving, prelim decision/document may attract > PF if it has large bearing on final decision

Dairy Producers Cooperative v Saskatchewan HRC

Facts

- Investigation re: sexual harrasment/HR - Cooperative wants > details
- Attempts to settle fail → leads to Board of Inquiry

Issue/Holding - Information attracts DF? **NO**

Analysis

- Preliminary investig of HR complaint, just threshold investig - rights of PF ~~engaged~~ b/c early on in process
- Also, Cooperative knew C2M, ∴ much < PF, settlement negotiations ≠ determinative

Ratio - Law is staying the same, prelim decision/document attracts < PF if investigation is early/limited impact

Legitimate expectations

May arise where public agency/actor + clear, unqualified unambiguous conduct + makes rep + re: future process/position

- A representation on process = can be held to process, failure can overturn process
- A representation of a substantive outcome = >PF, but cannot grant a substantive right

Negligent misrep DIFFERENT - COE could be on a hook if misrep proven - damages in tort, ~~new outcome~~

Canada (Attorney General) v Mavi (2011, SCC)

Facts

- Immig sponsor may be obligated to reimburse for certain \$ incurred by sponsored immig

Issue/Holding - Gov't obliged to proceed with enforcement in PF manner (account for discretion in guidelines)? **YES**

Analysis

- “It is ironic here for gov’t to require debt payment but not fulfill their own duty”
- Though obligation is clear - Minister has communicated discretion on recovering debt in guidelines - SOME lim procedural fairness owed to a debtor ≈ written notice, opportunity to respond, consider, notice of decision
 - Representation achieves LE if it amounts to statements in a private law contract
- Reliance on representation is **required**

Ratio - Where discretion is communicated (even in non-statutory document) and amounts to or exceeds statements in a private law contract, > PF may be allotted

Jono Developments Ltd v North End Community Health Association, 2014 NSCA 92, leave to SCC ref’d

Ratio - Duty is owed where there is a procedure + says it will follow

- Rep made? Fosters LE (regardless of whether anyone is listening)

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36

Facts

- Agraira subject to deportation, denied appeal b/c had affiliation with Terrorist ties
- Minister’s decision (described in guidelines) re: appeal due to Terrorist ties

Issue/Holding - Gov’t obliged to proceed with enforcement in PF manner (account for discretion in guidelines)? **YES, BUT THE PROCESS WAS FOLLOWED**

Analysis

- Guidelines used clear, unambiguous, unqualified language
- LE ≠ creating a substantive right, it’s just procedural
- Process was appropriately followed (humanitarian was considered and was vastly outweighed by terrorist ties)

Ratio - When certain process with factors to be considered are set out in a guideline or in correspondence, there is a legitimate expectation that the guideline or representation will be followed.

Note: echoes of Baker - admission to Canada, humanitarian factors

Constitutional/Quasi-Constitutional Thresholds of Procedural Fairness

Charter/BOR/ABOR applies ≈ JR of DM

- Charter →
 - s 7 - Everyone has right to LLSP and not deprived except PFJ
 - Examples of s 7 cases
 - Siemans - ~~Bar~~ + VLT prohibition
 - Gosselin - ~~Welfare~~ (at least on these facts)
 - G(J) v NB - Custody/parenting re: SP → representation
 - BCMVA - Imprisonment re: L
 - Singh - Deportation = danger re: SP → oral hearing re: credibility
 - Charkaoui - Detainment re: L → know C2M
 - Blencoe
 - No right to hearing unlike BOR, only triggered if LLSP engaged, may = substant rights ()
 - Search/seizure decisions (s 8), DM w/ detention powers (s 9), mental health facilities (s 12)
 - s 11 application limited only to criminal/penal (Law Society of Saskatchewan v Abrametz, 2022 SCC 29)
 - s 15 relevance and application very limited
- BOR will only apply to Feds and if > Charter → BOR applies to individuals, property, and 2e) procedural guarantee
- ABOR applies to Prov → right of indi LSPEProperty and NOT to be deprived except due process

Authorson v. Canada (Attorney General), 2003 SCC 39

Facts

- Parli enacts legis to lim liab for past int → Vets claim inop b/c BOR

Issue/Holding - Gov’t obliged to proceed with enforcement in PF manner (account for discretion in guidelines)? **YES, BUT THE PROCESS WAS FOLLOWED**

Analysis

- BOR guarantees notice + some opp to contest deprivation of property rights (2e) re: adjudication/individualized

- Notice + opp req where gov't legis bene
- Hearing req only when law applic to indi circum in proceeding before court, tribunal, body

Ratio - Entitled to hearing when hearing exists, quasi-const of no help here

Singh v Minister of Employment and Immigration, (1985, SCC)

Facts

- Deny application for admis by Min → legis expressly only allow[ed] for hearing in certain circumstances
- Process re: initial refusal to grant refugee status in the IA fully codified process - no room to read in additional req

Issue/Holding - Gov't obliged to proceed with enforcement in PF manner (account for discretion in guidelines)? **YES, BUT THE PROCESS WAS FOLLOWED**

Analysis

- "by being present in Canada" - Charter applies
- s 7 SP is applicable → thus cannot be deprived except w/ PFJ
- Process was followed (humanitarian was considered and was vastly outweighed by terrorist ties)
 - Hearing ~~required~~ everytime LLSP engaged → serious issues of credibility (oral req in alignment with > FJ)
- Process set out in IA → problematic due to process for refugee claimant to state their case and C2M
 - This process is adversarial → Minister has opportunity to reject claim ∴ quasi-judicial, > fairness
 - CLaw not enough, charter overrides and requires a hearing due to focus of credibility

Ratio - Procedures of IA incompatible w/ s 7 b/c legis provides no opp for case submit/C2M/oral hearing, ~~saved~~ by s 1 b/c ">\$/admin"

Charkaoui v Canada (2007, SCC)

Facts

- PR detained on "national security certificate" → barred from access to documents due to secretive process
- Some of info available was tenuous - karate ≈ indicia of being linked to terrorist sleeper agents

Issue/Holding - Gov't obliged to proceed with enforcement in PF manner (account for discretion in guidelines)? **YES, BUT THE PROCESS WAS FOLLOWED**

Analysis

- Being detained on a security certificate clearly engages L (s.7) → regime ~~allows~~ detainee to know C2M
 - FJ includes inde/impartial (✓), decision ≈ facts/law (X), C2M (X)
 - Decisions ≈ facts/law, C2M related → DM in informational vacuum if party doesn't have all relevant facts
- s 1 analysis - PSO ✓ options available to ensure fairness in the process → security cleared advocates who could appear ex parte and ∴ fails at min impairment

Ratio - R2K/C2M ~~absolute~~ → need situation w/ immense impacts on LLSP to highlight

Blencoe (2000, SCC)

Facts

- BC Cabinet Minister accused of SH → BCHR tribunal → delayed by thirty months → Alleges s 7 L impacts b/c depressed/unemployable

Analysis

- s 7 impacts? → here there is no intrusion into private life, no serious/profunding impact on fundamenta being
 - < Jail/restraint ≈ L impact - some form of deprivation that ≈ liberty impact
 - "State compulsions/prohibitions affecting important and fundamental life choice"
 - "Interference with an individual's psychological integrity may also interfere with SP" → very high bar
 - BUT, dignity, reputation, and freedom from stigma are not self-standing rights → ~~amounts~~ to s 7 violation
- Delay is not causing the impact, it's the media
- Leaves open possibility of delay in HR ≈ s 7 violation

Ratio - R2K/C2M ~~absolute~~ → need situation w/ immense impacts on LLSP to highlight

Note: Similar to Law Society of Saskatchewan v. Abrametz, 2022 SCC 29 re: excessive delay in admin hearing

Statutory Thresholds of Procedural Fairness

Statute w/ rules will only apply when i) DM exercise stat power ii) hearing → though rigor nns needed always

CH8: D2CA

Overview

Grounded in HOR - intention to do whatever you've committed yourself to (specifically treaty, s 35 (1982))

HOR per McLachlin in Haida	<ul style="list-style-type: none">- making/applying treaties, R must act with honour/integrity, avoiding even appearance of sharp dealing- requires that these rights be determined, recognized and respected.- requires the Crown, acting honourably, to participate in processes of negotiation.- process continues, the HOR may require DC2A- infuses the processes of treaty making and treaty interpretation.
----------------------------	--

KEY FACTORS BEHIND D2CA

RP1763 - Outlined treaty making process to acquire land – R declared that only it could acquire land from FN via treaties

Treaty ≈ formally concluded/ratified agreement between countries | written agreement btwn nation-states, establish a relationship governed by ILaw | negotiated agreement, spells out the rights, resp, and relations of FN/fed+prov

- Promise - Euros pledged to FN in exchange for access to their land
- Unbreakable - no term/no termination
- \$\$ - Intended to benefit both parties, ~~land sales~~
- *sui generis or unique* - Quasi-const - can't be taken away
- Relationship-building - political/economic/social associations btwn FN/settlers
- FACTOR B/C not everything discussed was document, dialogue for this focused on ~~details~~, accomodation/trust

S 35(1) - Existing ATR recognized+affirmed of FNMI

Guerin (1984)

Facts

- Musqueam Indian Band voted to surrender land to HMQ, on understanding respecting terms of future leases
 - Oral terms of Musqueam understanding not in surrender document attached to the process
 - Terms considerably < favourable to the Musqueam Band than originally represented
- IA - s 18(1) - Reserve lands are held by HMQ for benefit of bands
- TJ - Band wins, FCA - R wins

Issue/Holding - Fiduciary duty? **YES**

Analysis

- Muqueam enjoyed some form of Aboriginal title - Sui generis "legal right to occupy and possess certain lands"
 - Support - S. 109 of Const, I int ≠ Prov int, Calder
- "DoD" gave title to "discovering" nations, but pre-existing rights of occup/possess remain unaffected
- Surrender gives rise to R duty - FIDUCIARY DUTY (as per s 18) - Inalienability/fiduciary duty "go together"
- IA, Parli gives discretion to decide for itself where Indian's best int lie, Court regulate this relation
 - Breach is similar to a breach in a trust relationship (not strictly in the private law sense)
 - Court creates equitable obligation = ~~ignore~~ oral terms (unconc), must check in
 - Somewhat like promissory estoppel ≈ cannot make promise and unfulfill - induces FN to act
 - Failure means remedies - judiciable/compensable
- Note: AT THE TIME Little or no judicial recognition of justiciable rights to Indigenous lands or rights

Ratio - Sui generis → any surrender gives rise to subsequent fiduciary duties re: IA s. 18

Sparrow (1990)

Facts

- Musqueam licensed to fish for food | FA license included net length restrict | Charged under FA for fishing w/ > net

Issue/Holding - Restriction inconsistent w/ s. 35? **YES**

Analysis

- 35(1) Existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
 - Existing - rights in 1982, defined by 1982-reg (frozen), Extinguished rights revived (intent imp, reg exting)
 - Modern treaties can exting aboriginal rights and create treaty rights

- Rights - some evidence, overwhelming proof req, interpret flexibly can exercise in contemporary manner
 - Right does not get shaped by reg, regs just modif exercising right
 - TJ finds "ancient tribal territory where his ancestors had fished from time immemorial"
- Extinguishment of rights - Only where "clear and plain intention" on the government to deny rights ≠ Regs
- Recognized & Affirmed - interpret 35 = codify+entrench+renounces the old rules of game, fiduc duty+HoR
 - as part of its FD must exercise restraint when applying powers that interfere with Aboriginal rights
- Nothing explicitly authorizes gov't to restrict (s. 1 applies), but R&A comport a sense fiduc duty, allow justification
 - AR
 - Compromise between "extreme" positions: of freezing in 1982 OR unrestricted
- Test
 - 0) Is PTC an existing aboriginal right?
 - 1) Legis's effect interfere w/ existing aboriginal right? - Consider "abl perspective" on meaning of right
 - Onus = claimant
 - Existing - not extinguished, regs
 - Integral to distinctive culture, continuity, Artificial distinct btwn right/exercise (particulars evolve)
 - Lim unreas? Reg impose undue hardship? Reg denies preferred approach?
 - 2) PM infringe justified? Valid Legis Obj (closer to PSO, not federalism) - in light of HoR (prioritize)
 - Onus = gov't
 - Consider - compensation, consultation, etcetera
 - Examples; Conservation of resources, Preventing harm, ~~Shifting resources to user groups w/out aboriginal rights~~
- Guiding principle - gov't resp to act in fiduc capacity, contemp recog made in light of history ~
- Here, there is a right - Retrial - New evidence needed in light of newly established tests

Ratio - Recognition by SCC of D2CA Aboriginal peoples as a req, if gov't wishes to justify an infringement on AR per s 35

Delgamuukw v British Columbia (1997)

Analysis

- AT - a sui generis right arising from prior occupation of the land - not fee simple ownership
 - right to exclusive use/occupation of land held pursuant to that title for a variety of purposes, which need be aspects of those PTC which are integral to distinctive aboriginal cultures
 - 2 - that those protected uses must not be irreconcilable with the nature of the group's attachment
- Test - occupied pre-sov + present occup proof, then cont + pre-sov occup, exclu
- Infringements if legitimate gov't obj → ag, forestry, mining, and hydroelectric power, econ devel of interior of BC, protection of environ/endangered species, building of infrastructure and the settlement of foreign populations
 - those of "sufficient importance to the broader community as a whole" (R v Gladstone)
 - natural resource conservation (Sparrow), preserving the safety of the general populace (Sparrow)

Haida Nation (2004)

Facts

- Province of BC issued a Tree Farm Licence (TFL 39) in 1961 (and re-issued in 1981, 1995 and 2000)
- Haida Nation asserted AT - title had not yet been recognized at law, and AR to harvest red cedar in that area
- BC unilaterally authorized transfer of TFL to Weyerhaeuser Co. in 1999
- Sought to set aside the replacement and transfer of the TFL
- Process
 - Chambers: Crown under a moral, but not legal duty to negotiate with Haida
 - BCCA: Crown + Weyerhaeuser Co. are under legal obligations to consult with Aboriginal groups whose interests may be affected

Analysis

- D2CA → rooted in HOR, even without proven claim → do so "pending resolution of claim"
 - Arises where R has knowledge (real/const) of potential ATR and contemplates adverse impac

- Here, claims strong + gov't action could have a serious impact

Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council

Facts

- RT wants to make a technical change - no enlarge/new dam - required BCUC approval
- ~~Consulted~~ when dam built → serious impacts, this proposed change is JUST technical
- BCUC → ~~adverse impacts~~ on Carrier Sekani and ∴ did ~~trigger~~ D2C

Issue/Holding - Did BCUC have authority to decide D2C? **YES, PER LEGISLATION**

Analysis:

- BC Hydro, as a Crown corporation held D2C (~~BCUC~~) -
- UCA did not empower BCUC to engage in consultations to discharge the duty
- BCUC acted reasonably and correctly b/c they could JUDGE level of D2C based on UCA

WHEN - Summary of Thresholds

Per Haida → R K(r/c) of pot'l ATR + R conduct + May adversely impact

- R K(r/c) of pot'l ATR
 - Threshold is not high, though unproven needs to be credible (asserted, short of final judicial determination)
 - K(c) arises - lands are known/reas suspected to have been traditionally occupied OR imp on AR reas anticipate
 - Assign content of D2C re: difficulties associated w/ absence of proof/definition of claims (don't just deny)
 - Consult/accomodation is challenging, but possible → relates HOR, preserving the pending claims
- R Conduct
 - NOT confined to stat power or immediate impacts → general purposive approach
 - E.g. Tree license (Haida), management plan (Klahoose), review process for pipeline (Dene Tha')
- May adversely impact
 - Causal ≈ btwn proposed conduct/decision → ADVERSE IMPACT to ATR
 - Not prior (Rio Tinto), though incremental effects can be captured at borderline decisions
 - Speculative impacts ~~suffice~~, varies by context → phys impacts, management structures

Mikisew Cree First Nation v. Canada (Gov Gen in Council) - April 2012

Facts

- JR bill re: altered envtl protection regime they were unconsulted on that could impact TR
 - FC: granted a declaration that D2C was triggered = notice/opportunity to make submissions
 - FCA where ministers develop bills in legislative capacity, doctrines of parliamentary sovereignty, separation of powers, parliamentary privilege preclude judicial review

Issue/Holding - Does legislative action ≈ R conduct? **NO**

Analysis

- Majority → courts CAN nullify enacted legislation re: Const or executive decisions based on legislation, can't nullify for non-existent legislation
- Minority → Legislative sphere is NOT excluded from HOR b/c HOR attaches to all exercises of sovereignty
 - Ongoing consultation is preferable to a backward-looking approach of challenges → protects s 35 rights from irreversible harm and enhances reconciliation.

WHO - is impact

Rights/claims are primarily geog specific, but communities are not

- Band governments (under IA) assumed to rep, but their are issues; >1 Band ≈ right, land/resources in question ~~overlap~~ w/ band, urban populations of FNMI, non-status, Métis
- SCC says let FNMI decide themselves, should engage entire community

R v Powley SCC 2003

Facts

- Métis hunting rights

Analysis

- Three-part “Powley test” for determining who may claim Métis Aboriginal rights under s35:
 - Self-identify as Métis + ancestral cxn to historic Métis community + accepted by contemp community that exists in cont w/ a historic rights-bearing community

Manitoba Métis Federation Inc. v. Canada (AG), SCC 2013

Analysis

- Govnt failed in its obligation to properly distribute and safeguard 1.4 million acres set aside for the Métis in the Manitoba Act – In Nov 2016 Indigenous Affairs Min and president of Métis Federation signed an agreement to bring an end to the 146-year land dispute

Daniels v Canada (Indian Affairs and Northern Development), SCC 2016

Analysis

- Federal government has jurisdiction over Métis people and both members of the Métis Nation and non-status Indians are “Indians” as defined by the Constitution Act

WHO has the D2C

Ult resp w/ R → Govnt department + admin bodies/project proponents may all be involved in carrying out D2C via...

- Legislation → can outline procedural req | Delegation → best parties to respective parts
 - Admin only act if given expres/implied power, could include
 - Remedial powers (given) - power to order mitigation or avoidance measures
 - Power to engage in consult, which ≠ determining whether the duty is triggered/adeq discharged
 - Empowered to consider Qs of L → then can determine const sufficiency

If regulatory agency exists to exercise Exec power auth by legis, distinct btwn agency/R actions fall away (Clyde River)

- R can rely on regulator to do consult
- BUT, R is responsible for ensuring consultation is adequate

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc. (2017)

Facts

- Prior to hearing the Chippewas wrote to the PM and others seeking R D2C
- Chippewas granted funding to participate; filed evidence and delivered argument → concerns about > risk of spills
- Post-hearing, pre-decision, Minister says “NEB process = Consultation”
- NEB approved project with mitigation measures to address risk identified

Issue/Holding - NEB good enough? **NO**

Analysis

- NEB’s decision was “Crown conduct” ∴ D2C → approval of the project could potentially adversely affect ATR
- Rely on admin body IF stat power + R provides notice of reliance on admin body + admin body must assess adequacy of D2C
- Here: Sufficient → adequate opp to participate, minimal impact on ATR, appropriate accomodations

Ratio - Rely on admin body possibly if stat power, notice, admin body assess

CONTENT of D2C

Srs of adverse impact (low-mod-high) + strength of claim (weak-mod-established) → positively influence level

LOW/WEAK = Minimal D2C	HIGH/ESTABLISHED = Maximal D2C, even A
Notice, disclose, discuss issues raised	Exchange info, correspond, meeting, visit site, research, study, submissions to DM, written responses from DM, ACCOMMODATE → adjust, conditions, compensate

Challenges

- Focus discussion on impacts to ATR and not broader impacts
- Can't understand seriousness w/out > context (Chippewas of the Thames First Nation v Enbridge Pipelines Inc)
- Cumulative effects of an ongoing project, historical context → can inform

Considerations

- R prioritize A > others, minimize infringe re: PSO, compensate, CONSULTED/INFORMED of infringe? (Gladstone)

Accommodation ≠ veto?

- Not a veto pending final proof of claim, balance interests (Haida)

Tsleil-Waututh Nation v. Canada (AG) (2018)

Facts

- NEB process = report goes to GiC – can hold add'l process (accept, reject, or modify the recommendations)
-

Issue/Holding - D2C met? **NO**

Analysis

- Missing = someone representing Canada who could engage interactively → R reps were note-takers, instead
 - Dismiss req accommodation flaws, findings
- R says they're hamstrung by NEB report + unwilling to consider any new conditions → unreasonable conc

Ratio - Importance of engagement – must be more than recording concerns + how considered

UNDRIP

Establishes "minimum standards for the survival and well-being" of Indigenous Peoples, according to the UN

- "No international or domestic agreement on the meaning of the principle of free, prior and informed consent"
- Possible - "making every effort toward mutual, acceptable arrangement, allowing Indigenous people to genuinely influence the decision making process." (James Anaya)

Murray Sinclair - "People who use the concept of veto and the concept of free, prior and informed consent as though they are the same thing are totally missing the point."	Perry Bellgarde - As indigenous peoples, we're not stakeholders. We're indigenous peoples with rights and title, and that has to be respected. That's what this speaks to.
---	--

Final pre-written answer

- This class → don't need to assess strength of claim, just weigh evidence in D2C
- [D2C Practice Question](#)
 - Identify iMpact
 - Should R have been notified by the AER of this issue before the AER decided that it is required to consult with the Band?
 - What is D2CA - embedded within several other questions
 - Is there a duty - LIMITED TO THE FIRST ASPECT OF THE TEST
 - Explain using remedies available

CH4: LEVEL AND CHOICE AND PROCEDURE

Overview of process

Pre-Nicholson - CLaw = (Judi/Quasi-judi)

Post-Nicholson - CLaw = (Judi/Quasi-judi/Admin)

Due Process

- Traditionally - response to oppressive gov't action → narrow on LLSP/legis
- Natural rights - all about individual autonomy - infinitely expansive, no lim
- Balancing (contemporary) - mag of impact v gov't int in expeditiousness v likelihood that PF will fix things

What are rules/design to produce PF

1) PF triggered (threshold)?	Public DM affects rights/privileges/interests (Webb), Legislative/policy decision (Reference re Canada Assistance Plan), Charter int + DM ≈ governmental
If 1 Yes → 2) Content of PF	CLaw, legislation, regulations, policies, guidelines, const/quasi-const sources Eminently variable (Baker), range of things Baker factors if CLaw FF (Baker)

Basis to deny	Prerogative writs are discretionary (Homex) Issue justiciable (Highwood Congregation) Justified re: circumstances (emergency - Cardinal, Randolph) Justified re: Charter (Oakes) Keep decision same
---------------	---

There is not a trial for every decision → admin process largely sucks DMing out of the courts

- But level of adm process required would, absent some balancing interest would always ≈ trial-like procedure

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

Facts

- Suresh (Tamil movement) refugee in Canada → applies for landed immigrant status → Minister certificate re: danger to security → Order for deportation (opportunity to make written submissions)

Issue/Holding - JR? **YES, BUT LIMITED CHANGES**

Analysis

- IA process had some resemblance to judicial process, processes differs re: application, for Suresh received the least protection
- Looked at Baker factors re: s 7 Charter Challenges (CLaw ≠ “constitutionalized” does inform the s 7 procedure)
 - Here ≠ full oral hearing/judicial process, BUT facing deportation re: torture MUST KNOW C2M
 - DM’s relied material must be shared with applicant to know C2M
 - DM written reasons req too - rationally sustain findings, non-disclosure

Ratio - Where Minister relying on info re: torture (seem s 7 threat), must have; C2M, opp to submit, receive reasons)

Pre-hearing issues - LE

Covered previously

Pre-hearing issues - Notice

Req after some PF established, without it no other rights can be exercised at all → depends on level of imp

<u>Form (written, oral)</u>	<u>Manner of service (electronic, personal, newspaper)</u>	<u>Δt</u>	<u>Content</u>
Webbs re: illiterate	Personal when indi rights impact, legislated = enough	Enough to prep	Enough to know

Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System), [1997] 3 SCR 440

Facts

- Parties agreed to rules of procedure → right to counsel, cross-examine, call witness, introd evid, public hearings
- Parties understood that inquiry results ≠ crim/civ liab
- Commission sends out notes informing of eventual “findings of misconduct” ≈ heads-up
- Commission sends out confid notices “findings of misconduct” after findings found to provide opp to respond

Issue/Holding - JR re: notices/findings? **NO, COMMISSION DID IT RIGHT**

Analysis

- Commission may make findings re: misconduct, √ purp of inq
- PF owed b/c misconduct may impact reputation ∴ notice req (circumstance dependent)
- Sending findings √ finding findings, ∴ delay okay → notice was sufficiently and reas

Ratio - Notice req whenever PF engaged, nature of notice context dependent

Pre-hearing issues - Disclosure

Discovery / Disclosure (knowing the C2M)

Pre-hearing

Understand C2M, permit meaningful discussion, avoid trial by ambush, avoid delay (Blencoe)

May v Ferndale Institution, 2005 SCC 82

Analysis

- Stinchcombe ~~applies~~, innocence is not at stake
- Others in system may have privacy concerns

Ratio - Disclosure requirements must be assessed contextually in every circumstance

Ontario (HRC) v Ontario (Board of Inquiry into NW General Hospital) (1993), 115 DLR (4th) (Ont Div Ct)

Facts

- Re: racial discrimination → Board orders Hospital provide all witnesses statements → HRC applies for JR

Issue/Holding - JR re: disclosure of witness statements? **NO, BOARD CAN GET STATEMENTS**

Analysis

- Disclosure appropriate re: circumstances → Hospital needs to know C2M
- Even though there are concerns re: outing people, this can be accommodated via appropriate procedures

Ratio - Right to disclosure can be implied by the common law and found in statute

Hearing issues - Oral vs Written

Oral versus written → Presump in favour of oral hearing, though oral nns = trial-like procedure

Baker/Nicholson affirm deference re: hearing type

Manipulate process to match circumstances - resources, Δt, lay-people (offer guidance), credibility

Countervailing force is BOR/Charter, statute manipulated APRA

Masters v Ontario

Distinguish from Indian Head SB b/c Masters is more politically accountable, senior compared to others

Facts

- M has SH alleged → Inquiry/Report → Opp to respond → Premier reassigns, M ~~accepts~~ → JR

Issue/Holding - JR re: oral opp? **NO**

Analysis

- Decision = discretionary → < PF, M was well aware of the discretion, sticking around was √ continuing confidence
- Process = investigative, NOT determinative → < PF
- M had opp to respond and received disclosed accusations → this was enough

Ratio - Discretionary + investigative + other PF guarantees = ~~oral hearing~~

Khan v University of Ottawa

Facts

- Law student fails → Appeals to Committee → Meets w/out notice, student ~~present~~ → subsequent appeal fails

Issue/Holding - JR re: not being present? **YES, CREDIBILITY AT STAKE**

Analysis

- Very serious impact on student
- Student was not given any opportunity to correct/contradict evidence DM relied on
- Not necessary to demonstrate actual prejudice

Ratio - If high PF + credibility then get to OH

Clifford v Ontario

Facts

- Retirement goes to CLaw spouse and not beneficiary (Clifford) → appeals

Issue/Holding - JR re: not having full oral advocacy and witnesses under oath? **NO, BOARD CAN GET STATEMENTS**

Analysis

- Disclosure appropriate re: circumstances → Hospital needs to know C2M
- Even though there are concerns re: outing people, this can be accommodated via appropriate procedures

Ratio - Oral discovery is essential to fair hearing, written can be ample

Hearing issues - Open vs Closed

Presump for open hearing → sometimes closed (or portions closes) based on context

Written can be open → think AUC

Allows better transparency/scrutiny

Closed hearings may offend 2(b) → req a truly watertight system of info to be fully closed (Pacific Press Ltd v Canada)

- Other options ≈ publication bans or private testimonies

Hearing issues - Right to Counsel

No absolute right to counsel → BUT, often assumed for hearings/QOLs/complex matters

Participation of counsel can be limited if it impedes investigation, may only sit to safeguard particular interests

May receive > discretion re: adjournments if not supported by counsel (Ramadani)

Parish situations, where counsel is req; subpoena, threat of penalty, reporting is public, depriving rights, irreparable harms

Re Men's Clothing Manufacturers Association of Ontario and Toronto Joint Board, Amalgamated Clothing and Textile Worker's Union

Facts

- Union objects to Association's Counsel (a departure from the norm) → Arbitrator acquiesce b/c process is meant to be expeditious (Collective Agreement says nothing)

Issue/Holding - JR re: counsel? **YES**

Ratio - Entitled to rep? Can't deny lawyer as rep → important here b/c of complexity

New Brunswick (Minister of Health and Community Services) v G(J) [JG]

Facts

- Children taken for period → Minister extends period → JG req counsel (BUT \$\$\$)

Issue/Holding - JR re: counsel? **YES**

Ratio - s 7 SP int at stake >>> → Needed rep to have fair determination, to participate

Hearing issues - Disclosure

Presump party is entitled to know C2M, what DM relies on + opp to respon

"Official notice" → some key assumptions may need to be shared re: reasonings

Countervailing factors → FOIP, commercially sensitive

Throwback to Charkaoui → Stinchcombe applies in admin (as it does in crim) but s 7 impact does not turn on this distinction ✓ severity of consequences of state actions on LLSP

- Harkat (post Charkaoui) gives rise to "reas informed" standard
 - "sufficient disclosure to be able to give meaningful instructions to counsel"
 - can't rely on info that, if ~~disclosed~~, person req to be reas informed

Napoli v BC (Workers Compensation Board)

Facts

- WCB compensation amount appealed → pre-appeal hearing, receive summary w/out medical reports

Issue/Holding - JR re: lack of medical reports? **NO, BOARD CAN GET STATEMENTS**

Analysis

- >> standard of justice b/c impact ability to work/live → to effective challenge, reports needs to be produced

Ratio - serious allegation (fraud) - fact-dependent - should be given opportunity to respond

Mission Institution v Khela

Facts

- K reassessed post-incident and sent to max security → K request copy of matrix for scoring (denied)

Issue/Holding - JR re: matrix? **YES. TRANSFER UNLAWFUL**

Analysis

- Tension - informant safety vs. bad guy's liberty
- Disclose w/in reasonable Δt before decision made → legislation allowed ~~disclose~~ if threat to security, otherwise stat req high = "disclose all the info considered"
- Though deference typical, didn't invoke provision so none here

Ratio - Key consideration of DM should be disclosed

Oikiqtaaluk Corporation v Nunavut (Commissioner)

Facts

- Procurement → QC unsuccessful, appeals and seeks disclosure of all documentation of evaluation

Issue/Holding - JR? **PARIALLY**

Analysis

- Can know OWN BID, but bidding process must be confid → protect business int/competitive edge of proponents
- BUT, some disclosure is req for complainant to substantiate a review (otherwise totally ineffective process)

Ratio - Propponent request disclosure of ratings of their proposal (subj to any necc redaction to protect sensitive data)

Huerto v College of Physicians and Surgeons

Facts

- H ~~told~~ about assumption, reasons convey impression that assumption relied on

Issue/Holding - JR re: assumption? **YES. QUASH**

Ratio - Uncertainty created by evidence relied on (or unclear) re: Committee's medical knowledge "sullies the process"

Hearing issues - Cross examination

Important re: cred - Allows you to weed out misrep w/in affidavit - only thru probing questions can you test statements

If cred central, CE may be required

Can be displaced by statutes → CE allowed subj to "reas req for full/fair disclosure"

Re Toronto Newspaper Guild and Globe Printing

Ratio - CE ~~granted~~ = denial of basic right to justice

Innisfil Township v Vespra Township

Facts

- Annexation application → Applicant relies on Minister letter re: populations growth

Issue/Holding - JR re: CE letter? **YES**

Ratio - When testing merits, CE critical (fact specific, not absolute) → Decision to CE is for right-holder, ~~court~~

Re County of Strathcona No 20 and MacLab Enterprises (Sandy MacTaggart)

Facts

- Planning Board directs for ag to resid RZ → landowners appeal re: lack of CE and win → developer appeals
 - Developer relies on letter by German scientist that landowners want to CE

Issue/Holding - JR re: CE letter? **NO**

Analysis

- CE nns = procedurally unfair,
- If another method to "answer case against," you're all good → here, letter was in writing and landowners could bring their own experts to dispute letter's content
- Inability to answer goes to weight, not admissibility
- Attacking weight is equally as effective if they call their own expert

Ratio - CE varies with context → if other routes are available to contest credibility, CE may not be required

Djakovic v BC (WCB)

Facts

- Physio ≈ paralysis
- D wants to CE staff → WCB says since evidence is in writing, you're covered

Issue/Holding - JR re: CE? **YES**

Analysis

- Altogether, reasons in favour of allowing CE
 - Baker factors → similar to court, ~~appeal further~~, huge impact, WCB chooses procedure
 - Centrality of CE to matters
 - WCB's reasoning weak
 - Burden of allowing CE versus benefit of allowing CE → tips in favour of allowing it.

Ratio - CE varies with context

Post-hearing

Reasons → some explanation needed, delivered to those who are impact → typically written, could just be transcript

Almost always required, some exceptions incl Municipal councils (can't discern), minister exercising admin power

Situations where esp req - adjudicative hear evidence, interpret legis, weigh/balance

Rationale for requiring reasons - shield from arbit, encourages/disciplines rationalization, facilitates review

Baker factors may enhance standard of reasons provided, esp if; > impact, > participatory rights

APJA s 7 - statutory body adversely affects - need written reasons, needs to give written decision (facts, decision)

2127423 Manitoba Ltd o/a London Limos v Unicity Taxi et al

Facts

- LL applies for license → Taxi companies file oppositions → License granted (in part) – no written reasons

Issue/Holding - JR re: lack of reasons? **NO**

Analysis

- Before one claims breach re: lack of reasons, a party should ask for the reasons from the DM

Ratio - Reasons ✓ context → IF IMPACTED PARTY KNOWS TEST + RECORD AVAILABLE = SIMPLE ORDER

Wall v Independent Policy Review Director

Facts

- G8 protests - W arrested for wearing a disguise with intent to be naughty → released without charge
- W applies via complaint process, dismissed b/c out of Δt - Legislation, "MAY decline to hear if too late"
- ONSC → though this is a screening decision (<PF), PI mandate, impact of confidence, legis req (≈LE) all lead to requiring better reasons

Issue/Holding - JR re: dismissed? **YES, BETTER REASONS REQUIRED FOR DISMISSING**

Analysis

- ✓ context, here → Can't just share the outcome, need the rationale
 - Director must balance caseload, discretion (NOT UNFETTERED), and legislative requirements
 - Need to explain the exercise of stat power, BUT don't need to be lengthy/complex
- PI here is >>>> b/c arrests were illegal, ∴ court is very suspicious of Directors reasons

Ratio - Reasons must describe factors/rationale if you have discretion

CH5: BIAS AND LACK OF INDEPENDENCE

EVERYBODY'S BIASED → When does it become disqualifying, impermissible, unfair, or perceived unfair proceeding

Bias is leaning, inclination, bent, predisposition towards one side/particular result (Wewaykum Indian Band v Canada, 2003 SCC 45)

Nemo iudex in causa propria sua debet esse → can't judge your own case, can't adjudicate own benefits → bias ≈ some kind of possession/implication in decision ≈ RAB

Question is < “is this individual biased at this moment?” → not subjective inquiry

> “does this situation give rise to sufficient risk of impermissible bias?” → more of an objective inquiry, perceptions matter

Impartiality = open mind w/out actual/perceived bias | Judi inde = free to hear and limit intervention

.∴ lower standard for admin law to overcome re: bias compared to judicial

Bias in Administrative/Quasi-Judicial Decision Makers - General

RAB → Full defn = Would reas person + knowing facts, believe that member may be influ by improper consid to favour?
(NEB 1978 Grandpré → though a dissent, now acknowledged to be majority)

- A reasonable apprehension is one held by
 - a well-informed member of the public
 - who is familiar with the DM process that governs the tribunal and
 - who is familiar with the facts relevant to the alleged bias.
- Would an informed person + viewing the matter realistically/practically, think that it > likely that DM, whether cons/uncons, not decide fairly?
 - Reas person ≠ very sensitive/scrupulous person,
 - Reas person = right-minded person familiar with the circumstances of the case
- There are many different ways of saying this, but it’s practically the same → apprehension = likelihood = suspect

The test is not actual bias → it is difficult to prove the actual state of mind of an individual

4 non-mutually exclusive categories of RAB → next four headings

1. Antagonism w/in hearing

Evidenced w/in DM’s decision/conduct (related to Baker)

- Allege bias against a tribunal is a serious allegation - challenges integrity/members/admin of justice [Jane Doe v Alberta (Deputy Minister of Executive Council); 2016 ABQB 135, Arthur v Canada (Procureur général), 2001 FCA 223 at para 8; Munoz v Canada (Citizenship & Immigration), 2012 FC 227]

DON’T want to over do this though and apply this willy-nilly, resulting in impacts to/incursions on tribunal’s process

Donn Larsen Development Ltd. v Church of Scientology of Alberta, 2007 ABCA 376

Ratio - Threshold for RAB is >>>>

Munoz v. Canada (Citizenship & Immigration), 2006 FC 1273

Ratio - Presumption of acting impartially

Slawsky v Edmonton 2019 ABCA 302

Facts

- P files appeal and office says out of Δt
 - Merits hearing alleges bias → Preliminary hearing dismisses this
 - JR → quashes bias + TJ finds concern re: “statements of annoyance” ≈ RAB

Issue/Holding - JR re: dismissed? **YES, BETTER REASONS REQUIRED FOR DISMISSING**

Analysis

- Cairns Factor re: original Δt question unsuccessful no evidence of City being obstructive

Ratio - RAB can be found and undermines subsequent claims

Brett v Ontario

Ratio - Applies to both DM/Counsel

2. Personal association between party/DM

Actual OR perceived → overall is a sliding scale re: level of implications of decision/level of conduct

Marques v Dylex Ltd 1977, 81 DLR (4th) 554 (Ont Div Ct)

Facts

- Challenge of decision certifying union where one DM was lawyer who used to work for one of the parties

Issue/Holding - JR re: RAB? **NO**

Ratio - Δt has passed and there is common overlap of people in these positions

Terceira Melo v Labourers International Union of North America 2013 ONSC 3344

Facts

- Challenge of decision certifying union where one DM sat on similar matter

Issue/Holding - JR re: RAB? **NO**

Ratio - Though TJ finds RAB, overturned b/c Δt has passed and there is common overlap of people in these positions

Institute of Chartered Accountants of Nfld and Labrodor v Cole 2017 NLRD(G) 73

Facts

- 2 decisions, DM recuses in first, but not second → challenge on this

Issue/Holding - JR re: RAB? **NO**

Ratio - Contextual analysis, you don't have to recuse if there is truly no association

Gedge v Hearing Aid Practitioners Board 2011 NLCA 50

Facts

- Every member of board implicated in some way → competitor, girlfriend of former business partner

Issue/Holding - JR re: RAB? **YES**

Ratio - Even if there is no objection raised, board must be weary of own make-up → small community of members does not mean you can just have obvious conflict

United Enterprises v Saskatchewan (Liquor and Gaming Commission) (SKQB)

Facts

- Prosecuting lawyer enters hearing room before appellant thru a side door. When appellant enters the PL is chatting up the panel → Panel chair calls lawyer by first name + invites him to a BBQ, such interactions continue

Issue/Holding - JR re: RAB? **YES**

Analysis

- Reasonably informed bystander would perceive bias on the part of the Commission;
- Commission's conduct suggest special ≈ with P → DM can be INFORMAL, can't be FAMILIAR to one side!

Ratio - RAB if, on objective/cumulative basis, tribunal treats one party w/ familiarity not extended to other

DeMaria v Law Society of Saskatchewan

Facts

- Bad guy who sat on left side of LC-201 during lectures → got others to do his work → conduct hearing

Issue/Holding - JR re: RAB? **NO**

Analysis

- DeMaria raises email re: 2 members golfing as a potential for bias → it was just an email in passing, they are both part of the legal community and this is expected conduct

Ratio - Familiarity nns completely delegitimizing

3. Previous involvement by DM

Committee for Justice and Liberty v National Energy Board et al 1978 1 SCR 369

Facts

- DM was involved w/ development of group who is now applicant

Issue/Holding - JR re: RAB? **YES**

Analysis

- Regardless of whether decision is about route or final approval, both pertain to economic and social feasibility which DM had a direct hand in establishing as participant in applicant's development → ∴ RAB

Ratio - Grand-daddy of category of three

New Brunswick v. Comeau, 2013 NBCA 41

Facts

- Employees working at an adult residential care facility
- Complaints, an investig ensued → Investigator also DM making FINAL DECISION
- Statute didn't expressly provide for this - no checks/balances on this

Issue/Holding - JR re: RAB? **YES**

Analysis

- Level of PF > so higher standard here

Ratio - May be acceptable to have investigator = DM if investigation can be appealed, here not available ∴ issue

Vespra v Ontario Municipal Board, 1983 43 OR (2d) 680 (Div Ct)

Facts

- Panel rehears decision despite objections and allows for no new evidence re: statute

Issue/Holding - JR re: RAB? **YES**

Ratio - Though a statute may have limits on deadlines, cannot deny evidence outright as it undermines whole hearing, in addition to panel rehearing = RAB

Paine v. University of Toronto

Ratio - Similar case as above, DM on performance review also = DM on tenure appeal committee, an issue

4. Attitudinal bias

Biased position on issues of contention, predisposed to cert outcome based on beliefs/statements

Cartwright v Rockyview County

Ratio - Can't disembark from decision, but provide reasoning/thoughts on the way out (esp if you hold position of power)

Lee v. Canadian Kennel Club Appeal Committee, 2003 ABQB 51

Facts

- Crazy dog person @ dog shows → Mouthy, real piece of work → taken to Dog Show Appeal Committee
 - Hearing 1 - witness/party in original decision starts to allege abuse/other really bad stuff
 - Not recognized/objected to, but went to record
 - Hearing 2 follows → DM brings down disciplinary action, upheld on appeal → JR

Issue/Holding - JR re: RAB? **YES**

Analysis

- Freq fliers nns disqualifying - Some indi often before same tribunal, including panel members (norm)
- RAB where irrelevant/prejudicial allegations are made and may impact decision maker
 - No acknowledgement from DM recognizing that these allegations were irrelevant.
 - Can't focus on character issues if it is not @ issue

Ratio - Well poisoning, must acknowledgement that it wasn't poisoned

Large v. Stratford (City) ONSC

Note: goes to SCC re: other matters

Facts

- Human rights tribunal case dealing w/ mand retirement at 60 → Chair made public comments questioning desirability of mand retirement req, suggests that such things ought to be dealt w/ on a case-by-case basis;

Issue/Holding - JR re: RAB on statements? **NO**

Analysis

- Statement/perspective was not at issue b/c all parties agreed that mand retirement at 60 was discrim
- Those who get appointed are also those who are interested → some leeway should be given on comments, so long as squarely NOT RELATED

Ratio - **RAB** comments address the point at issue in the case, ∴ **disqual**

Great Atlantic & Pacific Corporation Co of Canada v. Ontario (Human Rights Commission), 1993

Facts

- Prof had prev advocated on issues of sex discrim, including being a party to proceedings dealing w/ same issue.

Issue/Holding - JR re: RAB on positions? **YES**

Analysis

- Went beyond advocacy → become a personal complainant before the very commission that she was sitting on

Ratio - RAB when Advocate on specific issue to DM on specific issue → problem

Benedict v Ontario, 2000 (ONCA)

Ratio - RAB when judge being party in a wrongful dismissal case with similar facts, from her time as a lawyer → disqual

Pelletier v. Canada (Attorney General), 2008 FC 803

Facts

- Inquiry re: misuse of government funds → Mid-inquiry, Lead on inquiry absolutely lambasts politicians (“juicy stuff was yet to come,” “a charming scamp”) EVEN THOUGH there is still more info

Issue/Holding - JR re: RAB on statements? **YES**

Analysis

- TOR of inquiry made clear findings ✓ all evidence, so cannot state findings/guilty before this point
- DM should not be participants in the media while presiding → WC especially bad “catastrophic” = conclusory

Ratio - Saying “I’m not biased” ≠ enough → People are usually not aware of their own blind spots

Pecuniary or other Material Interests

“Slightest whiff” = was disqualifying (Dimes v. The Proprietors of the Grand Junction Canal, 1852) → evolves

- Ladies of Sacred Heart v Armstrong Point Association similar to Dimes, re: municipal zoning and living there

Now → exceptions for de minimus, a decision w/ a community-wide impact where a DM is a community member

Can be statutorily permitted → this is especially the case for ag producers, who often benefit from setting rates

<p><u>Energy Probe case</u></p> <p>Facts</p> <ul style="list-style-type: none"> • DM owned company that profited from power plant construct, decision re: new power plants <p>Issue/Holding - JR re: RAB? YES</p> <p>Analysis</p> <ul style="list-style-type: none"> • TJ’s finding that disqual, upheld by CA even though his business <u>would likely be involved</u> • Contingent expectation ≠ pecuniary • Benefit must come from decision itself 	<p><u>Canadian Pacific Ltd. v Matsqui Indian Band</u></p> <p>Facts</p> <ul style="list-style-type: none"> • Board dealing with the tax assessments of band lands leased to non-Indigenous persons <p>Issue/Holding - JR re: RAB? NO</p> <p>Analysis</p> <ul style="list-style-type: none"> • Disqual if larger bene + you’re incorporated into the benefit, Issue where there is a specific benefit, you receive it • Band = members are institutionally independent
---	---

Context is everything here

Sometimes where >>> PF owed, Baker factors used → courts have little tolerance for specter of bias

Kozak v. Canada (Minister of Citizenship and Immigration), 2006 FCA 124

Ratio - Standard of impartiality ✓ context, Baker factors can be applied (immigration cases will have > standards)

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

Facts

- Consumer advocate appointed to Board → makes strong public comment/colourful opinions re: exec salaries
- Board had several roles → supervise utilities (incl policy-making), investigate rates, call for hearings

Issue/Holding - JR re: RAB on statements? **YES, BUT NOT ON SOME PARTS**

Analysis

- Monopolies have to be regulated by tribunal who investigates, prosecutes, and adjudicates
- Board members need to be from community, which we have lower expectations for b/c they're stupid
- Supervisory/investigative functions of Board ≈ policy-driven → not disqualifying re: closed mind test
- Hearings ≈ adjudicative however → RAB on statements = disqualifying

Ratio - Different roles, different standards in different role

Bias in Legislative Decision Makers/Policy Makers

"Closed mind test" - DM closed, no longer amenable to persuasion?

Old St. Boniface Residents Association v. Winnipeg (City), 1990 CanLII 31 (SCC)

Facts

- Councillor participates in committees re: finance AND rezoning, supporting one before other

Issue/Holding - JR re: RAB on statements? **NO**

Analysis

- Alleging party has to prove party was NOT amenable to persuasion → mind made up irrevocably
- Councillor upheld finance decision on merits, no pecuniary concern or thwarting PI → could still make subsequent decision on rezoning

Ratio - Closed mind test → only statements that are expression of final opinion on matter are biased

St John's (City) v Seanic Canada Inc, 2016 NLCA 42

Facts

- TJ → RAB b/c clearly closed his mind based on electoral considerations → though he mentions planning considerations, the electoral considerations were clearly over-riding

Issue/Holding - JR re: RAB on statements? **NO**

Analysis

- So long as you're questioning whether to maintain your position → you're good
- Be wary as a councillor → part of mandatory regulatory regime that req councillors to inde judgment/deliberate

Ratio - Closed mind test → only statements that are expression of final opinion on matter are biased, mentioning planning considerations saves you

Save Richmond Farmland Society v Richmond (Township), [1990] 3 SCR 1213

Facts

- Councillor literally says "I've made up my mind, though I'll listen attentively"

Issue/Holding - JR re: RAB on statements? **NO**

Analysis

- Did not reach a final opinion
- Conc: Closed mind okay so long as it is not result of corruption, but rather an honest opinion strongly held

Ratio - Closed mind test → only statements that are expression of final opinion on matter are biased

Statutorily Authorized Bias

Exception to the rule → you can adjudicate, investigate, develop policy etc so long as Statute express/implied allows this

Brosseau v. Alberta Securities Commission

Facts

- Chair of AB Securities Commission had a statutory mandate to participate in diff parts of the relevant process.

Issue/Holding - JR re: RAB on prior involvement? **NO**

Analysis

- A specialized body must cover multiple tasks and will have repeated dealings
- Would be unreasonable for commission to have EXPLICIT permission from statute to review documents, implicit in existing authorization for investigation
- Not enough to just claim bias b/c of overlapping functions when this is literally rules set in place

Ratio - Statute can authorize this form of bias

Alberta Securities Commission v. Workum, 2010 ABCA 405

Ratio - Statute authorizes the same single person is the investigator and then the adjudicator - this bias is permitted

EA Manning Ltd v Ontario

Facts

- Report names/shames → chair makes comments

Issue/Holding - JR re: RAB on prior involvement? **NO**

Analysis

- Presumption that expert member swill act fair/impartial
- ~~Pass judgment~~ upon very matters it was to consider → we good

Ratio - Multiple stat auth roles for DM, but takes on additional roles → that would be an issue

Institutional Bias

What if DM operates in a flawed process → Test - Would "fully informed person" have RAB in a subst # of cases?

- If the issue is based on internal choices → CLaw remedy
- If the issue is based on the statute → Const remedy

2747-3174 Quebec Inc. v Quebec (Regie des permis d'alcool)

Facts

- Admin agency → permitting, investigations, prosecution, license revocation and the appeal process.
- Restaurant facing a license revocation challenged the institutional independence of the Regie.

Issue/Holding - JR re: RAB on prior involvement? **YES**

Analysis

- Same lawyers may be involved in advising licensing team, prosecutions AND the hearing DM
- Agency COULD have give evidence of safeguards - they weren't able to show any - if they had had these safeguards in place, it probably would've gone another way
- Though admin is more lenient, cannot be uber lenient as this would undermine public confidence
- However, the following are not concerning
 - Admin DM ≠ life appoint → this is fine, especially where dismissal can ≈ only to enumerated reasons
 - Supervision of executive/minister contact points → no evidence of influence, DM swears oath

Ratio - No evidence of safeguards re: prior involvement of advisors = an issue where not authorized

Ocean Port Hotel Ltd. v. BC Liquor Control and Licensing Branch, 2001 SCC 52

Facts

- Kitchen Nightmares → Drunk person attempting to fight + 1 minor on premises + 2 people taking drinks off-site.
- Ocean Port didn't challenge the merits, did challenged regulatory process

Issue/Holding - JR re: RAB on independence of board? **NO**

Analysis

- Board ≠ court, does not approach the constitutional role of the courts, rather Board = licensing body.
 - Suspension complained of was an incident of Board's license func re: Act
 - Simply an exercise of power here falls squarely within the executive power
- If statute is silent on a matter → assume it aligns w/ PNJs
- Though Board members served "@ pleasure" of government, that's okay in executive context
- Absent a constitutional issue, regime will prevail over any CLaw principle of natural justice

Ratio - Statute permits and creates structure of appointment - no RAB concern

Altus v. Calgary, 2015 ABCA 86

Facts

- Muni benefits if tax assessment is higher, appoints CARB members for 1-year term - ∴ board members are in a very wary position

Issue/Holding - JR re: RAB on independence of board? **NO**

Analysis

- If a statute authorizes a statutory scheme → no remedy for perceived "institutional bias" unless...
 - Const or quasi-const arg for indep (i.e. engages a liberty int? - Singh case), OR
 - Regie-type situation where broad responsibilities are assigned and the agency sets up responsibilities in a unfair and prejudicial manner.

Ratio - Courts undermine workings of a tribunal regime that has been set up by the legislature.

Lack of Independence...

CH6: INSTITUTIONAL DECISIONS

Overview

Institutional decisions - product of an institution/institutional process rather than made by identified individual(s).

Pros	> volume, < internal checks/balances, specialized staff
Cons	Anonymous decisions, loss of personal responsibilities for DM, rob applicant of opportunity to present full case b/c GLs dismiss

1. *delegatus non protest delegare* → delegate is not able to delegate → those who hold power must exercise it

- Those who hold power could ≈ institution
- Interpret statute to understand ambit/range of this

2. Duty of disclosure

3. Impartiality/independence of DM

4. Hear evidence, make decision

Need to be able to influence who hears

Exception, courts require powers to be delegated expressly by Minister to civil servants

- But, certain decisions clearly delegated to gov't Minister may require the Minister's personal decision [AG (Que) v Carrieres Ste-Therese Ltee, [1985] 1 SCR 831], [Suresh v Canada, 2002 SCC 1]

Vine v National Dock Labour Board [1957] AC 488 (Eng HL)

Facts

- Legislation provided that National Board (re: stevefors) could delegate its function to local board
 - Vine was assigned work, but did not report
 - Local board established discipline committee (further delegate) → Committee ordered Vine discharged

Issue/Holding - Legitimate delegation? **NO, NO AUTHORITY TO DO SO IN LEGISLATION**

Analysis

- Consider importance of the duty which is delegated and the people who delegate - we want to inspire confidence in administrative bodies
- Impossible to imply "limited right of delegation"

Ratio - If legislation says you're entitled to certain decision/DM, you should receive it

Delegating duty to hear

Local Government Board v Arlidge [1915] AC 120 (Eng HL)

Facts

- Council has authority under act to make orders to close unfit dwellings and terminate such orders
 - Inspector appointed/makes report → no individual described on report → Delegee signed though
 - Owner had right of appeal → Wanted to make case to Board

Issue/Holding - Right to individual DM w/in Board? **NO**

Analysis

- Board is legislatively directed to dispose of an appeal ≠ particular DM
- So long as it is signed by delegee, responsibility has been assigned → you can rely on others' support

Ratio - Consider volume, if volume > individual capacity → expected to obtain information vicariously via officials

Consultation among members

Though CA/SCC can circulate opinions, this isn't allowed in Admin → Tension is consistency vs. making your case to DM

- Tribunals differ from judges, less independence → so influence must be monitored more closely
 - DM exercises power as a member of an admin ∴ admin has interest in subst/qual of decisions
- Generally → So long as consultation meetings focus on consistency, then it is not an issue because it reflects
- May be statutorily permitted as well (Broadcasting Act s 20(1))
- Problem we try to avoid is not allowing party to cross-examine/question total base of decision

Consider pressure on indi DMs → per diems

IWA v Consolidated-Bathurst Packaging Ltd. [1990] 1 SCR 282

Facts

- OLRB panel makes decision → in deliberations, the "full board" meets and discusses
 - Board practice required discussion be limited to policy implications of draft (not fact)
 - No vote, no consensus, no minutes, no attendance

Issue/Holding - JR re: full board meeting re: BF? **NO**

Analysis

- Statute confers >>> powers re: interpret/apply ∴ law/policy are inseparable → board law needs to be consistent
- Any practice that unduly reduces capacity to act fairly is contrary to NJ → but, account for institutional constraints of admin (> efficiency) → ∴ this is a bit more of a balance between benefits/constraints
 - Limiting discussion to policy decision, no vote/consensus/minutes/attendance = DM discretion impact
 - Furthermore → rationale of full board meeting supports institutional aims → benefit from coherence
- Some level of discussion does not offend "who hears must decide" / "*audi alteram partem*"
 - Result of this meeting did not impose policy directives
- Dissent (Sopinka): Full board meeting might have affected outcome
 - "While achieving uniformity in decisions is a laudable, it cannot be done at expense of rules of NJ"

Ratio - Open discussion does not infringe on panel members ability to draw conclusion

Tremblay v Quebec [1992] 1 SCR 952

Facts

- T was receiving social aid, Minister denied her claim for certain costs → appeals to Commission
- Panel hears → draft decision → full board meeting that was called on by Commission president
 - w/ vote, attendance, differing opinion on decision → Panel changes mind

Issue/Holding - JR re: full board meeting? **YES, RAB**

Analysis

- Full board meeting - "compulsory consultation"/"systemic pressure" (or an appearance of systemic pressure)
 - Cumulatively, there is an imposition
- "Deliberative secrecy" ~~relied on~~ like judi does b/c level of top-down admin control over DM process differs

Ratio - Discussion that is stressful on indi DM is a problem

Ellis-Don Ltd. v Ontario (Labour Relations Board) [2001] 1 SCR 221

Facts

- Complaint that Ellis-Don Ltd had subcontracted under right union group → OLRB makes decision
- Ellis-don wants access to documents that inform decisions

Issue/Holding - JR re: full board meeting? **NO**

Analysis

- Institutional consultation ensures consistency, we don't know if it occurred here
 - Factors: Consult cannot be imposed by Auth + Limit to QOLP + Indi DM remain free to make decisions
 - Any intervention by JR = Mere speculation, intrusion on authority
- Dissent: "Presumption" of regularity of the process was displaced → change in position is basis for JR

Ratio - Discussion that is stressful on indi DM is a problem - lists out factors

Soft Law

Non-legally binding instruments (e.g. policy statements, guidelines, manuals, handbooks, etc.) for coherence

Again → Tension is consistency vs. making your case to DM → consistency = gov't program being delivered coherently

A DM should never defer to guideline for answer → "it's JUSTIFIED to apply here b/c GL" → weak af, use your brain

Canadian Association of Refugee Lawyers v. Canada (2020 FCA 196)

Facts

- Jurisprudential Guides imposed by the Minister of Immigration → Challenge that indi DM discretion fettered
- FC - Some, but not all Guides

Issue/Holding - JR re: guides? **NO**

Analysis

- An expectation to explain misalignment w/ GLs is troubling as it limits DM freedom
 - But, Bathurst says "institutional constraints" do not have fixed content → informed by context (here, there is a über high number of applications to get thru)
- Weigh competing factors of admin independence and party entitlement to alike treatment → do not encroach b/c
 - Simply put claimants on notice re: current existing conditions → can still decide case
 - Public guides → everyone can understand

Ratio - Soft law can be better technique to impose consistency instead of Court imposing decisions

Thamotharem v Canada (Minister of Citizenship and Immigration), 2007 FCA 198

Facts

- Challenge of GLs re: question ordering

Issue/Holding - JR re: GLs? **NO**

Analysis

- Soft law is never fully outside legal control (Roncarelli)
- Effective DM - strike a balance between general rules and the exercise of ad hoc discretion
 - General rules = soft law, communicate an agency's thinking on an issue to agency members and staff, and to the public at large → they can validly influence
 - Efficient to implement/amend
 - BUT → DM can't apply as though law, can't unduly fetter DM discretion
- GLs did not created "the kind of coercive environment" which would make it an improper fetter of discretion

Ratio - Admin free to devise processes for ensuring an acceptable level of consistency/quality

Agency Counsel

The third counsel (after two parties' counsel) - not really involved like the other too

- Advise panel on QoL, ~~assume~~ a role that creates impression that they're running hearing
- Appre of bias argument: would reas observer conclude → someone other statutorily authorized DM deciding?

- Degree of permissible intervention by agency's legal counsel ✓ nature of the proceeding
 - Exception → AUC has active counsel role, they are asking questions for the Commission

Contemporary reason writing is very much consultative; many sources including not delegate

Remember: Can't have counsel at several different stages (investigate/hearing)

Lil baby list of cases - generally, counsel can be available via telephone - if proceeding is more adversarial, there is a greater role	
<u>Venczel</u> Ratio - If counsel role >, may ≈ bias	<u>Hutterian v Starland</u> Ratio - Counsel needs to look/appear independent
<u>Pritchard</u> Ratio - Counsel advice subj to privilege but otherwise, must notify parties/opportunity to respond	<u>Weldevoord</u> Ratio - Can overlook ambiguous
<u>Brett</u> Ratio - Agency counsel favouring 1 party = problem	<u>Spring</u> Ratio - Assistance is allowed
<u>Vavilov/Re Del Core</u> Ratio - Admin justice ≠ judicial justice	<u>Re Sawyer</u> Ratio - Cannot ask for help re: 1 party ≈ bias

When writing reasons, remember - support is necessary b/c this is tough, we just need to make sure 2 following reqs met

- 1) reasons must be made by tribunal
- 2) reasons must be tribunal's own

Khan v College of Physicians and Surgeons of Ontario (1992), 94 DLR (4th) 192 (Ont CA)

Facts

- Discipline committee misconduct → appeal allowed, then reversed b/c despite evidential errors, the case was strong enough that the result would've been same
 - Decision comes 3 months later w/ assistance of counsel = 1. Draft 2. Counsel Review 3. Final Draft

Issue/Holding - JR re: agency? **NO**

Analysis

- Committee is entitled to legal assistance during hearing → acceptable limits considering statute, nature of advice
 - Simply improving quality and counsel review after initial draft
 - "Outside assistance" must be married to PF → there is no magic formula
 - Support should not be supportive, saying no to support is unrealistic and destructive
- Nothing suggests that this undermined C2M or compromised independence

Ratio - So long as counsel involvement **compromises** independence/impartiality of committee, allowed → Khan Factors

- DM 1st draft + Counsel only reviews, does not write + DMs reconvene post edit + Final product signed by DM

Bovbel v Canada (Minister of Employment and Immigration) [1994] 2 FC 563 (CA)

Facts

- Immigration Board decision re: "convention refugee"
- Members of the Board were governed by "Reasons Review Policy," includes a review opportunity

Issue/Holding - JR re: policy? **NO**

Analysis

- Nothing wrong w/ receiving comments from legal advisor, especially where - no impacts on findings of fact, just noting factual inconsistencies and how these could be resolved
 - Though there is potential for abuse (any policy could be abused) → here there is no evidence of this
 - Counsel having access to file/fact ≠ bad, does not amount to messing w/ QOF (though if this occurs, that's a problem)

Ratio - Policy re: review of written reasons allowed where no impact on facts

CH7: Rulemaking

NOT MADE BY LEGISLATURE → Delegated agency/DM can lay down a norm of conduct of general application (subord)
Legislation = skeleton of principles → *Regulations add detail/process* → *Policies/GL add context*

Sometimes there are statutory requirements for creating rules (Feds have process, Ab doesn't)

- E.g. Env BOR in Ontario req public participation in "env signi decision" BUT failure to comply does not impact validity, BUT appeal will be permitted if public participation reqs not met
- Courts have tended not to interfere with processes for rule-making (quotas in Canadian Association of Regulated Importers, and bylaw in Wyoming)

Remember: Pre-Nicholson → [1978] → Post-Nicholson
 Quasi-j = PF Quasi-j/admin = PF
 Admin ≠ PF Legis ≠ PF

PART III SUBSTANTIVE REVIEW

CH9: STANDARDS OF REVIEW

Overview

Reminder: administrative decisions can appear wrong on its face, conflict with precedents

BUT! There is a role for review of decision

- E.g. Crevier - provincially constituted tribunal cannot be constitutional immunized of jurisdictional questions
- s 96 is root of subst review ≈ General, constitutionally-established role of superior courts to oversee delegated authority
- Appears to address the appointment of Judges merely,
 - But Courts have determined that it prevents the legislative branch from granting unlimited auth to persons/bodies that are not appointed as Judges (e.g. administrative tribunals).

Privative clause is a statutory attempt to restricts JR → "authorized" + "circumscribed" the court's role

- Types
 - Full / strong privative clause → broad language to preclude any form of review by court
 - Weak privative clause → finality clause / exclusive jurisdiction clause
- Considerations
 - JR is constitutionally entrenched
 - Signals legislative intent ≈ "deference" (**determinative**)
 - Interpretation may also √ statutory appeal clause
- Reasons
 - Protracted ΔT and Court litigation is \$\$\$\$\$\$
 - Tripartite decision-maker required for labour (employer, employee, neutral)

Courts continue to reduce presence of a privative clause

- there is a line of decisions re: role of courts, legislature can't take away role of courts to give away to tribunal
- Example → Residential tenancies board, can't take away role and immunize entirely
- Example of opposite - LU regulation was never courts role, ∴ they don't interfere

Statutory appeals attempt to circumscribe the court's role - define route to court

- can be very broad (all questions) or limited (e.g. errors of law and jurisdiction)
- W/ or w/out leave of Court (arguable case, chance of success, serious issue) – "permission to appeal"

If ~~statutory appeal~~ → JR exists by default

Privative Clause indicates > DEFERENCE	Statutory Appeal Clause indicates < DEFERENCE (not as clear cut)
- A reminder that the effect of these is dependent on Constitutional barriers... Similar to how there are constitutional limits on the impact of statute on CLaw PF	

- Impact of these is especially limited if the subject matter area was one previously of judicial determination

Pre-Dunsmuir, statutory appeal on a QOF → still deference to trier of fact

However, statutory appeal on QOL → no presumption of deference (historically)

Pre-Vavilov SOR process

For a long time → simply defer to their expertise unless ROL/PF

- Tension between deference/respecting legislature and upholding consistency/ROL

Pre-2008 → Pushpanathan factors (orig Bibeault) produces spectrum of deference... consider...

- (1) Presence/absence of privative clause/statutory appeal mech,
- (2) Expertise of the courts vs. tribunal
- (3) Purpose of Act, specific provision
- (4) Nature of the issue (QOL/QOF)
- Based on above factors ≈>
 - Correctness (did we hit the bullseye) - Court will intervene if wrong
 - Reas simpliciter/unreas (did we hit the board) - Court will not intervene if within reas range
 - Patent unreas (did we miss entirely) - Court will not intervene unless totally irrational

Dunsmuir (2008)...

- Shifted approach from contextual to functional
- Continues to be how we describe a reasonable decision:
 - “transparent, intelligible and justifiable”
 - the range of reas will encompass “a range of possible acceptable outcomes which are defensible in respect to the facts and law”.
- Continues to be important re: public/private overlap - terms of private agreement will generally govern.
- Notes this on reasonableness
 - Reasonableness = deferential standard
 - Animating principle = certain questions that come before administrative tribunals ≠ one specific, particular result, rather may give rise to a number of possible, reasonable conclusions.
 - Tribunals have a margin of appreciation within the range of acceptable and rational solutions.
 - Court conducting a review for reas inquires into qualities that make a decision reas, referring both to process of articulating the reasons and to outcomes.
 - JR reasonableness is concerned w/
 - existence of “justification, transparency, intelligibility” w/in the decision-making process.
 - whether decision falls w/in a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

And then we are in for a wild ride... Greg is sad

Dunsmuir v. New Brunswick, [2008], 2008 SCC 9

Facts

- Court official dismissed after 3 reprimands w/out cause, served at pleasure (but subj to employment agreement)
 - One piece of legislation says termination governed by ordinary rules of contract
 - Another says that “grievance process” extended to non-unionized
 - Gov’t believes first piece of legislation applies, don’t need to provide cause (just say official is unfit)
- Adjudicator (DM) says cause is required based on Indian Head, says reasons are required
- NBQB overturns based on correctness → NBCA says unreasonableness applies (but still overturns)

Issue - Which SOR? ***Burn the whole system down***

Analysis

- Legis supreme is maintained b/c SOR is a choice → privative clauses nns impactful, legis can’t remove this power
- There are two buckets: Reas/Correct → How to sort → presumption of reasonableness... but... consider...

- 1. What is the issue
- 2. Previous jurisprudence categorizes, keep (via Pushpanathan)
- 3. Analyze following factors for a contextual analysis
 - Does a presumption of reasonableness apply? Is it rebutted?
 - Tribunal interpreting own statute → reasonableness b/c of familiarity
 - Tribunal interpreting ~~own~~ statute nns = correctness
 - Tribunal expertise in CLaw (re: adjudication) → reasonableness b/c of familiarity
 - Privative clause → reasonableness b/c > deference indicated (NOT DETERMINATIVE)
 - Four categories shift to correctness -Const, Central importance, True questions of juris, 2+
- Adjudication flawed b.c applied PSLRA, which was at odds w/ contract (contract was supreme per CSA) → ∴ not reasonable

Ratio - New process for JR → BUCKETS w/ some contextual

Canada (Minister of Citizenship) v Khosa, 2009 SCC 12

- A spectrum. It is a singular standard that takes its colour from the context

Mowat, 2011 SCC 53

- "Disguised correctness" where the words "reas/reas" supplant "correct"
 - correctness is right or wrong
 - reasonable is a deferential standard considering justification

Newfoundland Nurses, 2011 SCC 62

- Decision = reasonable based on reasons "that could be offered in support" → leads to lots of imagination → this concept no longer applies

McLean v. BC Securities Commission, 2013 SCC 67

- Correctness when there is only one reasonable answer:
 - Sometimes there is only one reasonable outcome that does not turn it into correctness, it just means there is a narrow range of reasonable outcomes i.e. "All houses shall be made of brick" - house will be brick/wood/cinder block = reas/unreas/reas

Wilson v. Atomic Energy, 2016 SCC 29

- When things really come apart
 - Abella J → Dunsmuir isn't working. This should be reasonableness
 - McLachlin C.J., Karakatsanis J., Gascon J., Wagner J. → Don't need to revisit SOR in order to rule on the case. While we appreciate Abella J.'s comments, we are not prepared to adopt any specific proposal at this time.
 - Cromwell J. → Dunsmuir is working finr. No reason to change anything.
 - Moldaver J., Cote J., Brown J. → Should just be correctness here.

Capilano Mall 2016 SCC 47

- Stat appeal measure matters, JR/Stat appeal subj to same exceptions,
 - another way to say this is presence of statutory appeal ≠ impact on presumption reasonableness

Footnote: Greg was frustrated by SOR Pre-Vavilov → it didn't matter, but now everything has changed → he's happier

CH10: SELECTING SOR

Overview

Before selections, is there permission to appeal, often determined by myriad of factors

- Sufficient important + Reasonable chance

- Type of question asked
 - QOF - interpretation to a set of facts
 - QOL - application of a legal standard
 - MQFL - application of a legal standard to set of facts

Several questions were created by Dunsmuir

- Charter, Indigenous, quasi-constitutional issues?
- Constitutional and MQFL?
- How close must the precedent match?
- What does removal of patent unreasonableness mean for legislation with this term?
- How do you determine what's central for question of central importance?
- What if there are no reasons?

Canada (Director of Research and Investigation) v Southam, 1997 CanLII 385 (SCC)

Analysis

- 3 types
 - QOL are questions about what the correct legal test is;
 - QOF are questions about what actually took place between the parties;
 - MQFL are questions about whether the facts satisfy the legal tests.
- Distinction can be difficult → In theoretical terms, the rule...
 - As we get more particular with law/legal test, we get closer to MQFL
 - as level of generality of challenged proposition approaches complete particularity, the matter approaches unqualified application of law and draws away from the forging of new law, and hence draws nigh to being an unqualified question of mixed law and fact.

Ratio - Best case to cite explanation of QOL/F

What did Vavilov create

We were living in a very contextual world → very case-by-case / Current framework unclear
 Everything new in Vavilov → only after careful consid do alter earlier decision b/c → | Dunsmuir's Promise ~~realized~~
 \ Lim practical guidance

SOR - presumption of reasonableness unless certain category

- 1) Legislation says other standard - explicit/implicit
- 2) ROL says other standard - Const/2+/GQLCI2LS/Concurrent auth (Composers)
 - Const - if CA is reviewing KB Doré analysis, then that is on CA

Simplifies framework - promote culture of justification

Retains Dunsmuir's focus on JR ≈ maintaining ROL while giving effect to legislative intent

There are additional reasons for presumption of reasonableness (expertise, responsiveness, proximity), but legislative choice is the main factor in upholding it

Pushpanathan

Analysis

- Issue boiled down here to whether drug trafficking was inconsistent w/ UN principles and values,
- Court applied a correctness standard having characterized the question as one of general international law.

Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63

Facts

- Fire convicted coach, arbitrator says conviction is not determinative

Issue - Arbitrator decision invalid? **YES**

Analysis

- ROL will not tolerate different outcomes - need for consistency is high - SOR is correctness
- Don't want to force relitigate based on conviction, or create scenario that court would create conflict

Ratio - Identifies GQLCI2LS where an administrative tribunal will be barred because of res judicata

Note: This is similar to Greg's War Story about evicting pigs - Greg is 2-0 (getting a summary conviction - criminal) and now brings forward an injunction application → The defendant could not re-raise issues brought up in the summary conviction → correctness would apply to review of scenario

Mouvement Laïque Québécois v Saguenay (City), 2015 SCC 16

Fact

- HRC makes decision around prayer before town meeting

Issue - Did prayer violate state's duty of religious neutrality that flowed from freedom of conscience/religion? **YES**

Analysis

- Review of HRC is based on correctness - no deference was intended by statute

Ratio - Identifies GQLCI2LS in relation to state's duty of religious neutrality

Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53

Facts

- Request for review to FOIP Commissioner in relation to UCalgary say they have grounds - legal opinion - fired
 - Legal opinion is FOIPed, fits requests, but not disclosed due to FOIP
 - Appeal to OIPC - OIPC gets all the documents
 - FOIP Act, "...[d]espite any other enactment or any privilege of the law of evidence."
 - OIPC says... yes we do | UCalgary says the below is not very specific, b/c privilege

Analysis

- SCC says "clear, explicit and unequivocal" statutory language is required
- Decision of Commissioner on this issue reviewable on correctness standard - decision is important in all contexts

Ratio - Identifies GQLCI2LS re: appropriateness of limits of solicitor-client privilege

**Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 - [Selecting SOR]

Facts

- Vavilov born in Canada to undercover Russian spies → In 2010, parents were arrested in U.S., returned to Russia
 - Four years later, Registrar of citizenship notified Vavilov that Citizenship canceled
 - Analyst concludes in report → parents lawfully Canadian citizens or PR @ ΔT of Vavilov's birth,
 - Parents were "employees/ reps of a foreign gov't" per s. 3(2)(a) of Citizenship Act
- FC dismisses JR (conducted same analysis of 3(2)(a) as analyst)
- FCA quashes decision as unreasonable (3(2)(a) applies only to diplomatic immunities/privities, ∴ citizenship)

Issue - SOR analysis? **DESTROY IT ALL**

Analysis

- Presumption of reasonableness (can be rebutted) → b/c SOP + presume that legislature...
 - Established ABC to determine issues before it
 - Wanted minimal judicial interference
 - Delegated to level of experts
- Rebut presumption where...
 - Legislature says different standard...
 - Explicitly if they say correctness, it's correctness (you silly goose)
 - Implicitly, a.k.a. Statutory appeal mechanism
 - QOL (statute interpretation, charter) - Correctness

- Pushpanathan: Legislature assumed to leave highly general QOL to courts
- E.g. What does negligence mean here
- QOF/MQFL - POE - PLAINLY visible + AFFECTS outcome → must find error + show impact
 - MQFL - E.g. Whether D committed alleged acts
 - QOF
 - Dunsmuir: defer > b/c > respect for TOF → assess contextual factors of providing evidence, more familiar w/ regulatory context
 - E.g.: Whether D committed negligence
- ROL req correctness
 - Const question
 - Provision within enabling statute alleged to violate Charter/Const = Correctness
 - EXCEPTION - decision itself alleged to impact Charter Right ≈ Doré ≈ Apply “Oakes”
 - General Question of Law of Central Importance to the Legal System as a whole for everyone ever alive of planet earth and that there is massive system-wide repercussions (GQLCI2LS)
 - “Wider public concern,” “framing in abstract” is not enough
 - E.g. - Criminal/Civil proceedings, Scope of state’s religious neutrality, FOIP/Solicitor/client privilege, Parliamentary Privilege
 - Questions re: 2+ administrative bodies → avoid operational conflict - two agencies pulling in two different/incompatible directions
- COURT IS CAREFUL TO NOTE THAT THIS LIST IS NON-EXHAUSTIVE - any additional is exceptional, consistent with overarching framework/principles
 - Rejects additional options like “persistent discord w/in admin tribunal” - use soft law instead
 - Other rejected examples - nature of employment (not broad enough)

Society of Composers et. al v. Entertainment Software Association, 2022 SCC 30

Ratio - adds 6th ground - court/tribunal have concurrent jurisdiction → tribunal is reviewed on correctness, b/c legislature wanted to subject decisions to appellate SOR

What did Vavilov destroy

Vavilov epically destroyed “True Questions of Vires/jurisdiction” from Dunsmuir/United Taxi b/c

- United Taxi was basically like “Can the COC restrict taxi licenses” → this is the purest version
 - Cote - first question is always vires, are you in it
 - Brown - Vires does not apply well to reasonableness b/c it is a > breadth of analysis, some DM’s ~~wrote~~ **write reasons**, review of legis expands scope
- Frankly everything is jurisdiction → We should defer to tribunals
- See recent prior example cases - West Fraser Mills, 1120732
- Shifted this kind of analysis to reasonableness itself
 - Sometimes jurisdiction is clear and the question is “did they cross the line”
 - Sometimes jurisdiction is unclear and the question is “did they cross the line, beyond what is fairly allowable”

∴ we can do reasonableness analysis to find only one reasonable outcome - can establish finalized decision w/in final appeal, “decision was unreas, and the only other possible decision was reasonable → ∴ give passport”

- Deference re: exercising discretion, means that we don’t question ability to exercise own jurisdiction

Privative clauses are not epic

Vavilov also epically destroyed the consideration of expertise

- Before, > expert = > deference → again shifted to reasonableness itself

West Fraser Mills Ltd. v British Columbia (Workers Compensation Appeal Tribunal), 2018 SCC 22

Analysis

- Framed issue as a true question of jurisdiction → ∴ United Taxi

- Language used in statute could not be broader → “...any regulation that may reasonably be construed to be related to workplace health and safety is authorized...” → Reasonable standard should be applied

Ratio - True question of jurisdiction translated to a ≈ reasonable standard

1120732 B.C. Ltd. v Whistler (Resort Municipality), 2019 BCSC 984, aff'd 2020BCCA 101

Facts

- Chambers judge (pre-Vavilov) used United Taxi → Next court used reasonableness

Analysis

- Emphasis on “robust” nature of the reasonableness review: “...jurisdictional power of an administrative body is to now be reviewed on the reas standard unless there is a competing administrative body that may have jurisdiction.”

Ratio - True question of jurisdiction translated to a ≈ reasonable standard

Minority's epic criticisms/general concerns with of Vavilov

Minority was like this is so fucking whack for the following reasons

- Legis can delegate out work w/ < oversight
 - Gov't activities operationalized with less oversight re: alignment w/ constitution if tribunal's are afforded some deference re: this
- What is an issue of central importance to the legal system as a whole? Doesn't this just invite further debate?
- Removing jurisdiction → but jurisprudence says that JR of QOJ is > JR of QOL
- Adding additional grounds could be concerning
- Forget privative clauses? That is not listening to the legislature
- Even >>>> intervention re: statutory appeals and appellate standards of review
- Two-tiered system of review - JR reasonableness then Statutory review (see Neptune)
- Rejection of past precedents troubling - Court should not so easily dispense past precedents
 - May open up many new issues that had been previously settled

Rationales applied for selecting certain SOR, as derived from legislative choices, nns aligned w/ judicial outcomes

Questions after Vavilov - WHAT IF LEGISLATION SAYS PATENT UNREASONABLE

Neptune Wellness Solutions v. Canada (Border Services Agency), 2020 FCA 151

Note: they said potential exam question

Facts

- NWS Importer of Krill - bring in raw and then processed and then consumed
 - Not safe for human consumption at border? | border says it is safe (eventually) → implications for tariff
- Stat appeal mech allows for decision of CITT (Canad Int'l Trade Tribunal) on QOL ≈ interpret legislation (to FCA)
- JR is restricted by privative clause, but did not restrict JR for MQFL (to FC)

Issue/Holding - FC or FCAy? **BOTH**

Analysis

- Nothing wrong w/ receiving comments from legal advisor, especially where - no impacts on findings of fact, just noting factual inconsistencies and how these could be resolved
 - Though there is potential for abuse (any policy could be abused) → here there is no evidence of this
 - Counsel having access to file/fact ≠ bad, does not amount to messing w/ QOF (though if this occurs, that's a problem)

Ratio - Policy re: review of written reasons allowed where no impact on facts

CH11: Applying the Standards of Review

Correctness

Court give deference to DM → Not any of this “Is DM reas,” it's “Do I agree w/ DM” → OWN ANALYSIS, OWN ANSWER

Judicial substitution, but it's attentive correctness (unpack some of DM's work)

Roger's correctness category → round up SOR if diff stat appeal/action would amount to > SOR now where this is a sep jurisdiction appeal tribunal, int of those provision is on correctness

Bell Canada v. Canada (Attorney General), 2019 SCC 66

Facts

- Simultaneous subst - Canad channels have rights to program from elsewhere + rights to Canad commercials
- In 2017, the CRTC issued an order to prevent simultaneous substitution during the Super Bowl
 - Bell (the broadcaster) and the NFL appealed the jurisdiction of the CRTC to issue this order

Issue - SOR? Correct interpretation of enabling legislation? **CORRECTNESS, NO**

Analysis

- Interpretation of BA = QOL ∴ correctness
- CRTC lacked the authority to prohibit simultaneous subst (s. 9(1)(h) of BA) b/c it was program-specific, inconsistent w/ statute's goals (maintain a generation of Canadian Content)
- Use attentive correctness, esp if tribunal's deal w/ specialized issues
- Dissent: Angry that we are ignoring expertise of tribunal

Ratio - Explains attentive correctness - courts can no longer just totally apply their own reasons

Canadian National Railway Company v Richardson International Ltd., 2020 FCA 20

Facts

- If there is an interchange, @ interchange, can switch providers

Issue - Was there an "interchange" between two (CN/CPR) rail lines near Lamont? **Remit**

Analysis

- Interpretation of BA = QOL ∴ correctness
- Although correctness, the expertise of DM is relevant → allows for Court to evaluate context, purposes, technical implications.

Ratio - Correctness analysis cna just led to remitting

POE

Pretty new to administrative → existed in civil appeal (robust body of case law)

PLAINLY visible + AFFECTS outcome → must find error + show impact

- You must fell the tree, not just shake the branches - South Yukon Forest Corp., 2012 FCA 165
- Similar to reasonableness standard → it's not a treasure hunt for errors LOL

Housen v. Nikolaisen, 2002 SCC 33

Analysis

- Generally speaking - the reviewing court will not second-guess or interfere with factual conclusions, unless the process in formulating the factual conclusion is in error... e.g.s...
 - (a) Findings made in the absence of evidence,
 - (b) findings made in conflict with the accepted evidence,
 - (c) findings of fact, drawn from primary facts, that are a result of speculation rather than inference; and
 - (e) findings of fact based on evidence that has no evidentiary value b/c it has been rejected by the trier of fact: Quadrex Hedge Capital v. OSC, 2020 ONSC 4392 (opposite of B)

Ratio - POE creation

Mahjoud v. Canada (Citizenship and Immigration), 2017 FCA 157

Facts

- Security certificate case → the lawyer didn't know POE and so the Judge schooled them

Analysis

- “Palpable” means an error that is obvious... e.g... are obvious illogical reasons
 - findings that cannot sit together,
 - findings without any admissible evidence in support,
 - improper inferences or logical error,
 - findings with a complete or near-complete disregard of the evidence.
- “Overriding” means an error that affects the outcome of a case.
 - If a particular fact was found after, but it does not impact the case, it is not overriding.
- Need both P+O
 - But, a whole bunch of little errors can fell the tree ≈ could amount to need to review, b/c poor job
- 1st instance courts enjoy rebuttable presumption that they considered all evidence → POE process looks @ just decision, record, submission

Ratio - POE explanation

Al-Ghamdi v. College of Physicians and Surgeons of Alberta, 2020 ABCA 71

Facts

- Al-Ghamdi is a frequent litigant and a declared vexatious litigant in the Province of Alberta
- Grande Prairie surgeon found to have committed unprofessional behaviour ✓ pattern of disruptive conduct

Issue - Does “a pattern of disruptive behaviour” qualifies as “unprofessional conduct?” **YES**

Analysis

- This an epically classic case of MQFL, because we are basing things on conceptual level → POE
- There are problems, does not breach POE → Board put erroneous emphasis on one factor it shouldn't have - but in the big picture it didn't matter to the final conclusion

Ratio - POE in action

Mayer v. The Superintendent of Motor Vehicles, 2020 BCSC 474

Facts

- Challenge to a driving suspension under BC's administrative driver's licensing penalty scheme - caught texting 2 times in 1 month = 4 month prohibition

Issue - SOR? **POE**

Analysis

- Stat appeal mech ≈ > involvement of Courts? COULD only dismiss OR allow appeal + terminate DM's decision
 - Basically turns on DM's discretionary power → Not actually a lot of deference, they're not permitted to create their own decision by the stat appeal mech, so this is not a correctness review
- Argues that weighing is of factors prejudiced vs. safety of people using roads
 - Alleges insufficient reasons re: hardship/circumstances
 - Panel is weighing = fact-finding exercise → it's an issue of fact
 - i. Panel is applying facts to regime → MQFL
- POE b/c questions involved in analysis were MQFL (application of discretionary principles/judgment to scenario)
 - Provision to disallow invalidation re: unreviewed evidence also doing a lot of work here

Ratio - POE in action

POE v Reas

Appeal courts often require you to frame a proposed question.

P&O error is suggested to be > deferential than reas (POE is looking to any error, while Reas is logical chain)

Framing of question makes difference → POE is better on offense, Reas is better on defence

Case with a defensible outcome but lousy reasoning (Reas), or a fact-heavy appeal (POE)

But the courts know this - “conceptual sleight of hand” (Sunshine Village Corp)

Patent unreasonableness

Lives in legislation only. E.g.s (MGA s 548 appeal of council's decision re: clean-up order appeal, or BCATA)

- BCATA calls it "exercised arbit, in BF, impro purpose, based on irrelevant factors, or doesn't account for stat req"

@ CLaw this standard was extinguished in Dunsmuir

= decision is clearly irrational or "not in accordance with reason," bordering on absurd

If const conseq, we 1st respect legislatures decision to regulate DM in this way and 2nd proly investigate anyways

Ryan, 2003 SCC 20

Ratio - "clearly irrational," ~~accordance~~ w/ reasons, a simple/easily identifiable defect, no real possibility of doubting defect

Pacific Newspaper Group, 2014 BCCA 496

Ratio - Where patent unreasonableness is the standard of review, the Court will apply the pre-Dunsmuir meaning

Team Transport Services Ltd, 2021 BCCA 211

Ratio - If PR, also unreas

Steadman v WCAT 2021 BCSC 477

Ratio - Must show "clearly irrational" - sufficiently srs shortcomings in decisions such that exhibits requisite level of JIT

Reasonableness

It's literally the lynchpin of institutional legitimacy - their role is epic...

- Explain... show how arg considered... shield against arbitrariness... feels fairer... disciplines reasons... provides auth

Assessing reasons ≠ fashioning your own yardstick to measure it by (Ryan 2003)

In America, everything is fucked up ≈ they use Chevron deference (approx. = to reas)...

- liberals now see the doctrine as a means of safeguarding expert policymaking,
- conservatives believe it enables governance by the so-called "deep state."

Vavilov shifts a lot of the factors that would've been considered pre-SOR into reasonableness

<u>Understand the reasons' process Read in light of record/setting</u> Reas decision = [Internally coherent reasoning] + [justified in light of legal/factual framework] → Burden is on challenger to prove either of these	
Reas decision = JIT in relation to the people who are subject to it <ul style="list-style-type: none"> • Problems can ≈ Reas outcome, but unreas reas OR ≈ Unreas outcome, but reas reas REMEMBER admin justice ≠ judicial justice Reasons will not be required everywhere (re: Baker), but esp where there has been; participatory rights, adverse decision, right of appeal	
Illogical chain - circular reasoning, generalization, false dilemma, absurd premise, have re: for record	Patel: Unreas, not responsive to the evidence and no internal chain of rationale Boros: Unreas, failure to address a critical factor Longuepee: Irrational chain of analysis
Gov statute - Discretion provided, DM can't fetter and must align w/ reasons for discretion	
Other statute/CLaw - DM can't int in unreas way, inconsistent w/ court	
Stat interpret	<u>Past</u> : Reas ≈ any int that statute is reas capable of bearing <u>Now</u> : we deserve better Minster Enterprises (CA decision): Reas, having regard to the governing stat. scheme Taino: Unreas as no effort to distinguish from existing precedent/common interpretations Canada Post: Reas, accounting for principles of statutory interpretation Smith: Unreas, accounting for principles of statutory interpretation
Evidence be4 DM - must be reasonably responsive reasons - nns to review UNLESS fundamental misapprehended, failed before it (like Baker)	Sadiq: Unreas if presumption of all evid accounted for rebutted by existing evidence
Failure to consider submit - this affirms to parties that right to be heard/PF	<u>General</u> : If there are 20 grounds, some will be more important than others (If everything is a priority, nothing is a priority)

respected	Mattar: Unreasonable decision, not reflecting a key issue raised by Ms. Mattar
Past precedents (policies, plenary, training materials, templates) Court says correct = bound Court says reas = bound ID facts? Bear burden of explain Conflict? Tribunal sorts out	<u>General</u> : admin DM, a single person, suddenly they change practices NOT REAS Honey Fashions: Appeal court finds unreas, given past practices of a regulator Reyes: Reas, as tribunals are not bound to precedent but must account for relevant precedent. Labourers International Union: Reas, addressing conflicting lines of precedent
Impact ≈ spectrum Baker/Webb set	<u>Spectrum</u> : > LL, dignity, livelihood, political death OR Sticky Nugz v AGCO 2020 ONSC 5916 (merely imp \$\$ stake) Khan: Unreas, missing aspects of the analysis that are relevant, given the significance of the decision to the individual. <u>Note</u> : same set of reasons could have divergent reasonableness ✓ vulnerability/sophistication of party

**Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 [Reasonableness analysis]

Analysis

- Reasons generally
 - Not all DM need reasons
 - Where reasons req important role re: public trust/soundness
 - Req reasons b/c basis for legit for procedural/subst perspective
 - Reasonableness analysis focuses on process, NOT outcome
 - Reasonableness is a SINGLE STANDARD that accounts for CONTEXT
 - Varying levels of reasonableness (no mod/super-reas) (Khosa v. Canada, 2009 SCC 12.)
- Step 1 - Understand the reasons' process
- Step 2 - Read in light of record/setting
 - ≠ standard of perfection, ≠ lawyer standard
 - Expertise/specificity need to be respected - smtms things seem silly, but law ≠ subj matter experts
 - Diverge from Nfld Nurses - we're not BOLSTERING deficient reasons
 - Nurses allows connecting the dots, but NOT adding new dots
- Step 3a - the test - Reas decision = [Internally coherent reasoning] + [justified in light of legal/factual framework]
 - [Internally coherent reasoning] - no line-by-line treasure hunt - must trace line of reasoning w/out fatal flaw
 - [Justified in light of legal/factual framework]
 - i) Gov statute - comply w/ rationale/purview of the statutory scheme
 - ii) Other stat/CLaw - comply OR explain why diverting
 - iii) Stat int - < stand than court, also tribunal can consider other things (elevate int exercise)
 - iv) Evidence be4 DM - NOT reweigh, but jeopardized by misapprehend, out of context, miss
 - v) Submit of parties - NOT every argument, BUT must do those of central importance
 - vi) Past practices - Consist is constraint that MAY be considered, BUT unanimity can be tolerated
 - vii) Impact - more significant impact? Reasons = stakes of decision
- Step 3b - NO REASONS? Look to record as whole - debate, deliberations and statements of policy - naturally is more outcome-based b/c the process record is <
- Dissent: deference needs to be afforded consistently/across board, this may be some overreach

Analysis applied

- Reas to find "Vavilov's parents = other representatives of employees in Canada of a foreign government?"
 - [Justified in light of legal/factual framework]
 - iii) Stat int - though reas on face, it fails to account for whole context (i.e. of contemplated persons are those with diplomatic privileges/immunities)
 - ii) Other stat/CLaw - Domestic legislation is presumed to comply w/ internat oblig .'. narrows
 - vi) Past practices - Reas decision = DM *grappling w/ that existing precedent* (nns = precedent)
 - vii) Impact - stateless and w/out citizenship rights
 - NOT [Justified in light of legal/factual framework] and .'. unreasonable, [Internally coherent] doesn't apply here
- Ratio - Reas decision = [Internally coherent reasoning] + [justified in light of legal/factual framework]

Patel v Canada (Citizenship and Immigration), 2020 FC 77

Note: shows overlap between substantive/procedural concerns

Facts

- Accepted into Uni, condition on ESL program → Visa application to study ESL in Canada
- Admin DM has 2 considerations to review = [Bona fide student] + [End of course, likely to leave]
- Rejected re: cost of English classes and unreasonable course of study re: cost-benefit analysis [≠ considerations]
 - Echoes Baker b/c this is dumb as fuck

Issue - Reas? **UNREAS**

Analysis

- Fails logical chain - DM goes onto own thoughts and musings - irrelevant considerations - illogical flaw - poisons well
 - Makes (-) credibility findings → PF breach re: lack of interview, opportunity to bolster credibility
- Should've looked at the test → look at app → apply test to facts (any further relations that may make him stay)

Ratio - Logical chain fail (does not follow test) - evidence does not relate to conclusion (proposed studies ≠ bona fide)

Romania v Boros

Facts

- Minister denies discretionary requirement re: extradition, though several safety considerations raised
 - Romania was VERY delayed in going after Boros → reasons do not explain this

Issue - Reas? **REMIT**

Analysis

- Though some evidence supports explaining delay, it is unclear when parties had knowledge and when they acted on that knowledge → ∴ remit to DM to explain

Longuepée v. University of Waterloo, 2020 ONCA 830

Facts

- Claimant not admitted to Uni basis of previous poor grades, ≈ previously undiagnosed TBI and PTSD.
 - "Demonstrated an ability to succeed"
- Makes claim to ON HRT.

Issue - Reas? **UNREAS**

Analysis

- Tribunal logic is circular: Grades earned w/ disability so accommodation req → Look to only grades to assess ability (holistic info irrelevant)
 - They tried to say that their assessment was "holistic," but this was not reflected

Ratio - Logical chain fail (circular)

Zhang v Canada

Facts

- Sponsor immigration ΔT delay ≈ hospital stay

Issue - Reas? **UNREAS**

Analysis

- DM could not find that PF was NOT breached where notice b/c "outcome inevitable" and then go on to say that the applicant "had not exhausted all options" - two sentences don't add up together
- Governing statutory scheme provided discretion → list of factors to consider ≠ checklist, DM should have assessed the situation more comprehensively

Ratio - Statements in conflict fail

Canada Post Corporation v. CUPE, 2019 SCC 67

Facts

- Under OH&S legislation → inspect every part of a mail carrier's route on an annual basis as the "workplace?"
- Appeals officer held - no - does not apply to every step of the entire route. Reasonable decision.

Issue - Reas? **REAS**

Analysis

- Courts will chuck interpretation with drastic consequences
 - Impose unfulfillable duty would do nothing to further the aim of preventing accidents/injury
 - Consider other parts to further animate

Ratio - Stat int fail (too broad)

Smith v Canada (Attorney General)

Facts

- Federal Judge agree to work as Dean of Law School - to steady the ship... But what about this provision
No judge shall, either directly or indirectly, for themselves engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.
- Review Panel concludes - yes - as occupation found to include non-remunerative "pursuits and activities".
- Note: No consequence for JR

Issue - Reas? **UNREAS**

Analysis

- Int that makes sense on its face may become unreas when viewed thru purposive/conseq interpretation.
- Court goes through legis history of the provision, trying to ascertain its intended meaning.
 - Purpose - prevent side hustle | Legis hist can include passed + failed amendments
 - Failure to consider qualifier ≈> reverse engineering outcome
 - Fails to do dict definition | Fails to engage in all applications of keyword | Fails to engage entire term
- Court examines implications of such a broad interpretation - "pursuits and activities" includes most of what does in daily life. *Even includes writing a mystery novel....*
- Note re: onus - Someone who is challenges decision - has the onus to demonstrate that it is unreasonable

Ratio - Stat int fail (not reflecting purpose)

Minster Enterprises Ltd v City of Richmond

Facts

- DP issued w/ condition, "Construct by date" → though one extension is granted (grading starts), second is not
 - Bulletin comes out between extension applications saying grading ≠ construction

Issue - Reas? **UNREAS**

Analysis

- No reasons and must ∴ focus on outcome
- Demonstrates that one judge's unreas may be an appeal panel's reasonable (or vice versa).
- Statutory interpretation - differs between Chambers Justice/CA
 - CA looks at the entirety of the bylaw.
 - At CA, Respondent fails to explain why DM is unreasonable, just says their view is reasonable
 - At CA, Respondent also failed to bring up PF concerns and ∴ can't complain about lack of reasons

Ratio - Stat int fail (not reflecting purpose) - DM

Practice Point: If you are preparing the record, include contextual material. - Anything you might want to rely on, provide all details

Kanthasamy 2015 SCC 61

Ratio - Evid can be acknowledged, but without weighing it you may have an issue

Sadiq 2020 FC 267

Facts

- Autistic son in danger re: family at home
- DM says no refugee status b/c not enough evid → Tribunal says son ✓ mom not re: evid

Issue - Reas? **UNREAS**

Analysis

- DM/Tribunal fails to ack evid that mom is in danger re: surrounding circumstances (her brother was beaten)
- "Presume DM considers all evid," rebutted if DM ignores central evidence or allows contradictory evidence

Ratio - Evid ignorance fail

Torrance 2020 FC 634

Ratio - Evid ignorance is okay if it's not exceptional in nature

Mattar v Dental Board, 2020 ONSC 40

Facts

- Mattar fails her dental licensing exam.
- On Compassionate Appeal, argues; tyodont was defective + treatment amounts to her into a panic attack.
- Internal appeal finds that the tyodont was just fine, so no extra time would have been necessary. Appeal refused

Issue - Reas? **UNREAS**

Analysis

- Missed part of the point - The decision completely overlooked the fact that she alleged a panic attack occurred. The fact that the tyodont wasn't defective didn't change the fact she panicked.
- Mattar's panic attack submission was a "key submission" and the decision was completely silent?

Ratio - Submission fail

Service d'administration DCR Ltee c Reyes 2020 FC 659

Facts

- Federally-regulated pallet repairman dismissed for derogatory treatment of a colleague

Issue - Reas? **NOT UNREAS**

Analysis

- "Helpful analysis" - Court must address the legal constraint imposed by the precedent, which includes:
 - A. WHO - Position of the author of the precedent in the judicial or administrative hierarchy;
 - B. LEVEL OF CONSISTENCY - Degree of consensus about the alleged precedent;
 - C. REASONABLE - Precedent was a decision on an application for judicial review, whether other outcomes could be deemed reasonable; and
 - D. BALANCING - Fact that, in order to decide questions that would be governed by precedent, the decision-maker has to weigh a range of factors.
- Court determines whether decision reas, may raise following questions
 - If the decision maker explicitly disregarded the precedent, did they give adequate reasons, and
 - Taken as a whole, is the decision incompatible with the alleged precedent?

Ratio - Past practices fail

AUPE v Alberta 2020 ABCA 284

Ratio - Past principles apply with less force on an "ad hoc" decision

Domtar re: discord

Ratio - "a lack of unanimity is the price to pay for the decision-making freedom and independence"

Vavilov re: discord

Ratio - We tolerate discord - but encourage meeting of minds - not satisfactory for ROL (even if it's reasonable)

Canada (Public Safety and Emergency Preparedness) v Taino, 2020 FC 427

Facts

- Similar circumstances to Reyes, which noted that statutory interpretation must be informed by general legal principles (common law concepts, international law).
 - significant body of law had developed regarding detention pre-deportation
 - DM ordered drug dealer Mr. Taino out of detention when his deportation date was stayed

Issue - Reas? **UNREAS**

- Decision diverges from existing standards/CLaw ≠ automatically unreas. > burden on DM to explain reasoning.

Ratio - Didn't address change in process and .'. unreas

Canada (Attorney General) v. Honey Fashions Ltd., 2020 FCA

Facts

- Deals w/ a change in practice under a import tax credit program
- Department of Finance revamped program, allowed some retroactive treatment under the old rules.
 - Honey Fashions uses old rules for a while, files claim, denied w/out reasons

Issue - Reas? **UNREAS**

- Impact of decision >>> \$ consequence, decision made w/out recognition for denial
- DM can't deviate esp when it is too late for party to change behaviour accordingly w/out reas explanation

Ratio - Regulator CAN change what they do, they just have to provide a rationale/notice ≈ PF

Labourers International Local 183 v GDI Services 2020 ONSC 1018

Facts

- Discord between 2 lines of reasoning re: termination of unionized employees banned by a 3rd-party from worksite

Issue - Reas? **REAS**

Analysis

- Decision is JIT, w/in reasonable range - don't have to agree with every distinction drawn by DM

Ratio - Correctness req, BUT reviewing courts do have a role where persistently discord or contrad int

Khan v Canada (Citizenship and Immigration) 2020 FC 438

Facts

- Conflict in Pakistan, leaves to Canada (though has option between two flights/end destinations)
- DM and Appeal both find this unreasonable, though new evid is provided

Issue - Reas? **UNREAS**

Analysis

- New evid should be assessed by both statute/CLaw, plays central role in claim - raises stakes
- If Appeal doesn't believe newly admitted evid, they need to hold a hearing to assess credibility

Ratio - Consider context/stakes/credibility

Lingering questions post-Vavilov

Gateway to disguised correctness - stat in

Doré - tension re: expertise, as Doré says to accommodate for this while Vavilov doesn't

- BUT, can't be delegating to receive < Charter scrutiny

Law Society of British Columbia v Trinity Western University, 2018 SCC 32

Ratio - Erroneous int of Charter w/in decision is unreasonable

CH12: Review of Discretionary Decisions

Defining a discretionary decision

≈ legal power to act as deemed necessary/appropriate | NOT quasi-j decisions - determine issues btwn parties, or "shall"

- Examples - grant permit, issue enf order, enact rule/bylaw
- Think "day-to-day" tasks to fulfill mandate
- Must be statute based, can be express or implied, must be within reasonable range, may include inaction
 - Can be broad or narrow grant in legislation, based on ...
 - Statutory interpretation, enf determined by DM, some ROL limits (per Baker)
 - Trad Claw - Statutory grant, impact of decision, accountability, character of DM (elected, expert)
 - Note - discretion CANNOT be exercised in relation to personal aims, must related to statutory aims

Ruminations

- Dicey Critique - discretion is in conflict w/ ROL - esp re: liberty-oriented decisions
- McRuer - power of discretion should be no wider than necessary
- Nowadays - central to state - prescribing everything in law is antithetical to public purp of statute grants of power

Examples of ongoing concerns

Cote in GGPPA - all other consent to this delegation | Federal funding to reserve NOT being tied to legislation

Note: If a discretionary decision is appealed by statutory appeal, use appropriate standard from Housen

Reviewing a discretionary decision

Reasonableness analysis generally applies

<p>Historically</p> <ul style="list-style-type: none"> • Decision = error (<u>BE fettering, not considering relevant/considering irrelevant, jurisdiction, beyond power/purpose, using discretion of another</u>) = reversible ≈ basically Correctness • > intervention, starting w/ Roncarelli • E.g. Ab WCB v. Penny, 1993 ABCA 228 → irrelevant consideration, renders whole thing invalid 	<p>These decisions begin to get subsumed in...</p> <p>Baker → becomes part of general reasonableness analysis</p> <ul style="list-style-type: none"> • Discretion in accordance w/; statute, ROL, admin law, fundamental values, principles of Charter <p>Suresh → Weighing of relevant factors is <u>not</u> function of a court reviewing exercise of ministerial discretion. More focused on whether weight placed at all.</p> <ul style="list-style-type: none"> • Following cases, Charkouiri, Harkat → more measured approach to this
---	---

Halifax (Regional Municipality) v. Nova Scotia Human Rights Commission

Facts

- Case looking at whether a decision to refer a complaint to BOI (pre-screening) =
- Governing statute indicated that appointing a board was something the Commission "may" do.

Issue - jurisd q or a discre decision? **DISCRE**

Analysis

- Seeking to determine whether, in light of circumstances, the decision is warranted = reasonableness
- Exercise restraint, b/c hindsight is 20/20

Ratio - Discretionary decisions by administrative tribunals are subject to review on reasonableness.

Kathasmy

Analysis

- Big question - was the application of GLs reasonable
 - >>> attention being paid to GLs , Terms in GLs like “unusual/underseverd” are descriptive, **determinative**
 - Reason’s analysis of personal experience enough re: not inferring, discounting some evidence
 - Dissent: finds application is reasonable - DM shows they are alive to details of personal experience

Forest Ethics v. Canada (National Energy Board), 2014 FCA 245

Note: Some characteristics of an adversarial process here

Facts

- NEB considering a pipeline approval application for the Line 9B Reversal Project.
- Expressly states - “not considering climate impacts”

Issue - Did NEB overlook relevant consideration in their determination? **NO, DISCRETION IS EXERCISED REASONABLY**

Analysis

- Account for Board’s responsibilities, legislative provisions themselves, statutory context, and Board’s own take on relevance → Board’s justification to not consider is reasonable
 - Court can’t be “setting their own yardstick” to then determine whether decision reasonable or not

Ratio - Discretionary decisions by administrative tribunals are subject to review on reasonableness.

Review of bylaws/subordinate legislation

Have the power to enact something? Once you enact it, you’ve used discretion → subject to JR

- Bylaw application = MQFL
- Bylaw statutory authority = Vires
 - Consider ss 3,7 of MGA to understand scope of authority to pass bylaws

BUT, remember, no reasons when pass a bylaw → ∴ consider the following

- Vavilov
 - If reasons req, and no reasons → remit to DM
 - If reasons not req (not possible, not required by PF/statute)...
 - Look to record as a whole, context, constraints
 - Per Catalyst, deduce from debate, deliberations, statements of policy
 - Per Roncarelli, record/context can be basis for finding improper motive or impermissible reasons
 - May need to focus on outcome over process, nns means less robust, just a different shape

Pre-Catalyst - determining if bylaw vires | Post- Catalyst - reasonableness

Shell Canada Products Ltd. v. Vancouver (City)

Note: Some characteristics of an adversarial process here

Facts

- COV passes bylaw to not do business with Shell as per apartheid concerns
 - VC allowed Council to “provide for the good rule and government of the City”.
- BCSC quashed these - R v Lewisham London Borough Council is persuasive
- BCCA allowed appeal - that in the absence of an express limitation on the respondent's commercial power it should not be interpreted so as to limit its exercise to municipal purposes.

Issue/Holding - Can the bylaw be reviewed, and is the bylaw valid? **YES, NO**

Analysis

- Another way to phrase the issue - is this an abuse of discretion re: improper purposes?
- Majority applies the VC’s permission within the boundaries of the City
- McLachlin advocates for a more generous view - ‘welfare of the citizens’, = immediate/psychological welfare

- "City Council may properly take measures relating to fostering community identity..."

Ratio - Purpose nns limited by boundaries

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

Note: Some characteristics of an adversarial process here

Facts

- Dealt with a tax bylaw that placed a significant tax burden on Catalyst's pulp and paper mills.

Issue/Holding - SOR? **DEFERENTIAL**

Analysis

- Process - Reasonableness → could any reasonable municipality, accounting for various factors pass? → If no reasons, look to framework and record
 - Council has a wide variety of factors that they may legitimately consider
 - NOT a carte blanche, but very contextual

Ratio - Test - only if bylaw is one that no reasonable body informed by factors could have taken will bylaw be set aside

Green v Law Society of Manitoba, 2017 SCC 20

Ratio - Applies Catalyst concept to Law Society rules.

Non-Reviewable Discretionary Powers

1. Prerogative powers - this power is not exercised over individuals, so doesn't re

- Traditionally, discretionary actions under R prerogative cannot be JR.
- Modern suggest this idea cannot bar review, it is more about what is at stake
 - Council Civil Service 1985 AC 374 - Immunity is NOT provided just b/c decision is solely prerogative
 - Black v. Canada (Prime Minister), 2001 CanLII 8537 (ONCA), where court refused to intervene, but not because it was a Crown prerogative issue.

2. Private law powers

- R generally has full capacity/power of natural person, sometimes this is modified by statute
- Pragmatically - inappropriate to introduce > layer of legal reg'n into relationship that is governed by a contract
- E.g. - Servicing agreement, landlord, procurement

Confining/structuring discretion

Davis says to accept discretion and guide it w/; soft law, rule-making, procedures, sharpening reasons

CH13: Tribunals

Basics

Can tribunals answer constitutional issues (including legislative validity)? - if statute expressly/implicitly allows QOL, YES

- If yes, can they grant constitutional remedies?
 - If they can do 1st question, they can do this - auth to decide based on overall authority/validity in statute
- What is SOR of constitutional questions/remedy, if they are asked?
 - Correctness re: Vavilov rebuttals re: constitutional matters

Historically - not always the case

- Lamer says no b/c only democratically elected bodies can strike down legislation, not appointed

NOTE: If grant of power is VERY BROAD, better version is to narrow it

Under Administrative Procedures and Jurisdiction Act (AB), only certain identified tribunals can decide above issues

Nova Scotia v Martin, 2003 SCC 54

Facts

- Case deals with a tribunal's ability to refuse to apply legislation b/c violate the Charter

Issue/Holding - Can they ask const questions? **YES**

Analysis

- General authority to determine issues of law granted tribunal *authority* to determine const questions.
 - Note: *authority* was to decline to apply basis of invalidity, not to "strike down the law" - narrower

Ratio - QOL allows determining const questions

R. v. Conway, 2010 SCC 22

Facts

- Case dealing with an NCR patient seeking a Charter remedy from the Ontario Review Board - Poor treatment

Analysis

- Generally, ratio aligns with idea that we should provide accessible venue to assert rights
- Here, providing remedy would thwart public safety concerns - ∴ analysis works w/in existing statutory framework

Ratio - Court of competent jurisdiction in s 24(2) is NOT only superior courts

What if there's a Charter Violation

History

- Sleight (Oakes) → Baker (DM account for Canadian values, cedes authority for DM to analysis) → Multani (critical of Oakes because does not match admin law well)

Reasonableness as per the Doré decision - application of facts and the Charter (law), often infused with discretion.

If there is a statutory appeal mechanism, arguably a review on POE

Doré v Barreau du Québec

Facts

- Code of Ethics of Advocates - "advocate must bear the stamp of objectivity, moderation and dignity"
- Doré Punished by Law Society b/c letter he wrote to judge found to violate Art. 2.03
- Decision to punish challenges based on s. 2(b) - NOT the article in the CoE or suspension
- QBSC holds that by finding decision to be a minimal restriction on Doré's freedom of expression, disciplinary tribunal had implicitly held the restriction was justified in a free and democratic society → QCCA upheld decision.

Issue/Holding - What is framework for this analysis? **LITERALLY THIS FRAMEWORK**

Analysis

- Court says overall goal in their decision is to balance Charter/Deference
 - Strict Oakes test DOES NOT achieve this - PBL/PSO req is weird, applying to facts attracts deference
 - Discussion of Hill
 - analyzing CLaw of Defamation did not relate to s 1
 - CLaw is all about sorting out conflicting principles - not well-adjusted for Charter violation
 - Onus of s 1 does not relate well to private litigation
- Reasonableness - DM exercising discretion under home statute and has expertise in considerations. Process..
 - 1st DM balance the Charter values w/ stat obj
 - 2nd DM ask how to best protect value in light of obj (margin of appreciation - >1 possible outcome)

Ratio - Balance Charter value with stat obj to determine decision, reasonable balance suffices

TWU v BC

Analysis

- Majority says written decisions not required

- McLachlin says that Charter values animate part 1 (not part 2) of analysis

Ratio - Balance Charter value with stat obj to determine decision, reasonable balance suffices

Considering Constitutional Issues in Alberta

Per above Administrative Procedures and Jurisdiction Act (AB), only certain identified tribunals can decide above issues BUT, this doesn't prevent decision-maker from considering Chartered Values

- "APJA should not be viewed as a direction to Alberta tribunals that they should ignore Charter values": UFCW Local 401 v Alberta, 2012 ABCA 130

Lethbridge and District Pro-Life Association v Lethbridge, 2020 ABQB 654

Facts

- COL refuses display of five anti-abortion advertisements from buses and bus shelters

Issue/Holding - Can they ask const questions? **YES**

Analysis

- Reasons from City Solicitor were fulsome, BUT high standard expected for lawyer (compared to transit manager)
- Charter analysis within reasons very weak - only say they carefully weighed rights of all parties, no analysis

Ratio - Explain how it is minimally impaired, balanced, considered → will go a long way to ensure decision is reasonable

CH14: Remedies for Unlawful Administrative Action

Generally - Public/Private

Review Second standard of review -recording 6:30

Types → JA permits rules on this under s 28.1(1)(b)(ii) , ARC s 3.15(1)

- Certiorari: "To be informed" - provide us with the basis for this decision, show us the process
 - Vavilov: they were satisfied that there was only one answer, therefore they do not remit
- Habeas Corpus: "Let me have the body" - review of incarceration (note: Bail hearings is statutory invention)
- Mandamus: "We order" - compel development authority to provide approval
- Prohibition: An order prohibiting an act - rare, e.g. prohibit issuance of licences
- Quo Warranto: "By what authority" - show me how you did this

JR hist relates to prerog writs - monarchs controlling exercise of authority via KB/QB - anything under royal/parliament

The Reach of Public Law Remedies Government → Volker Stevin principles: What kind of power?

- Both there is some confusion - e.g. Universities
 - Public ≈ public (R v Commissioner, 1924),
 - Contracting out statutory authority re: accreditation = public (Cyr)
 - Unfairness in private process could go public (Assaly)
 - Egregious conduct becomes public (Irvin)
 - Private ≈ private
 - Pure contracting, procurement
 - "Natural person powers" - not subject to public law remedies - b/c we stick with private law

Public remedies generally → Is it a state actor, are they within the state, granted powers by statute, created by statute?

Air Canada v Toronto Port Authority 2011 FCA 347

Facts

- Concerned the allocation of landing spots by airport authority
- TPP acts on statutory authority... but for private purpose → Dunsmuir says this is private

Issue/Holding - Was that decision subject to review? **NO, NOT IN PUBLIC CAPACITY**

Analysis

- Factors used to determine
 - Character → obviously private? | Law or private discretion? | DM controlled by public entity?
 - Suitability of public law remedies? | Existence of compulsory power? | Serious public dimension?
- Here - action distanced from statute, matter is “other” on Crown documents

Ratio - 6 factors to consider private versus public dimension

Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall, 2018 SCC 26

Ratio - Proposition that private decisions of a public body subject to JR ≠ the inverse true (public decisions of private)

Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aqa, 2021 SCC 22

Ratio - Unincorporated association has a constitution is private in nature, ≠ contractual rights that can be enforced

Ripley v Investment Dealers Association

Facts

- Disciplinary decision of a private association of professional members (not statutorily recognized)

Issue/Holding - Was that decision subject to review? **NO, NOT PUBLIC CAPACITY**

Analysis

- All of the stock brokerage firms are members - voluntarily so, they are contractually based
- No direct authority derived from statute, though organization references other regulatory schemes
- Citing: Chyz. Appraisal Institute - “Certiorari and prohibition, generally speaking, will not lie against a private body which derives its jurisdiction from the consent of its members banded together in a voluntary association”

Ratio - Reference to statute is not sufficient - Authority derived solely from contract

Excluded Species of Administrative Action and Public Authorities from Review

Not intended to be subject to judicial scrutiny (appointments) → cross the boundary from legal to political

Decisions of Superior Courts → but it can be appealed

- PC is created under provincial statute → only has statutory authority → an adequate remedy is available (appeal)
- FC/FCA is creature of statute - no JA, rather this is created via legislated Act

Decisions of Parliament → respect boundaries

Decisions of Crown → prorogation of parliament, dropping the writ (express exception under statute), lil meaning today

Democracy Watch 2020 FCA 69

Ratio - Admin action ≠ JR → some issues are not justiciable b/c poli and legal, ALSO if imp on rights/interests, no reward

Canada (House of Commons) v Vaid, 2005 SCC 30

Ratio - Employment of Legislature is subj to review, parliamentary privilege does not protect this, it’s not like it used to be

Jurisdictional divisions between Federal Court/Superior Courts

Generally - go to the lowest power who has authority to grant application - but, concurrent matter can be handled by both

- Federal Court – FCA s 842, 843 - defines federal board, tribunal etc under an act of parliament
 - Note: any wrong decision of FC could ≈ vires b/c acting beyond statute
 - Nns having authority over habeas corpus, Canadian Labour Code
- Superior Courts - can also go here, concurrent jurisdiction, but prevented because of of paramountcy issue
 - No provincial version of FCA s 842 b/c you can bring anything here → S. 96
 - THESE are the courts of Inherent Jurisdiction - all the powers, unless it’s been taken away

Some overlap between allocation of Judicial Review Authority - e.g.

- Immigration case - administrative detention - under the act that allows this, there’s a scheme that provides bail hearing → INSTEAD, someone brings habeas corpus → PICK YOUR FORUM - SA or JR (habeas corpus)

Administrative reliefs

Direct vs collateral attacks

- Direct → respond to the order, the ticket (Now, imbedded in statute - ARC rules 3.15-3.24)
- Collateral → Need an action to accompany challenging constitutionality of bylaw (i.e. appeal ticket)

Interim and Interlocutory Relief Stays of the Administrative Process

- A halting of a proceeding is a STAY → ARC 0 3.23
- RJR McDonald Test - Serious Issue? → Irreparable Harm if not granted? → Balance of Convenience?
 - Irreparable harm nns = \$\$\$

JR/Damages may be united via discretion

Evidence and Process Issues in Judicial Review - GENERALLY IT'S THE RECORD (ARC s 3.22)

- But you can tag in info re: PF, general background, to note absence of info, prior decisions

SA is the legislatively preferred mode of challenging → but can be narrower than JR

360Ads Inc v Okotoks (Town), 2018 ABCA 319

Facts

- They were trying to move trailers - wanted to keep the ad money coming in
- SDAB decision was being appealed → but the decision was still in effect

Issue/Holding - Was that decision subject to review? **NO, NOT PUBLIC CAPACITY**

Analysis

- 7:33

Ratio - Application of RJR Macdonald

Brotherhood of Maintenance of Way Employees v. Canadian Pacific Ltd.

Facts

- Lost day of rest

Issue/Holding - Can the Court impose an injunction against an employer while a labour dispute proceeds to litigation? **Yes!**

Analysis

- There was no adequate alternative remedy

Bergman v Innisfree (Village), 2020 ABQB 661

Facts

- He died, and he hated paying taxes

Analysis

- a) to address standing;
- b) to show bias or a reasonable apprehension of bias where the facts in support of the allegation do not appear on the record;
- c) to demonstrate a breach of the rules of natural justice not apparent on the record;
- d) to reveal the evidence actually placed before the decision maker where the decision maker provided an inadequate or no record of its proceedings.

Ratio - Example of supplementary evidence being allowed

Canada (Attorney General) v. TeleZone Inc, 2010 SCC 62

Facts

- JR (by Feds) before damages (by Prov)

Analysis

- Allow this to expedite access to justice → BUT, only required in exceptional circumstances

CH17: Money Remedies

Generally

Moneys Mistakenly Paid to/Benefits Mistakenly Conferred on Public Auth → Typically things do not get paid back

- BUT, this has been repudiated - ✓ EoF/L (King Street)

Act = damage = \$ if (license ≈ income), (\$ paid per regulations), (fines), (admin negligence)

Theory

- Dicey - no one is above the law - those in institutions who do wrong w/out justification are LIABLE
 - Pros of government payment - ability to pay, impacts all of us, greater expectations

Reminder, if private law, then use private law basis

Alberta v. Elder Advocates of Alberta Society

Ratio - Confusing holding → What is the legal remedy for a person that makes a payment to government that is ultimately incorrect or ultra vires - Typically, **public law remedies** - BUT, could also resort to private law remedies (unjust enrichment)

Hamilton-Wentworth v. Ontario

Ratio - Can't enforce political promises, doesn't weigh in on policy considerations of decisions here

Tort Liability Generally

Historical immunity of R from liability and the general presumption that no liability lies in respect to ultra vires acts

Legislatures will do something naughty and then pass legislation to prevent liability → and they can get away with it...

Cooper v. Board of Works for Wandsworth District

Ratio - Was literally an action for trespass

Canada v Saskatchewan Wheat Pool

Ratio - UV, unreas, incorrect ≠ civil liability

Reversal re. Pearson Airport

Ratio - Can't sue us baby hehehehe, we passed legislation

Negligence and Nuisance Specifically

P may not always have to establish malice, misfeasance, abuses to get tort/extraction

Wellbridge Holdings Ltd v Greater Winnipeg - zoning case

Ratio - ZB overturned caused change in value - sue - court says we're not responsible

R v Imperial Tobacco Canada Ltd.

Ratio - Policy decision exemption - true/core protected (i.e. soc, poli, econ) so long as NOT irrational/BF

Paradis Honey Ltd. v Canada

Analysis

- Need to use public law tools on public issues → Flag decisions if reasonably unacceptable/indefensible and remedial discretion - consider; reas, circumstances, public law purposes
- E.g. maladmin - many forms, not fulfilled duty to act

Ratio - New type of tort re: public bodies (not based on private law)

Francis v Ontario

Ratio - Class action of inmates in solitary confinement in provincial prisons

Injunctions baby (Guest Lecture)

Generally

"not everyone is up on their injunctive law, lots of language confusion"

Prohibitive - One party must refrain from some action harmful to party seeking to relief (STOP TREE CUT)	Mandatory - One party must perform a positive act to remedy a wrong - take down the illegal porch	Quia timet - preventative in nature, before the harm is done, requires... Strong prob upon facts that damage will occur → Imminent harm → Temporal nature
---	--	--

3 more overlap w/ prior

Interim - pre-trial relief granted with/without notice; order for brief/specific period of time, preserve status quo - before the matter is decided, prevent things from happening	Interlocutory - pretrial relief for a limited time, preserve status quo, more thorough arguments by both parties	Post-trial Permanent - granted after hearing on the merits (1711811 Ontario Ltd v Buckley Insurance 2014 ONCA)
---	---	---

3 part RJR MacDonald (1994) Test

- 1) Serious issue to be tried - strong prima facie case
- 2) Irreparable harm - Refers to nature of harm, ~~magnitude~~ - Damages NOT adequately compensated by \$\$\$
- 3) BOC - PI comes in here - Weigh which party will suffer greater harm from granting or refusing injunction

Equitable

Inherent jurisdiction - Judicature Act - it's where we get the power

s 13(2) may be granted where just/convenient that order should be made, make w//w/out conditions (whatever's just)

Nova Scotia v Freedom Nova Scotia, 2021 NSSC 170

Facts

- No compliance with Covid-19 Health Order at previous rallies
- Seeking Quia Timet injunction - ex parte - NO NOTICE - file on 13, hear on 14, to prevent on 15

Issue/Holding - Was that decision subject to review? **YOU BETCHA**

Analysis

- Wrongful acts have not yet occurred but are imminent or have been threatened!!!!
- Assessment is cautious is based on 2 elements:
 - a high probability that the alleged harm will occur; and the presence of harm that is about to occur imminently or in the near future
- High probability of harm because of correlation between social gatherings and spread
- Clear, convincing and non-speculative evidence to infer irreparable harm if no injunction granted

Ratio - Application of RJR Macdonald

Statutory

"It's the best" → MGA s 554(1) → (a) where auth to enforce + (b) continuing contravention → injunction can be granted

Robert J. Sharpe, Injunctions and Specific Performance, (Toronto: Canada Law Book, 2013)

- court will rarely conclude that PI in having the law obeyed is outweighed by the hardship of injunction
- once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances
- THE EQUATION - **SHOW BREACH + BYLAW (PRESUMPTIVELY IN PUBLIC GOOD) > ANY HARDSHIP**

Summary - Test for Statutory Injunction

- Factors considered in equitable injunction will be of limited use, if any

- Public authorities
 - Assumed enacting laws is in the public interest
 - Irreparable harm and balance of inconvenience preemptively satisfied
- Open and continuous disregard requiring Court intervention
- Private hardship does not outweigh PI in having the law obeyed

Calgary v Bullock, 2011 ABQB 764 (“Occupy Calgary”)

Facts

- Tents → Warning Notice issued by City that they would enforce removal per Parks and Pathways Bylaw
- No immediate enf (even when deadline passes); tried to negotiate; later enforced against unoccupied structures
- Before removing → Statutory injunction: enjoin continuing breach, require removal, enjoin future breach

Issue/Holding - Grant? **YOU BETCHA**

Analysis

- Constitutional challenge to Parks and Pathway Bylaw – this is not the appropriate venue
 - Action under bylaw prescribed by law
 - Reasonable and Demonstrably Justified:
 - Objective: absent regulation of the competing demands for city parks, chaos would reign
 - Proportional, rationally connected, and minimal impairment found
 - Limit on Respondents proportionate to public benefit
- Evidence supports granting statutory applications
 - Normal tools - warnings, violation tickets - not effective → continuous
 - Balance favors application of injunction → hardship from injunction not outweighed by PI

Ratio - Application of statutory application

Vancouver v O’Flynn-Magee, 2011 BCSC 1647

Analysis

- when elected officials enact by-laws or other legislation, they are deemed to do so in the PI at large.
- ∴ irreparable harm/balance of convenience factors are pre-emptively satisfied in ensuring complying with law

Ratio - Application of statutory application

Freedom Convoys

COE	COC
Predominantly vehicle convoy	Predominantly convoy/parade
Issues of noise, disturbing residents, slowing traffic	Issues of traffic, noise, disruption, CONFLICT
Community standards bylaw - noise	Community standards bylaw - noise Traffic Bylaw - improper use of horns, pedestrians on road Parks Bylaw - use of park that disturbs

Challenges

- Timing - all injunctions are fast-paced
- Unknown RespS → Service - needed to satisfy court w/ many options - broadly social media, news, pamphlets
- Affidavits – fear (some people didn’t want to swear based on reaction, having to be questioned)

Permanent Injunction not sought → Problem resolved

CH 16: Discretion to Decline a Remedy

Residual discretion to decline relief

- Differs from most law, as the remedy is clear and is applied once the test is satisfied
- Refuse relief if...
 - Unreasonable delay, acquiescence, waiver no hard rule here, but consider if appellant is acting diligently, if granting would undermine system that people rely on (Immeubles Port Louis v. Lafontaine (Village))
 - Alternative remedy statutory appeal mechanisms available, but it won't exhaust every situation
 - Prematurity (absence of ripeness) - look to the big picture and any other related proceedings, don't need to award in early stages as the juiciest prize may come later on
 - Mootness sim to civil, but admin is especially aware of issues "capable of repetition, evasive of review"
 - Collateral attacks ≈ res judicata, you can't appeal and appeal and appeal
 - Some things end - if there's an order, THEN a ticket - you can't appeal the order after you receive the ticket, the ship has sailed
 - Balance of convenience injunction-like standards
 - PI, disproportionate impact on parties, interest of third parties (Canada v Khosa, 2009 SCC 12)

Self-represented litigants

> than other areas of law - "Admin tribunals exist to make justice more accessible" = > #s of self-reps\

Be wary when...

- Provide info (Moreau)
- Rule out vexatious - no authority to rule people out, meant to serve public BUT can control own processes
- Participatory rights (Beljan, Pinteá)
 - > parties w/ standing means > parties who can appeal/JR
 - Caution/red-flag on the possibility of irrelevant or prejudicial evidence - e.g. Dog show

Moreau v Canada, 2019 FCA 23

Ratio - Conduct s counsel can create PF issue (provide bad info = bad guy, ∴ write everything down)

1164694 Alberta Ltd. v Beljan Developments, 2022 ABCA 325

Ratio - Some DM must intentionally consider who should receive notice of the hearing or who might be affected

Pinteá v Johns, 2017 SCC 23

Ratio - Statement of Principles on Self-rep Litigants and Accused Persons (2006) (online) by Canadian Judicial Council

Basically, the below amounts to greater assistance

1. Access to justice for self-represented persons requires all aspects of the court process to be, as much as possible, open, transparent, clearly defined, simple, convenient and accommodating.
2. The court process should, to the extent possible, be supplemented by processes that enhance accessibility, informality, and timeliness of case resolution.
 - case management, alternative dispute resolution (ADR) procedures, and informal settlement conferences presided over by a judge.
3. Information, assistance and self-help support required by self-represented persons should be made available through the various means by which self-represented persons normally seek information,
 - pamphlets, telephone inquiries, courthouse inquiries, legal clinics, and internet searches and inquiries.
4. Court administrators and other participants in the legal system should:
 - (a) inform any self-represented parties of the potential consequences and responsibilities of proceeding without a lawyer;
 - (b) refer self-represented persons to available sources of representation, including those available from Legal Aid plans, pro bono assistance and community and other services; and
 - (c) refer self-represented persons to other appropriate sources of info, education, advice assistance.

Police (Guest Lecture)

Police discipline - the last of stronghold of old administrative law, pre-Roncarelli - WTF)

System is fairly archaic and the Police Chief's don't like it

- Chief - appoints everyone in the hearing room but the defendant, can dismiss complaint
 - Rationale - "expertise"
 - Concerns - conflict between authority to penalize and direct with other hand
- Chief determines if there is a disciplinary hearing, if yes, hold hearing, if appeal decision, commission hearing, if appeal, go through Statutory appeal
 - Most issues reasonableness - LERB - Chief is assumed to have knowledge of policies and applies experience as a police officer, gets to make minor mistakes from time to time, can make certain assumptions (Conlin)
 - Error's in the past - Chief decision, Board does de novo → disagreement
 - Correctness - LERB - civilian oversight function (tainted, biased investigation, some other matter of urgent public importance)
- Generally, policing review needs to consider "Proper conduct and unpopular conduct"

Takeaways

- REASONABLENESS - BUT THEN YOU HAVE ALL THE ACTUAL DECISIONS THAT COLOUR OUT THE LINES OF THE PARKING STALL
- THE WAY THE IS LAW GOING - YOU DON'T WANT THESE PEOPLE "WITH PAY" - THEY ARE JUST FLICKING CHEESY DUST AT RERUNS OF GREY'S ANATOMY

PRACTICE QUESTIONS

PF

- Do Baker factors
 - Seriousness
- Oral hearing req → If there is no credibility issue - not required
- But here, cross-examination at least - want the transcript → then you could make the claim re: credibility at issue
- Institutional bias

RAB

New chair of board gives interview on radio → general statement → should they recuse themselves from panel

- Administrator or Legislator?
- First thing - go thru the statement line by line
 - This is an issue credibility, ∴ "believe"
- Analyze context → position, process,

Rule-making (Oct 18)

Coal plant phase out agreement → change rule for assessment of coal plants (depreciation factored out), no notice of this

- Legis decision, think Homex/Tesla/Inuit Tapirisat → narrow group, overall reg'n affects everyone (large group)
- Runs foul of threshold issues re: PF → "right/interest" to expectation of lower taxes, LE to system staying same
- 2021 ABQB 37

Baker Analysis (Oct 25)

1. Explain what does baker do in this course → Baker answers the question of where
2. Describe resultant spectrum
3. Run thru factors, sprinkling in cases, reminder that list is non-exhaustive
 - Nature of decision - if the DM's proceedings are similar judicial proceedings, there is > PF
 - In Baker → [EXPLAIN], Consider - number of applications, reduction

- Nature of statute - if there is no appeal, there is > PF
 - In Baker → [EXPLAIN]
- Control over proceedings - if the DM has a greater level of control over proceedings, there is > PF
 - In Baker → [EXPLAIN]
- Impact on individual - if the DM's decision has a large impact on the individual's rights/privileges/interests, > PF
 - In Baker → this factor was very influential since the deportation would have severely impacted the claimant's family members, and the claimant's own health
- Legitimate Expectations - if the DM/public entity made any representations around the types of treatment and/or results the claimant would receive, this should be factored in to procedural (though not substantive) outcomes
 - In Baker → this did not weigh extensively in
- Baker was entitled to...
 - A higher amount of PF compared to many administrative decisions due to the impact on individual
 - Full and fair consideration of the issues
 - Reasons explaining the decisions → the Baker factors weigh heavily here as the level of PF afforded here amount to it being unfair if the claimant could not understand the reason why
 - Not entitled to an oral hearing
- Baker did not receive the level she was entitled to...
 - In actuality → no b/c the claimant did not receive written reasons

RAB (Oct 25)

- 1. Define Bias, why does it matter
 - Examples of Cases that give boundaries
 - Cases that provide factual
- 2. List types - Not mutually exclusive
 - Prior involvement - a DM or supportive entity either making a decision or advising a DM during more than one stage of a administrative bodies process (investigation AND revocation) and/or one party's establishment/applicaiton
 - Personal association - actual or perceived familiarity that is afforded to one party over the other, informality is okay
 - Antagonism - a DM or supportive entity being openly adversarial to a party
 - Attitudinal bias - a DM strongly holding a particular viewpoint that would directly interfere with the decision at hand, a DM is informed of some matter not pertinent to the decision at hand and does not reflect on its weight within the decision
 - Pecuniary interest - a DM has a financial interest in a decision (subject to a deminimus exclusion)
- 2. Baker factors influence → where PF >, the standard for finding bias is lower, more behaviour that may indicate an issue will give rise to this
- 3. Statutorily authorized bias may be permitted via legislation
 - some administrative DM's are permitted via their home statutes to engage in some form of bias, this takes the form of prior involvement, where a DM may be permitted to be involved with several stages of the administrative body's process
 - Rationalize concept w/ PF → where do the source of CLaw → quasi-constitutional, but also CLaw
 - Therefore somewhat subordinate
 - Why court is hesitant treading on → don't want to fuck with executive
 - Certain regimes appear to be quasi-judicial → this is just how how certain entities are regulating (Ocean Port)
- Different legal tests, circumstances for applications

- RAB - a reasonably informed person would conclude, knowing the facts and circumstances that the decision was free from bias believe that a member may be influenced by improper considerations to favour one side → administrative decisions
 - Would reas person + knowing facts, believe that member may be influ by improper consid to favour?
 - Not actual bias, b/c it is difficult to pove contents of mind
- CM - open to persuasion → legislative/policy makers decisions

Fact pattern - concern about participation re: bias (Nov 1)

- 1. Describe nature of decision
 - Homex
 - Tesla
- 2. Describe nature of DM - RAB/CM
 - Go line by line
 - Discuss whether pecuniary interest, antagonism, attitudinal bias, personal association, prior involvement
- X. Only discuss Baker if it especially accentuate our sense

Fact pattern - admissibility of evidence (Nov 1)

- Touch of advocacy → how would you explain to parties their concerns
- Admissibility of evidence → hearing, in-person → evidence is exchanged → rules of evidence don't apply → are there any specific rules for this → ATA does not apply → not a court of law

Fact pattern - post-hearing evidence sought by DM (Nov 1)

- Offends "he who decides must hear": as a general rule, the members of a panel who actually participate in the decision must have heard all the evidence as well as all the arguments presented by the parties (IWA v Consolidated-Bathurst Packaging Ltd. [1990] 1 SCR 282)
 - Asking expert ≈ delegating
- PF ≈ want to know case made against you
- Exhibits a potential attitudinal bias → taking time out of day to source further information about the matter ∴ Offends RAB
 - Case: re: board making notice of assumption
- Outline process
 - Reach out to board and raise concern prior to the decision being released → request confirmation on whether tis information was sourced and if it did request a new hearing → making clear that we want to keep the decision fair for everyone → don't want to have to appeal after the decision and create more work for everyone → poor decision making process reflects poorly on everyone involve
 - REHEAR OR OPPORTUNITY TO RESPOND, SECOND MEETING OR GO TO COURTS
 - PUT SOMETHING ON THE RECORD ASAP

Note: If another question on this kind of matter, not super important

Fact pattern - Grounds of review

Premier summoned by EAB - parlia privilege. EPEA has a privative clause; no statutory appeal; so Premier brings JR

- (a) the EAB has ~~auth~~ to issue legal summons - QOL (stat int) → look at JIT of reasons re: auth re: correctness
- (b) parliamentary privilege is applicable - GQLC (privilege, warning bells would be going off) - Correctness

Fact Pattern - Cold Lake taxes situation

Feds change approach to tax agreement - what do you do

- 1. Look at legislation - statutory interpretation (whole act, context, text, purpose)

- Request rationales supporting feds decision
- Question whether the letter provided by Feds was clearly and opportunity to discuss, a notice of the change etc.
- Look to tax codes

Issues

- Is this decision notice of intent or an actual decision? No request for consideration... not looking good
 - Is there PF? Yes, there is a right/interest impacted
 - What is PF under Baker - YOU ALWAYS GET NOTICE!
 - If this is a notice, then did they already make-up their mind
 - Timing? Did time elapse
- Is nature of decision showing predetermination, is this BIAS?
- Legitimate expectation (within Baker test → increases)

Outcome - look to quash the decision!

- Reasonable - they interpreted leased to or occupied by unreasonably
- Reasonable - they interpreted concession agreement unreasonably

Cold Lake (City) v. Canada (Public Services and Procurement), 2021 FC 405

Baker factors - low - But you deserved more notice

- You can “glean” it - then Greg was like “LOOK AT THIS PAINTING” - picking up individual grains - you gotta pick up all these little wheat
- CULTURE OF JUSTIFICATION!!!!!!! VAVILOV!!!!!!!

Reasonableness

- There’s a gap between federal/provincial legislation
- Precedents - didn’t form part of the record - not made public - where it’s says “we have depended, the reasons are there, trust us” - privilege waived
- There’s only reasonable outcome? Court declines

Judge says - BF argument is bad, don’t bother

Pre-class discussions

Power to appoint

- Authority ≈ R Prerogative (war, treaty, appoint Minister, passports) [Const puts bounds on, Legis subtracts from]
- Customs are NOT legally binding, not enforcing ≈ customary
- Executive gets power from delegation (in statute) or R delegation (from Prerogative)