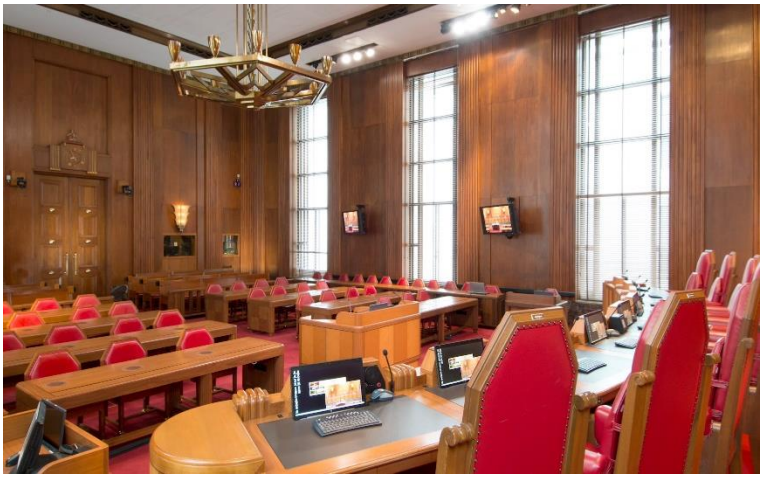


2022/2023

LAW 450
Administrative Law

Professor: Matthew Woodley

CONDENSED ANNETATED NOTES (CAN)

UNIVERSITY OF ALBERTA
FACULTY OF LAW

Contents

CHAPTER 1: THEORY, PRACTICE, JUSTICIABILITY

First things first. Any administrative law question will have 4 major steps, each divided by chapters in this CAN. Answering a question on the final should follow this order:

1. Preliminary Assessment
    a. Is the question even able to go to Court at all?
    b. Step 1 is to always look at the statute
    c. Step 2 is to analyze if there is adequate standing
        i. Is it even an administrative tribunal?
    d. Step 3 is if it is justiciable
        i. Is it sufficiently public character?
    e. Step 4 is the procedure of the judicial review
        i. Were statutory requirements of *Rule of Court*/applicable statute followed?
2. Procedural Fairness
    a. Again, look to the statute if they have any guidelines about this
    b. Is a duty of procedural fairness owed?
        i. Is there applicable exceptions to the duty?
        ii. What is the content?
    c. Was there any bias?
    d. Was there a constitutional violation of the principles of fundamental justice (section 7)?
    e. Was there constitutional duty to consult if dealing with Indigenous nations?
3. Substantive Review
4. Remedies.

<u>Rule of Law</u>

Administrative Law is the area of law that governs how executive functions (ie, those of Cabinet) are carried out in the form of administrative tribunals. It is in essence, the legal branch of the executive.

- Parliament and Legislatures will enact legislations that enable Administrative Tribunals to carry out the law by regulatory or statutory bodies. The Courts oversee these tribunals to ensure they are carried out properly.
    - Often, Tribunals do a quasi-judicial function, of resolving claims or reviewing applications. But they are not courts – they have a much more specialized

understanding of specific areas of the law and when legislative bodies view this as more beneficial than a court overseeing the decisions, without full understanding of that industry or field.

- Administrative law is the other form of public law, alongside constitutional and criminal law. It is a way in which the public has readily available information about how a specific industry works, and this affords higher predictability
    - Most legal parameters of this area of law are based on common law principles and not codified in cases.
    - There are some statutory rules, most often specific to the enabling legislation.
- The main point about Administrative Tribunals, is that they are *always* dealing with a statute. All tribunals are formed from a legislation (called the 'enabling statute'). The statute, more often than not, will limit the scope of what the tribunal can do, and the way they can do it. However, governments often delegate a substantial amount of power to these tribunals, to ensure there is a specialized body with firm understanding of the area in question.
    - It also, usually, includes the ways that decisions of tribunals can be appealed to the judicial system (ie, Courts).
    - They always exercises statutory goals, so they can be discretionary or adjudicative.
        - All to say, whenever tackling an administrative law question, your analysis will start with the statute in question.
    - Administrative law is very broad and encompasses a lot – almost every area of law will touch on administrative law and tribunals, with the exception of contracts.
- Statutes have the potential to limit the ability to appeal tribunal decisions to the court, however this power is constrained. Section 96 of the *Constitution Act, 1867* permit courts to oversee tribunals, and legislatures cannot oust that role since it is constitutionally protected. Courts will thus always have some interfering powers with tribunals, though may be hesitant to use it.
    - Section 96 courts are the superior provincial courts; in Alberta, Court of Kings Bench
    - Nonetheless, legislative intent is important, so the courts will analyze the language of the statute to see what role they can play

The sources of administrative law are diverse:

- Section 96 of the *Constitution Act, 1867* for oversight
- Legislation for the powers and limits given to the tribunals
- *Rules of Court* for procedural rules around administrative appeals
- Common law for finer details on administration of statutory administrative principles

The Rule of Law is heavily influential in administrative law. What is fair for tribunals to do, and what is implied for procedural fairness. Since every person is subject to the rule of law, the benefit of laws protection comes with the laws authority

- This requires the need for an avenue for anyone to challenge state power and ensure that it aligns with the rule of law. They have this power through the court
    - And this is why it is constitutionally guaranteed that courts have oversight of these tribunals

Roncarelli v Duplessis [1959] SCR 121

Facts:
The 1950's saw widespread discrimination against Jehovah's Witnesses in Quebec; local bylaws prohibited their literature, and arrests and violence were common against them.

- Some witnesses published a memoir: 'Quebec's burning hate' for God bearing freedoms
- Premier Maurice Duplessis (defendant) called this 'intolerable and seditious'

Roncarelli (plaintiff) owned a Montreal café and used profits to pay for bail for 400+ Jehovah's Witnesses, which Duplessis publicly warned him to stop as 'repeated and audacious' support is 'provocation of public order'

- Duplessis told the director of the provinces liquor commission (Archambault) to revoke the liquor licence of Roncarelli, which he did
    - Statute says licenses are regulated at the Commission's "discretion"

Procedural History:
Trial Court sided with Roncarelli, but the Quebec Court of Appeal overturned the decision

Issue:
Was cancellation of the license within the Commission's discretion?

Rule:
Statutory powers must be limited to the express or implied purposes for which they were granted, compatible with purposes envisaged by the statute

Analysis:
Cancelling at 'its discretion' must be weighed with considerations pertinent to the Commissions goals. 'Discretion' necessarily implies impartiality and integrity. Good faith is an implied duty to carry out the statute with rational appreciation for it's intended purpose. The actions of the respondent through the Commission is a breach of implied public duty towards the appellant as a gross abuse of power to satisfy a personal vendetta, in a way wholly irrelevant to the statute. The goals were merely to punish the appellant and to forewarn to others that they would also be stripped of privileges if they persisted with the Jehovah's Witnesses which amounts to untrammelled discretion contrary to the Rule of Law.

Conclusion:
The Commissions actions were not inappropriate as discretion

Hold/Order:
Appeal allowed. Liquor order to be restored

Ratio:
People who exercise statutory cannot abdicate that power and give it to someone else. It also requires that the decision maker make their conclusions based on relevant considerations.

- Even when statutes permit decision making on statutory authority, there is no such thing as 'untrammeled discretion' – there are inherent limits

The *Roncarelli* case isn't actually an administrative case, since it is private (it wasn't the review of a public board decision).

- But it does demonstrate Rule of Law principles. Even when the statute permitted the Commissioner to make decisions 'at its discretion', there are inherent limits to this discretion since no legislative act can allow unlimited power for any purpose.
- The Supreme Court affirms that you need to look at the legislative language that allows the decision maker to make the decision, and there is a presumed limit in line with the purposes of the legislation itself.
- They state that with the wording "without express language", the legislature can grant absolute discretion, but the assumption will be that it is not absolute.
    - In essence, everyone is subject to the rule of law, even those executing the law
    - The law is the determinant of what is to be done, but the execution must be in accordance with the law's purpose
- Decision makers need to be impartial and independent.

The Rule of Law is in constant jeopardy. If people do not believe they can use legal mechanisms to resolve problems, they will find other ways. When people believe they are not bound by rules, or they

believe institutions can do anything they want, it goes against the legitimacy of the institutions and cast doubt over the rules the institutions are governed by.

The focus of the Supreme Court is usually to discern the intention of the legislature and the implied obligations of discretion, but also finding that the exercise of statutory power can be overcome by explicit legislative language.

- The presumption of fairness will thus be overridden by legislative language that gives the board power to absolute discretion.
- Statutory appeals are often laid out in legislation, that allows people to judicially review statutes

Landmark Cases in Administrative Law

There are three landmark cases in Canadian administrative law. These cases have general frameworks that have since been altered, so only the general takeaways should be used as precedent.

There are a plethora of administrative decision makers in Canada, so courts have to answer to what extent boards can execute tasks, and to what extend courts will intervene.

- The legislative intention in creating these tribunals is to have decision makers with specialized knowledge and expertise in the field – expertise that common law courts would not generally have.
- Tribunals are almost always made of groups of lawyers, academics, diplomats who have expertise in that field. The Governor/Lieutenant General will appoint these people specifically because they have the knowledge of the field.

Each time a tribunal is made, it takes away from the powers of the powers of the common law courts. By the same token, every time administrative bodies are made, and procedural/substantive rights are gained, there are associated costs. The more procedural rights there are, the more work needs to be done in the decision-making process, which takes time by the tribunals and prolongs the general procedures and thereby increases costs. Administrative law is about balancing all these interests.

Constitution Act, 1867, 30 & 31 Vict, c 3
Section 96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick. Section 99 (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons. (2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

Default Courts in Canada are the section 96 courts. The point of these courts, being constitutional courts, is that they cannot be legislated out of existence. These courts are thus those considered of 'inherent jurisdiction'. Their powers can be vested in other courts or other administrative bodies, but they will always have a reviewing function. In Alberta, the s96 court is the Court of King's Bench and the Alberta Court of Appeal.

- So, the Alberta Provincial Court, not being a section 96 court, was made by provincial legislation.

- It is technically a glorified administrative tribunal, since it was created by statute to delegate some Court of King's Bench work

When administrative tribunals are made, and given powers often assumed by the court, the courts will have to grapple with which elements of fairness administrative bodies most apply

- Will they look like a court procedure? Or will they be given more leeway to make their own rules with respect to fairness?
    - These issues will run with administrative law through time

Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation [1979] 2 SCR

Facts:
The CUPE laid a complaint with the Public Service Labour Relations Board against the New Brunswick Liquor Corporation (NBLC; respondent) for replacing striking employees with management personnel. The management employees were doing the work during the strike.

- The CUPE (appellant) laid a complaint with the Public Service Labour Relations Board against the respondent over the interpretation of s102(3) of the *Public Service Labour Relations Act*.
- The appellant claimed that s102(3) did not allow replacing striking employees with managers, since managers were not considered 'employees' in the Act.

Procedural History:
The PSLRB rejected the NBLC claim that they were allowed to replace the employees.

- Supreme Court of New Brunswick reversed the decision
    - New Brunswick Court of Appeal reversed the NBSC decision

Issue:
Was the Board's interpretation so incorrect to warrant judicial overturning of that decision?

Rule:
Section 101 of the *Public Service Labour Relations Act*

(1) Except as provided in this Act, every order, award, direction, decision, declaration, or ruling of the Board, the Arbitration Tribunal or an adjudicator is final and shall not be. questioned or reviewed in any court.

Section 102

(3) Where subsection (1) and subsection (2) are complied with, employees may strike and during the continuance of the strike
    (a) the employer shall not replace the striking employees or fill their position with any other employee

Analysis:
The Act has a clear statutory direction that public sector workers be decided by the Board, such that the board is a tribunal and courts should restrain from interfering with their decisions. Given the 'privative clause' of s101, the legislature intended for the Board to be decision makers because of their specialized knowledge in the field.

- The Board doesn't have to be correct in it's interpretation, it is entitled to err and that error would be protected by section 101.
- Review can only come if the interpretation was so unreasonable that its construction is not rationally supported by the legislation.

The Court of Appeal wrongly characterized the laws and the interpretation of 'employees'. It was not the role of that Court to decide if the Board's interpretation was correct. Instead, it was if the interpretation was so patently wrong that it could not contribute to the statutory directions, that it warranted reversal.

- Given the statutory framework, the Board's decision was reasonable given the Act was ambiguous.

Conclusion:
Not patently unreasonable enough to overturn in Court.

Hold, Order:
Appeal allowed

Ratio:
Administrative Tribunals exercise particular statutory powers, and courts must exercise restrain in interfering with those decisions, only in the presence of patent unreasonableness

This case is *not* the leading case on standard of review – so only use the general principle that courts cannot answer whether the Board exceeded their jurisdiction – they cannot characterize them as jurisdictional to allow them to intervene and substitute their views instead of those in the tribunal

- This case started the grappling of the nature of the court-tribunal relationship and recognizes the basis of establishing the relationship of the expertise on the very matters of the issues.
- Section 96 Courts are not to do this – they are to decide about various general questions of law, with the Court of Appeal even more general
- As such, the NBCA should not have said 'we think you got it wrong, so here is my view'. This generally asks courts to accept the board decisions. The standard to step in became 'parent incorrectness' – where the interpretation is not reasonable.
- The language and the purpose of the statute is paramount in these decisions. The starting point is *always* the legislation, whether it is standard of review or fairness.
    - As such, the privative clause of s101 is important. This was a signal to the courts they should not interfere with tribunal decisions.

Privative Clause: provisions in legislation that state that administrative tribunal decisions are final and binding and not to be subject to judicial review by the courts.

- This allows the legislature to protect the views of the Tribunal it established. On the flipside, it signals to the courts should only be viewed holistically.
    - In this case, the legislative intent of the *PSLRA* was to give the Labour Board the power to interpret the act and respond to the issues. This made the Supreme Court conclude that tribunal decisions should not be reviewed unless 'patent unreasonable'. This is a very high standard.
- Before the landmark *Vavilov* case (more to come), there were three standards:
    1. Correctness: Court doesn't agree with Tribunal, so replace the decision
    2. Reasonableness: Court doesn't think Tribunal applied reasonably
    3. Patent unreasonableness: Court has to think that the Tribunal messed up so bad, that it has to be overturned (this is a very high standard).

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

Facts:
Nicholson was a constable for 15 months and was discharged by the Board. As per the *Police Act*, no constables who have served less than 18 months is entitled to a hearing as to his/her discharge.

- He was not given the opportunity to provide submissions and was not given reasons for his termination. He sought review of his discharge

Procedural History:
The Divisional Court ruled in favour of Nicholson to receive a review.

- The Ontario Court of Appeal allowed the appeal, and it was taken to the Supreme Court

Issue:

Is there a minimum protection that is ensured, notwithstanding the discretion awarded under the *Police Act*?

Rule:

Section 27 of the *Police Act*

No chief of police, constable or other police officer is subject to any penalty under this Part is subject to any penalty under this Part except after a hearing and final disposition of a charge on appeal as provided by this Part, or after the time for appeal has expired, but nothing herein affects the authority of a board or council

(b) to dispense with the services of any constable within eighteen months of his becoming a constable

Analysis:

The *Police Act* and regulations contain an array of powers, some of which are discretionary, as s27(b) is. The Court of Appeal found that a constable who served 18 months is awarded certain protections, particularly those against arbitrary discipline via the appellate review. But it also found there is no protection at all for constables who served less than that period. The termination was statutory, not contractual.

- Though the appellant cannot claim protection of 18 months, he cannot be denied any protection. He should be treated fairly

Even in the discretionary process, there is a common law general duty of fairness, consistent with the principles of natural justice.

- The Board was only entitled to exercise powers given to them in the *Act*. They had the discretion to terminate Nicholson and he would not have the statutory protection of a hearing as he did not work 18 months.
- However, he still has the common law right of fairness to be treated "fairly, not arbitrarily". Even if he could be terminated at the discretion of the Board, he should have been given the reasons why, and the opportunity to respond.
- The Board should have been certain they did not make a mistake, and thus a written or oral reason would obviously be required. With the appellant's response, the Board could then decide what to do.
    - This would be fairest to both the appellant and the Board
    - His lack of 18 months of service required this minimum amount of protection.

Conclusion:

Minimum protection is required.

Hold, Order:

Appeal allowed

Ratio:

Minimal protection of fairness in an administrative process is required at common law, even though discretion could have been exercised as per the statute.

Dissent (Martland):

The very purpose of a probationary period was to enable the company to decide whether they want to pursue employment with a new employee. Thus, the only interest to be considered is that of the Board, and it's decision was purely administrative.

- It could have provided the appellant with reasoning, but it's failure to do so was not a breach of any legal duty to an employee of less than 18 months of service

Again, this does not stand as the process of similar cases today. The main takeaway is that in the sphere of quasi-judicial decisions, natural justice rules run, such that even discretionary administrative powers have a general duty of procedural fairness.

- The amount of fairness required will be a function of the context, including the legislation in question, and the outcome that has resulted.

Generally speaking, employment law is based on contract law. Today, employees can be terminated at will, with or without cause

- Prior to this case, courts decided if administrative decisions are akin to judicial processes, and if they were, they would have to apply natural justice. If it was purely administrative, no duty was needed.
- *Nicholson* changed this. They don't see administrative decisions in a different light, since fairness is required in all proceedings, judicial or administrative. But, the content of that duty will depend on that context, heavily influenced by the legislative provisions.
    - In the *Police Act*, where it says 'nothing herein affects the authority of the Board or council' is a broad statutory grant of power. But that does not mean they can act however they want for an officer of <18 months. The common law cements a general requirement of fairness.
        - Nicholson wasn't entitled to the statutory appeal (since he didn't work for 18 months), but he was entitled to be disciplined in a way fair to him.

Crevier v Quebec [1981] 2 SCR 220

Facts:
Crevier (appellant) was subject to disciplinary action through his company, which was one of the companies subject to the Quebec *Professional Code*. Under the *Code*, the corporations had to establish a discipline committee to examine cases of professional misconduct. Decisions of these could be appealed to the Professions Tribunal, which was a general appellate body established by the *Code*. The tribunal was given power, by the *Code*, to jurisdictional questions implied strong powers that were normally performed by the superior courts.

- Crevier brough action to argue that the *Code* was unconstitutional.

Procedural History:
Superior Court of Quebec sided with Crevier since Tribunals under the *Code* usurped s96 courts

- The Quebec Court of Appeal allowed the appeal on the constitutional ground.

Issue:
Is provincial legislation that includes a privative clause to deny judicial review of jurisdictional questions *intra vires* of the province?

Rule:
Section 175 of the *Code des Professions*
The tribunal may confirm, alter or quash any decision submitted to it and render the decision which it considers should have been rendered in first instance. The tribunal has power to order any of the parties to pay the costs or to apportion such costs among them. The tribunal's decision shall be final.

Analysis:
The broad powers granted in the *Code* include strong privative clauses that effectively exclude courts from any decisions of the tribunal, including reviewing whether the tribunals had the jurisdiction to make the decisions they made. What this does, in practice, is make the Tribunal a s96 court. That is beyond the legislative competencies of the Legislature of Quebec. Legislatures cannot completely insulate tribunals from judicial review via a privative clause. They may oust judicial review in some cases, but not on questions of jurisdiction.

Conclusion:
Legislation *intra vires* and thus unconstitutional.

Hold, Order:
Appeal allowed

Ratio:

Legislatures cannot completely isolate administrative decision makers from the judicial system. They cannot make an effective s96 court to usurp the actual courts in the province.

The Supreme Court drew a line in the sand here, ostensibly in contradiction of the earlier *CUPE* decision, that legislatures cannot completely insulate administrative decision makers from courts via a privative clause. Although limitations of review on legal and factual interpretations are allowed, completely limiting the ability of courts to review decisions completely (including matters of jurisdiction) are unconstitutional.

- This line being drawn was done on constitutional grounds, which is always the trump card of legislation.
- It doesn't directly contradict *CUPE* since privative clauses can't be completely ignored, but they are not allowed to oust the jurisdiction of a s96 court to hear a judicial review.
    - A provincial tribunal cannot determine the limits of its own jurisdiction without recourse to a s96 court.
    - In simplest terms, legislatures cannot legislate to avoid judicial review of a s96 court.
- This protects the rule of law for people to seek judicial review if tribunals are doing something they cannot do. Provinces don't have the jurisdiction to block individuals from seeking intervention through the Courts.

Courts and Judicial Review: Process, Service, Evidence

Judicial Review is not necessarily the same as an appeal

- Judicial Review: a power of s96 courts to review decisions of administrative tribunals on the basis of fairness, reasonableness or lawfulness
- Statutory Appeal: a power of statutorily enumerated courts to review decisions of tribunals or other courts on the merits of fact, law, jurisdiction or mixed.

However, legislation commonly limits the powers of either of these. In terms of statutory interpretation, judicial review is only permitted if a statute is silent on that issue.

- Category 1: Statute is silent – judicial review allowed
- Category 2: Statute contemplates judicial review ("the Court may…") – statutory permission
- Category 3: Statutory appeal from administrative appeal
    - Until *Vavilov*, Category 2 and 3 were treated the same.
    - Now, it is a principle that if the word 'appeal' is present, the appellate standards applicable in civil procedure (ie, appeals) apply. This is a slightly different path

For example, it is common for legislation to only allow appeals for questions of law or jurisdiction. This would mean that judicial review could only be exercised for questions of law or mixed law and fact, since the Act is silent about these.

Alberta *Rules of Court*

The *Rules of Court* are the rules laid down that describe, front start to finish, how civil procedure is accomplished. The Courts have inherent jurisdiction to make their own process, but they are also delegated power in legislation to codify these. The Court of King's Bench grants powers to establish the *Rules of Court*, and the *Judicature Act* gives powers to regulate criminal procedures.

- Rules can put parameters on, or limit their access to court.
    - Things like timelines, that if not met, have consequences of potentially killing the claim

Similarly, administrative tribunals have procedural rules for procedures before them

- The rules can be from legislation delegating power, or it can be implied power to govern the rules process.

Rules of either the court or administrative tribunals ask if they have the jurisdictional power to do X.

- They tell you how to conduct litigation. For us, they limit an individual's ability to seek judicial review.

Part 3 of the *Rules of Court* deals with Court actions and rules around applications. Division 2 of Part 3 deals with Originating an Application (starting a lawsuit). An originating document can be used instead of a statement of claim in the case that there is no dispute over the facts (which is rare).

Alberta Rules of Court, Alta Reg 124/2010

Part 3: Court Actions
Division 2: Actions Started by Originating Application

Rule 3.15

(1) An originating application must be filed in the form of an originating application for judicial review if the originating applicant seeks from the Court any one or more of the following remedies against a person or body whose decision, act or omission is subject to judicial review:
    (a) an order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus;
    (b) a declaration or injunction.

(2) Subject to rule 3.16, an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act, and rule 13.5 does not apply to this time period

(3) An originating application for judicial review must be served on
    (a) the person or body in respect of whose act or omission a remedy is sought,
    (b) the Minister of Justice and Solicitor General or the Attorney General for Canada, or both, as the circumstances require, and
    (c) every person or body directly affected by the application.

Rule 3.19

(1) On receipt of an originating application for judicial review and a notice in accordance with rule 3.18, the person or body named in the notice must, as soon as practicable,
    (a) comply with the notice and send to the court clerk a certified record of proceedings in Form 9, or
    (b) provide in Form 9 a written explanation why the notice cannot be complied with or fully complied with.

Rule 3.21

On an originating application for judicial review, no person may be questioned as a witness for the purpose of obtaining a transcript for use at the hearing without the Court's permission.

Rule 3.22

When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
    (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
    (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
    (c) anything permitted by any other rule or by an enactment;
    (d) any other evidence permitted by the Court.

Rule 3.15 sets out that an originating application must be submitted for any judicial review of a tribunal decision that seeks the remedies in (a) and (b):

- Mandamus: issuance of a mandatory order which requires the administrative tribunal to act
    - If the tribunal refused to do something that you are seeking, you can apply for mandamus to compel them to do it
    - Not commonly sought, but shows the breadth of power that the tribunals have
- Prohibition: forcing the administrative tribunal to *not* do something
    - Often sought when the statutory tribunal is purporting to exercise a power that it does not have
    - Even rarer than a mandamus. Compared to an injunction, a prohibition is more permanent
- *Certiorari:* order to quash a decision made by an administrative tribunal
    - The most commonly sought application
- *Quo warranto*: compel someone who is purporting to hold public office to prove they hold that office
    - Also, incredibly rare
- *Habeas corpus*: challenge the lawfulness of someone's detention
    - Obviously more common for criminal matters
- Declaration: court announces the legal rights of an individual or parties.
    - No other effect flows directly from this
- Injunction: Force someone to stop or refrain from doing something
    - Can be permanent or temporary

3.15(2) establishes a 6-month limitation period to file an application for judicial review. Not doing so will forever prevents its application.

- However, if a statute sets out another timeline, that timeline will apply
    - When rules and statutes contradict, the statute always wins
- Rule 3.16 states that no judges have the authority to extend this period
- The standard limitation period is 2 years, so this is a harsh decline.
    - There needs to be a period where people know their rights are settled, and since this is public law (where the governments actions effect every citizen), this has to be tightened.
- Service and filing are separate issues. You can file within 6 months, but if the opposing party is not served in that timeframe, the application will be blocked. More of an issue for people who self-represent
- 3.15(3) describes who needs to be served:
    - The person against whom the remedy is sought (the tribunal)
    - The Minister of Justice/Solicitor General of Alberta, Canada or both
        - If the statute is federal, goes to Attorney General of Canada
        - If the statute is provincial, goes to Solicitor General of Alberta
            - But, if you argue that the tribunal acted beyond their means, you would file with both Canada and Alberta since you are arguing one took the power of the other
    - Applications don't usually go to the Minister of Justice when you sue someone, but since this is an action against a statutory, public body, saying effectively that the Crown was wrong, it is a public decision and a matter of public interest.
- The Tribunal usually only gets one chance to speak – they cannot argue they were right in the case of judicial review. But that is not how adversarial systems work for judicial review. Filing with the Solicitor/Attorney General permits another body to make the argument on behalf of the government.

- Judges have the discretion to allow tribunals to make additional submissions if the adversarial framework would not be followed without those submissions

Rule 3.19 ensures that the administrative body sends the record to the court. The record is meant to be what was before the administrative decision maker at the time of the decision.

- The rationale for this is that the Court is only analyzing if the tribunal was right – it is not relitigating the issue in front of the court (where new records would be needed)
  - Meant to respect the legislative intention to leave the administrative decision makers with the ability to make decisions (*CUPE*). More hands-off approach

Rule 3.21 ensures no person can be questioned as a witness. The court needs to give permission to get a transcript (may occur if there is an application of bias).

Rule 3.22 ensures that courts, on judicial review, will only use the record/transcript/anything else permitted by the statute/evidence permitted by the court.

- This is much more limited that general civil litigation.
- This means the decision maker cannot have the opportunity to supplement it's own decisions.
  - (d) is an issue since many people who lose at the tribunal will want to tell their story and include everything – these are often struck.

Alberta College of Pharmacists v Sobeys West Inc., 2017 ABCA 306

Facts:
Sobeys owns and operates Safeway, most of which contain pharmacies. If a customer is a member of the Air Miles program, they can earn benefits from Safeway pharmacy purchases.

- The College is a governing body of pharmacists under the *Health Professions Act* and *Pharmacy and Drug Act*

The Board prohibited inducements of a patient that is conditional on them obtaining a drug, including offering loyalty reward programs for pharmaceutical products.

- Sobeys argued the policy, saying it was beyond their jurisdiction of s3(2)

Sobeys attempted to include an affidavit, which the Special Chambers judge had to decide whether to include it, which it did.

- College argues that the judicial review was an interventionist approaches, rejected by the Supreme Court in *CUPE*

Issue:
Did the trial judge err in including new evidence in the affidavit that was not listened to in the tribunal?

Rule:
Section 3 of the *Health Professions Act*
(1) A college
  (a) Must carry out its activities and govern its regulated members in a manner that protects and serves the public interest,
  (b) Must provide direction to and regulate the practice of the regulated progression by its regulated members,
  (c) must establish, maintain and enforce standards for registration and of continuing competence and standards of practice of the regulated profession,
  (d) must establish, maintain and enforce a code of ethics,
  (e) [must] carry on the activities of the college and perform other duties and functions by the exercise of the powers conferred by this Act, and
  (f) may approve programs of study and education courses for the purposes of registration requirements

(2) A college may not set professional fees, provide guidelines for professional fees or negotiate professional fees on behalf of some or all of its regulated members unless the Minister grants the college an approval under section 27.

Analysis:
Generally, evidence not before a tribunal on the topic of the merits of a decision is not open to judicial review. Allowing new evidence on judicial review from evolving research would make the judicial process unworkable. As such, the evidence should not have been included.

Conclusion:
Error to include

Hold, Order:
Appeal allowed.

Ratio:
Only evidence included at the tribunal can be heard by the trial, and the judiciary cannot hear new evidence nor allow its inclusion.

This is very tied into s3.22, that only what is heard in front of the Tribunal can be heard in front of the judge. So, the court cannot consider affidavit evidence that was not heard by the administrative decision maker. However, there are exceptions

- Establishing a breach of natural justice (fairness and bias) not apparent on the record
- Background information establishing standing
- No transcript of the quasi-judicial proceeding
- No reasons were provided by the administrative decision maker
    - This was from *Vavilov*, some tribunals don't provide reasons. They may be able to be gleaned, but they would require some additional evidence for the court.
    - City councils rarely give reasons for bylaws.

It can't be included since they are not trying to do another trial, but review the tribunal decision.

Baker v Drouin, 2017 ABQB 204

Facts:
Baker was off work from a workplace accident and on WCB. He applied for greater pay for his injuries, but WCB found that he was not entitled to an increase.

- The Appeal Commission for the Workers' Compensation Board, a tribunal created by the *Workers Compensation Act*, in reviewing the decision, agreed with the WCB and said they Baker did not adduce enough medical evidence to support his claim and that the WCB could not determine to increase it or not.

Baker applied for judicial review and filed the document within 6 months (timeline set out in the *Act*), but he did not serve until 5 days after the deadline had passed.

Issue:
Did Baker comply with the application to continue the judicial review?

Rule:
Section 13.4 of the *Workers' Compensation Act*:
(4) An application must be filed with the Court and served on the Appeals Commission and the other parties to the appeal, all within 6 months after the date of the decision that is being appealed.

Analysis:
The requirement for judicial review, under both the *Act*, and the *Rules of Court* require that the application be filed *and served* within 6 months. This is stated unambiguously in both legislations. There is no discretion given to any justice to extend this period, since s13.4(5) of

the *WCA* and rule 3.16 of the *Rules of Court* both explicitly prohibit judges from enlarging this limitation period.
    - Accordingly, this application for judicial review must be struck

Conclusion:
Application procedures not followed

Hold, Order:
Application struck

Ratio:
Limitation periods, in statute or the baseline *Rules of Court* are strictly applied for both filing and serving and justices don't have the discretion to grant relief of this.

The judge was pretty clear that the rules did not allow him to extend the limitation period. He did dabble with the motion that he could extend the timeline in his 'inherent jurisdiction', but even if he could, he refused to do so. This reflects the policy decision where a tribunal decision is binding, and any challenge must be made promptly.

- Since many people's rights may be influenced by the decision of that review, the review cannot be left in limbo.
- His application for judicial review was struck.

Courts and Judicial Review: Limits and Justiciability

Even though Courts may answer disputes between individuals and a tribunal, public litigation is considered to be a last resort, particularly since the process is long, costs are high and even if the claimant wins, it may not change the end result.

- Administrative decisions may be appealed as laid out by the statute. Those rights come in different forms, completely dependent on the statutory provisions.
    - However, it is possible to go to court, without administrative avenues, when the administrative decision has affected an individual's *private* legal rights. Avenues such as contracts and torts still exist
- The most generous statutes will allow appeals on law, fact and discretion of the courts to substitute their opinion
- Others will only allow appeals on law or fact
- Most strict will only allow law and jurisdiction – these cannot be removed (*Crevier*) since a court is the only competent body to answer these in entirety
    - The court can either send it back to the agency or in put a decision/remedy
- Most statutes include wide ranging options for appeals. The exception is labour/employment where the options are limited since courts at common law are often seen as unfavourable to labour claims (particularly ones with collective rights)
- Courts long predate governments (and, thus administrative entities), so courts have inherent jurisdiction over tribunals
    - Since 1970, the Federal Court and Federal Court of Appeal (both statutory – not s96) have near exclusive jurisdiction over administrative agencies
- Judicial review is a specific remedy. When determining if the court will answer it, the nature of the application being brought is paramount – not every public law matter is amenable by courts

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

Facts:
Highwood Congregation is a voluntary, religious association whose members live according to standards of conduct on morality.

- Wall engaged in sinful behaviour and did not appear to be repentant, so he was disfellowed by the Judicial Committee and confirmed by an Appeal Committee.

Wall filed an application for judicial review, pursuant to Rule 3.15 of the *Alberta Rules of Court* for an order *certiorari* quashing the decision as it was procedurally unfair.

- He claimed the Committee breached the principles of natural justice and duty of fairness

Procedural History:

The Alberta Court of Queen's Bench found that they had jurisdiction to hear the application.

- The Alberta Court of Appeal affirmed this decision

Issue:

Do Courts have the jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness.

Rule:

Rule 3.15 of the *Rules of Court*

(1) An originating application must be filed in the form of an originating application for judicial review if the originating applicant seeks from the Court any one or more of the following remedies against a person or body whose decision, act or omission is subject to judicial review:

(a) an order in the nature of mandamus, prohibition, *certiorari*, *quo warranto* or *habeas corpus*

Analysis:

The ABQB/ABCA found they could hear cases where property or civil rights were in question, or that they may intervene in decisions of voluntary association where there is a breach of justice and the complainant exhausted all internal dispute resolution processes. Courts are limited in the way they are able to conduct judicial reviews.

- Courts are only allowed to conduct reviews for state action, whereas here, there is none (*Air Canada v Toronto Port Authority*)
  - Public bodies can make private decisions that are not central to the mandate given to it by the Parliament/Legislature
  - Court will review only when there is a broad public impact, and where the outcome of which is of public character
    - Impacting a broad sector of the public does not mean it is administrative; judicial review is only for legality of state action
- Courts are only allowed to intervene to address fairness concerns of voluntary association if legal rights are at stake (ie, there is no free-standing right to procedural fairness)
  - There are no contractual rights that are guaranteed in Walls relationship with the Congregation in and of itself, and no contract was signed.
- Courts are only allowed to consider issues that are justiciable, and theology is not.

Conclusion:

No jurisdiction of courts for judicial review.

Hold, Order:

Appeal allowed; application quashed

Ratio:

1. Judicial review is limited to public decision makers
2. No judicial right to procedural fairness unless a legal right is in question
3. Issues relating to theology are not justiciable.

From this case, it is generally accepted that the applicability of judicial review thus has a two part test:

1. Is there an exercise of statutory authority
2. If yes, does it involve a sufficiently public character?

a. If both yes – the courts may have judicial review powers (depending on the statute)

This is an embodiment on how limited courts are to do judicial review. It is a tool in surveillance of public decision making, and with a religious organization, there was no public decision.

- Implicit in this decision is judicial economy. Courts are already overburdened and cannot be asked to adjudicate matters when there is no public/state action involved.

There is no freestanding right to judicial fairness – there must be a subject matter jurisdiction over the matter first. The Supreme Court considers decisions to be 'public' when it involves questions about the rule of law and the limits of an administrative decision makers exercise of power.

- Simply impacting a broad section of the public does not make it public in terms of public law

According to the *Ethiopian Orthodox Tewahedo Church of Canada St. Mary's Cathedral v Aga* case, the court finds that natural justice is not a source of jurisdiction (ie, the Court can't answer only on that). Natural justice is only applicable when there is a legal right in question.

Even if it were in the jurisdiction, the Court says that justiciability limits the extend courts can engage in decisions made by voluntary associations in terms of procedural fairness.

- Justiciability: whether a subject matter of a legal issue is appropriate for the court to decide.
    - This relates to the subject matter. The general question is whether the issue is one where it is appropriate for the court to weigh in

Air Canada v Toronto Port Authority 2011 FCA 347

Facts:
The formation of Billy Bishop Airport was made between Toronto and the Federal transport minister, which required the Toronto Port Authority to regulate the takeoffs to decrease noise around the neighbourhood

- The Authority grandparented landing spots to Porter Airlines and created bulletins asking Air Canada to respect them.

Air Canada brought action against this and argued that the bulletins and Authority's actions were public enough to attract judicial review under s18.1 of the *Federal Courts Act*. They argued that the Authority was a public body, created by statute.

Issue:
Was the Toronto Port Authority acting as a "federal board, commission or other tribunal" in its conduct with the bulletins, allowing judicial review by the Courts?

Rule:
Section 18.1 of the *Federal Courts Act*

(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Section 2
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown, other than the Tax Court of Canada or any of its judges or prothonotaries, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*

Analysis:
Judicial review applications can only be brought against "federal boards, commission or other tribunal". The actions of the port authority, being transport, was federal jurisdiction. Toronto Port Authority argues that this doesn't mean they were acting as a federal board as in the Act.

- All federal tribunals are public, but still make private decisions.

- In matters where decisions were private in character, there is no room for a public law duty of procedural fairness

Public and private is not a simple delineation there is a careful study of factors decided on their facts. Some of the factors to be considered are:

1. The character of the matter for which review is sought
    a. Private, commercial? Or is it broader import to members of the public?
2. The nature of the decision maker and its responsibilities
    a. Is the decision maker public, like a Crown agent or statutorily recognized administrative body?
3. The extent to which a decision is founded in and shaped by law as opposed to private discretion.
    a. If authorized from public source of law (regulation/statute), more likely it is considered public
    b. Powers to act on something founded in legislation like contract law or business considerations are more likely outside the ambit of judicial review.
4. The body's relationship to other statutory schemes or other parts of government
    a. If the body is woven into a statutory framework and is acting on it, likely public
        i. Mere mention is not enough (*R v Hampshire Farmer's Market*)
5. The extent to which a decision maker is an agent of government or is directed, controlled or significantly influenced by a public entity
    a. A private employee retained by the state for an investigation could be seen as exercising public authority (*Masters v Ontario*)
6. The suitability of public law remedies
    a. If public law remedies are useful, court may be inclined to use it
7. The existence of compulsory power
    a. If a compulsory power over the public at large or a specific profession may indicate a decision as public. Contrast with situations when parties consent to jurisdiction
8. An "exceptional" category of cases where the conduct has attained a serious public dimension
    a. If the matter is serious and has an exceptional impact on the rights of a broad segment of the public, it may be reviewable
        i. Fraud, bribery, corruption, or human rights violations

Conclusion:

Public body

Issue:

Was the port authority acting in a public or private capacity?

Rule:

Section 28 of the *Canada Marine Act*

(3) Subject to its letter patent, to any other Act, to any regulations made under any other Act and to any agreement with the Government of Canada that provides otherwise, a port authority that operates an airport shall do so at its own expense.

Analysis:

TPA was not acting as a crown agent. A port authority, as per s7 of the *Canada Marine Act* is a Crown agency only for the purposes of engaging in activities under s 28(2)(a) of the same Act.

- Other activities would thus not be acting as a crown agent.
- Section 7.2 also goes over letters to other activities necessary for port operations, for which the TPA would act on its own accord, and not as a Crown agent.

The private nature of the TPA letters indicates it was not acting as a "federal board, commission or other tribunal". The bulletin matters have a private nature to them.

- There is no statute or regulation that constrains the TPA authority or gives guidelines for their decision-making abilities.

        - The TPA decisions were thus were not shaped by law, but the TPA's private views about how to proceed.
    - No evidence that the matters of the bulletins were instructed, directed, controlled or significantly influenced by government or other public entities. No legislative provisions would find it either
    - No evidence it should fall in the exceptional cases scenario, as it would not cause a significant/serious effect

Conclusion:
TPA was acting in a private capacity and therefore not reviewable

Hold, Order:
No judicial review permitted

Ratio:
In order for a court to proceed with judicial review, the decision needs to be more than by a public body, but also be of public character.

- Private administrative decisions of a public body are not public character

Even when a body is ultimately empowered by a federal statute, judicial review is not available when the public body is exercising powers of a private nature

- If the board terminates a contract for something, like a janitorial body, the fact that it was by a federal body does not make every decision they made a public law one and thus subject to judicial review – there must be a sufficiently public character.

The list of factors they use to consider the nature of the decision are not exhaustive and don't have to be passed, but can be indicative:

1. Character of the matter: private or public in nature
2. Nature of the decision makers: is it public in nature (Crown agent)?
3. Extent to which it is shaped by law vs private discretion
4. Body's relationship to other statutory schemes: is it woven into a network of government
5. Extent to which decision maker is an agent of government
6. Suitability of public law remedies
7. Existence of compulsory power: if power over public/defined group (profession), may be public
8. Exceptional category where conduct has serious public dimension

This, as always, boils down to source of power, which is the statute (or sometimes prerogative power).

Environmental Protection and Enhancement Act, RSA 2000, c E-12

Privative Clause

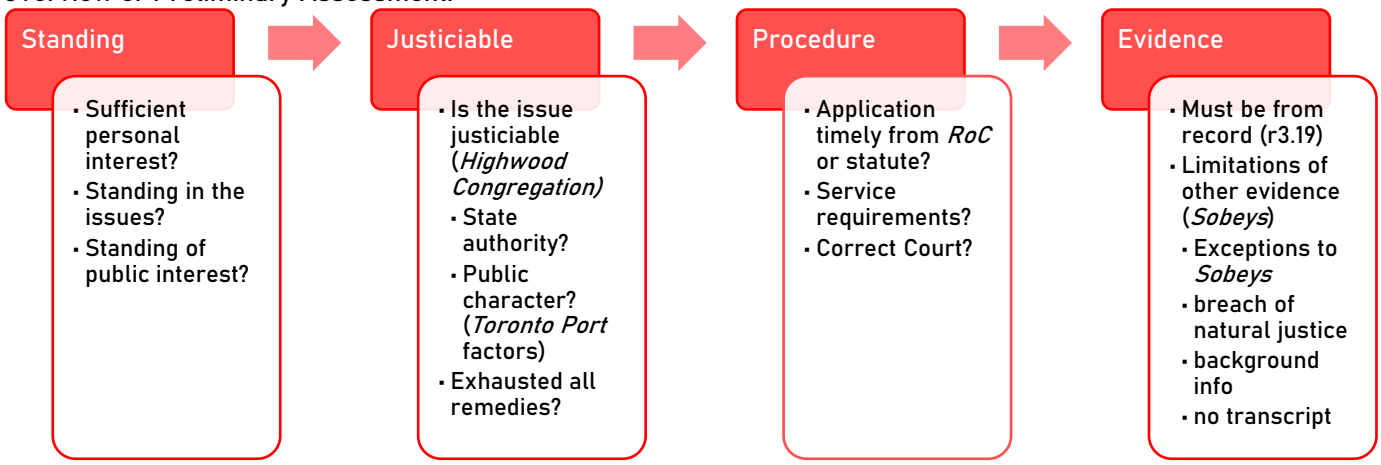
Section 102
Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

This is basically the Government of Alberta saying: do everything you possibly can to avoid Courts from giving their two cents of our administrative decisions to regulate the administration of our environment.

- This cast the net very broadly to not let the Courts in

- However, *Crevier* basically said this is unconstitutional. So, no matter how wordy or broad these clauses, section 96 court will still have the ability to review matters.
    - Even a strong indication from legislatures will not actually forestall judicial review by the courts ultimately.
    - Strong deference can be given to the courts. After *Vavilov*, these clauses mean very little because there is a constitutional basis for judicial review by courts that cannot be short circuited by legislature/Parliament.

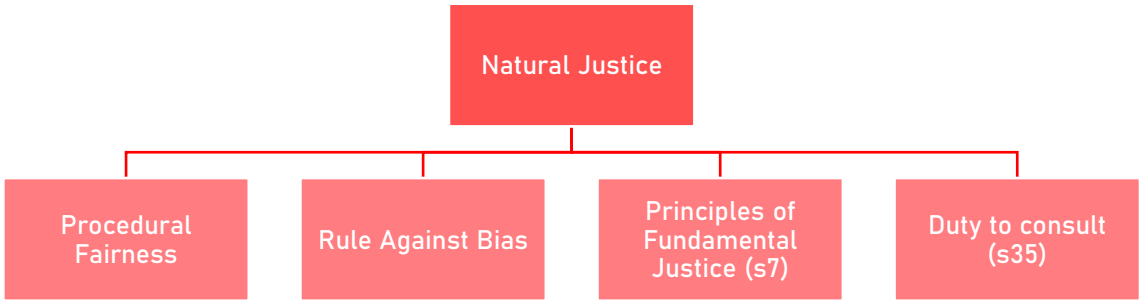
Overview or Preliminary Assessment:



CHAPTER 2: PROCEDURAL FAIRNESS

The concept of Natural Justice can be broken into four, not mutually exclusive, sub-categories

1. Procedural Fairness
2. Principles of Fundamental Justice (Section 7 *Charter* implications)
3. Duty to Consult (Section 35 *CA, 1982* implications)
4. Rule Against Bias



<u>Common Law Duty of Procedural Fairness</u>

The general notion behind procedural fairness is that whenever the public is impacted by state action, there is a presumed level of fairness.

- This does not apply without an actionable cause of action. In other words, this is not a cause of action in and of itself.

There are really two principles of natural justice at play in these cases

1. *Audi alteram partem*: hear the other side

(a) Those affected by a decision are entitled to some notice and information about what the issue is, and the ability to participate in some degree in the process
(b) Ensures that the decision maker hears the side of the other party
(c) This includes 'rights': notice, disclosure, submissions, counsel, lead and cross evidence (participatory rights)

2. *Nemo judex is sua causa*: cannot be a judge in your own cause
   (a) Impartial decision maker and the rule against bias

These are common law principles, sometimes reflected in statutes, but they were identified in common law and where the heavy lifting was done to put contours round those rules.

- These are rules governing process; they are *not* about substantive decisions
  - Substantive decisions are the actual merit of what was decided
  - Procedural decisions are the merit of how the process was carried out and if it was fair to both sides.
- From a foundational principle, it is important to the rule of law. Individuals subject to state action need to feel like they have had some role in the public judicial process because that assists them in their role of the public judicial sphere.
  - There is also instrumental value: these rules help decision makers make better decisions going forward
  - To make a decision, they need to listen to both sides because out system of law awards to best outcomes once all information is on the table.

The source comes from various places:

- Common law: cases like *Baker*
- Statutory law: specific provisions, *Administrative Procedures and Jurisdiction Act* ("APJA")
- Constitutional law: *Charter*, section 35 (duty to consult)

The general procedure for going through whether the Duty applies:

1. Does the duty apply? What is it's source?
2. What is the substance of the duty? What standard have to be met?
3. Did the administrative tribunal actually meet that standard?

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

Facts:
Cooper was constructing a house. He had previously been warned from the Board of Works about the statutory requirements of notice of construction. Cooper claimed to give notice, though the Board never received it.

- Cooper also started work 5 days after supposedly giving notice, though the *Metropolis Local Management Act* required 7 days

After hearing that construction began in contravention of the Act, the Board demolished what he had built, though they never gave Cooper notice of this demolition, though they were never required by statute to do so.

- Cooper sued for damages, in the tort of trespass. The Board argued the trespass was authorized by the statute.

Issue:
Was the Board authorized to trespass without notice through the statute?

Rule:
Section 76 of the *Metropolis Local Management Act 1856*
Anyone intending to build a new house must give notice to the Board of Works 7 days before starting construction

- Also gave board power "in default of such notice to cause such a building to be demolish and to recover expenses"

Analysis:
The powers granted in s76 is subject to the qualification that no man should be deprived of his property without an opportunity of having this heard. It is already a power with enormous consequences. Without the notice, any house, no matter how complete could be demolished without question.

- The notice requirement imposed is required by due consideration for public interest

There is the chance that his notice was subject to an accident that did not allow conformity with the legislation, so the opportunity to explain would be of great importance. It was removed in this case.

- There would be no harm of the Board from hearing Cooper before subjecting him to loss, but there is great harm for the public interest

Conclusion:
No authorization without notice

Hold, Order:
Appeal dismissed

Ratio:
In the absence of statutory language, individuals can rely on the common law for the administration of fairness for administrative decision makers.

- In cases as extreme as the loss of property, the Board, regardless of their statutory discretion, is required to hear and give notice to the property owner.

This case was the beginning of the recognition of a duty of fairness for public decision makers. This was cemented in Canada by the *Baker* case.

- In this case, though Cooper did not follow the rules, there was an implicit duty in the statute for the Board to provide Cooper with notice with what they wanted to do (ie, demolish)
  - The way in which the demolition proceeded was not fair
  - No person is to be deprived of their property without the opportunity to be heard.
- The court discusses how the statute is technically silent on fairness. So, the Court must fill in the gap of the legislation to address fairness, which it concludes requires at least notice. Given that the consequence was severe, they should have at least notified and listen to his story. They could have proceeded with the demolition anyway (as per the statute), but they should have given notice under principles of fairness
  - If the legislation said, 'there is no duty of notice', then that would have been a full answer and the common law would have no gap to fill
  - If the legislation said 'there is no right to hearing', it is still silent on notice. The common law could still fill in the gap and require notice.

This is consistent with the *Nicholson v Haldimand-Norfolk* case, where the Court confirmed that granting particular rights to one group (employees of >18 months to have a hearing) would not imply that there are no rights given to the others (employees of <18 months to be treated fairly)

- Parties of <18 months may have been able to address the allegations or explain something like misconduct if they were treated fairly
- Without that knowledge, and thus no chance to respond, he was deprived of his procedural rights, which is contrary to the principles of fairness for administrative decision makers.

This was a departure of the old reasoning, where courts decided whether the Administrative body was doing something in a judicial capacity vs a quasi judicial capacity, or an administrative

- Moving away from this recognizes that common law proves there is a general duty of fairness
- But the duty of fairness is not the same for all processes (enter *Baker*)

- Where there is a true adjudicative process, the duty may be more stringent for administrative bodies that for something like municipal councils.

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

Facts:
Baker is a Jamaican citizen who entered as a visitor in 1981 and remained in Canada since. She was never a permanent resident but supported herself illegally as a domestic worker.

- She had four children while in Canada, all of them citizens
- After her last child was born, she was diagnosed with paranoid schizophrenia
  - She attempted to apply for welfare, and her kids went to their father/foster care

In 1992, she was deported for working illegally and overstaying her visa.

- She applied for an exemption for humanitarian and compassionate considerations under s114(2) of the *Immigration Act*.
- Part of her application had doctors notes claiming she may become ill again if deported back to Jamaica as there is no treatment there, as well as claiming she was the sole caregiver of her children.

The Immigration Officer, Mr Caden, declined the exemption as there was insufficient grounds, but the letter contained no reasons for this.

Procedural History:
The Federal Court dismissed the judicial review application. They found without notes, the officer must have acted in good faith.

- The Federal Court of Appeal dismissed the appeal

Issue:
What is the legal effect of the stated question under s83(1) of the *Immigration Act* on the scope of appellate review?

Rule:
Section 83 of the *Immigration Act*
(1) A judgment of the Federal Court -- Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court -- Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

Section 114 of the *Immigration Act*
(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Analysis:
<u>What was the nature of the duty of fairness, if any?</u>
Once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal. Section 114 does provide exemptions, but it is more to be used when someone living in Canada illegally can continue to do so on the basis of humanitarian or compassionate reasons.

- Immigration Officers should clarify grounds and public policy considerations even if not well articulated

Factors affecting the Duty of Fairness are underlaid by the notion that procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with

an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker.

1. Nature of the decision being made, and the process followed in making it.
2. Statutory Scheme and the 'terms of the statute pursuant to which the body operates'
    a. Greater procedural fairness will be needed when no appeal procedure is provided within the statute
3. Importance of the decision to the individual(s) affected.
4. Legitimate expectations of the person challenging the decision
    a. Part of procedural fairness and does not create substantive rights
    b. The Convention would not give Baker legitimate expectations to the H&C decision since it is not binding law in Canada.
5. Respect the choices of procedure made by the agency itself (particularly when the statute grants decision maker the ability to make its own procedure

This is not an exhaustive list, rather one that illustrates the balance between respecting the administrative decision maker (and being efficient) with the rights of the person at the mercy of that decision maker.

- Given the very serious consequences for Ms. Baker if she were deported, there is a very meaningful duty of procedural fairness required.

Was the duty of fairness met?

She had the right to be given the reasons for the decision, the evidence, and the chance to respond.

- On the evidence, she did have the chance to respond.
- There were also notes written by the officer that satisfied the written notice requirement for the plaintiff.

However, the notes were unprofessionally written, and indicated that they did not approach the issue with impartiality. There was thus a reasonable apprehension of bias.

- This is not satisfactory for the principles of fairness.

Conclusion:

Duty of fairness present and not met

Hold, Order:

Appeal allowed. Sent back to administrative tribunal for decision.

Ratio:

Procedural fairness is required, and the 5 factors can help to determine the content of that duty

1. Nature of the decision being made and the process followed to make it
2. Nature of the statutory scheme and the terms of the enabling legislation
3. Importance of the decision to the individuals affected
4. Legitimate expectations of the person challenging the decision
5. Defence to the procedural choices made by the decision maker.

This is the leading case in Canada for the duty of procedural fairness. This case solidified the duty in Canada, and elaborated a (non exhaustive) list of factors used to determine the scope of the duty of procedural fairness. These are commonly referred to as the *Baker* factors:

1. Nature of the decision being made and the process followed to make it
2. Nature of the statutory scheme and the terms of the enabling legislation
3. Importance of the decision to the individuals affected
4. Legitimate expectations of the person challenging the decision
5. Defence to the procedural choices made by the decision maker.

Underlying all the factors is that the purpose of participatory rights is to ensure that the administrative decision is made in a fair and appropriate manner for the decision being made, and puts itself in the social context of the claimant, and of the position of the public to put their position forward.

- This was a case where the consequences were very severe: she would have been deported
- Another example of serious consequences is to do with professional contexts. If someone is risking being disbarred/discredited, the procedural burden will be very high.

In the decision, they also go over the guiding principles of duty of fairness and things to look out for:

- Full and fair consideration of the issues (notice and why)
- Meaningful opportunity to present evidence (chance to respond)
- Have it fully and fairly considered (impartiality)
- Oral hearing is not always necessary
- Reasons may be required (they were in *Baker* because serious consequences)
- Flexibility in relation to what constitutes reasons (officer's notes)
- Reasonable apprehension of bias

While the law is going to presume there is a duty of fairness, the degree to which depends on the Baker factors. But it should be noted that this duty is at common law, since statutory provisions can exist to restrict these duties.

- Since the presumption is that the duty exists, the legislation has to be very explicit to override a common law right. It is unlikely to be found by implication (*Nicholson*)
- Where common law grants rights, statutes are allowed to limit or restrict that duty, except where the duty is constitutional. Where the Constitution requires fairness requirements, they will find any contrary statutes unenforceable.

<u>Constitutional Duty of Procedural Fairness – Principles of Fundamental Justice</u>

Tribunals, though public bodies, may not be subject to the *Charter*

Constitution Act, 1982
Part 1: *Canadian Charter of Rights and Freedoms*

Section 7
Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 32
(1) This Charter applies
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province

The first step is to determine whether the *Charter* applies as per section 32. This requires asking whether the action was sufficiently 'governmental'. Universities for example, are made by statute, but most university decisions are not made by the government, and thus not subject to the *Charter*. Tribunals are the same – statutorily created, but only subject to the *Charter* if the decisions are governmental in nature.

The second step is to ask whether the tribunal action violates section 7 of the *Charter*. This itself is broken into a couple subparts. First, does it affect an applicable right? The *Charter* does not define 'life, liberty or security of the person', so the courts have had to do a bit of interpretation on this. Generally,

1. Life: freedom from government threat to one's existence
2. Liberty: freedom from physical restraint and state compulsion re important or fundamental choices

3. Security of the person: freedom from state interference with bodily integrity and serious state-imposed psychological stress.

Second in this analysis, if it deprived one of these three, was if the action was in the "principles of fundamental justice". Again, these are not defined in the *Charter*, so the courts have to fill in this gap as well. Generally, these principles are those in sections 8-14 of the *Charter*

1. It must be a legal principle
2. There must be a societal consensus that the principle is vital or fundamental to shared notion of justice
3. Principle must be identified with precision and must produce a predictable result.

Lastly you ask (not in the scope of this class) whether the infringement was justified under s1.

Overall, the analysis goes:

1. Does the *Charter* apply? (Section 32)
2. Was Section 7 violated?
    a. Was there a deprivation of life, liberty, or security of the person
    b. Was it in accordance with the principles of fundamental justice?
        i. Legal principle?
        ii. Societal consensus?
        iii. Predictable result?
3. Can the infringement be justified under Section 1?

Section 7 is so broad that it is often only plead when you have no where left to go. When common law precedents don't help, statutes exclude rights, you may be able to pull the trump card, which is the Constitution, saying that those rights are guaranteed under s7.

Charkaoui v Canada 2007 SCC 9

Facts:
Three men (Charkaoui, Almrei, Harkat) were issued public security tickets by the Minister of Immigration, thereby naming them as security threats because of alleged connections with Osama bin Laden. This was permitted under section 77 of the *Immigration and Refugee Protection Act* ("IRPA").

- The Federal Court has to read the certificate and ensure that the certificate was reasonable (ie, there are solid grounds for its issuance).
- The evidence used by the Federal Court judge is sensitive, so was not disclosed to the accused, nor their lawyers. This decision cannot be appealed.
    - All three men were detained

The men challenged the constitutionality of the provision, arguing it violated, *inter alia*, section 7.

Procedural History:
Federal Court of Appeal dismissed the case

Issue:
Does the certificate issuance under ss77-84 of *IRPA* violate section 7 of the *Charter*?

Rule:
Section 77 of the *Immigration and Refugee Protection Act*

(1) The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court — Trial Division, which shall make a determination under section 80.

Analysis:
Step 1: Does the *Charter* apply?
This was a Judge decision, and thus open to *Charter* protection
Step 2: Was Section 7 violated?
- Life, liberty or security violated?
  - Detention, in any capacity, by its very nature deprives liberty of the person
  - In this case, should the men be deported, they would be subject to almost certain torture in their home countries, and thus life and security of the person are also violated.
- Was it in accordance with a principle of fundamental justice?
  - Section 7 requires a fair process. Even something as important as national security requires a duty of fair process.
  - Impartial? Yes, the decision was objectively sound
  - Accused knew of the case? No, *Act* prevents knowing the case to meet
  - Accused right to answer? No, could not answer if not given notice
- Section 7 was violated, and not in accordance with the PFJ

Step 3: Was the violation justified under Section 1?
National Security is a pressing and substantial concern, but the process under *IRPA* is not minimally impairing. The United Kingdom has similar legislation but includes a provision to allow special advocates for the accused. Given this, *IRPA* is not minimally impairing
Conclusion:
Section 7 is violated by Section 77 of *IRPA*

Hold, Order:
Appeals allowed

Ratio:
Basic principle of fundamental justice for the person detained is that they need a hearing:
1. Decision by an impartial magistrate on facts and lac
2. Right of accused to know the case against them
3. Right of accused to answer that case

The law in this case was just after 9/11, so there were a lot of issues around national security. *IRPA* was quite comprehensive in terms of procedures, so the common law couldn't really stamp fairness into it. The statutory regime being set meant the appellants could only use the Constitution to argue it.

- The principles of fundamental justice require a fair hearing if it violates the life, liberty or security of the person. The court found that this needed three things: (1) independent and impartial magistrate, (2) right to know the case, (3) right to answer the case
  - Because the accused and their lawyers were not shown the evidence, 2 and 3 were not satisfied. The lack of the ability of the individual to learn of the allegation against them was thus a violation of section 7.
- Section 7 is different than section 1 because section 7 does not care if the limit on life, liberty or security was justified, just if it was in accordance with the principles of fundamental justice. Section 7 thus does not permit a freestanding inquiry to balance societal and individual freedoms
- In *IRPA*, the judge on the Federal Court who approves the certificate must act as quasi advocate, to look for problems in the certificate. But, our legal system requires adversarial models between the parties and an impartial judge to rule in favour of one.
  - In this case, the judge cannot independently investigate the facts, and because the accused are not given the full picture of the case to meet, the judge can't rely on them to present missing evidence.
  - The judge is thus not exposed to the whole picture. Without knowledge of the information put against him/her, the person can't develop proper arguments.

- Thus, the principle of fundamental justice is not only limited, but effectively gutted. How can one meet a case they do not know?

Canada v Harkat, 2014 SCC 37

Facts:
Mr. Harkat was expected to be in Canada for terrorism related reasons. The modified version of *IRPA* (modified after *Charkaoui*) permitted the issuance of a certificate, which would commence their detainment and subsequent deportation.

- As previously, the Judge had to review the certificate to ensure it was valid. If valid, they would be deported. This he did, and found it valid.
  - The trial judge concluded that Harkat would be subject to torture if he was sent back.
- However, the new *IRPA* permitted a special advocate for the accused, not present in *Charkaoui*.

Harkat appealed the judges decision to accept the certificate as a violation of section 7.

Issue:
Do the modified versions of *IRPA* still violate section 7 and the duty of fairness attached?

Rule:
Section 83 of the *Immigration and Refugee Protection Act*

(1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:

(b) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;

Analysis:
Step 1: Does the *Charter* apply?
This was a Judge decision, and thus open to *Charter* protection
Step 2: Was Section 7 violated?

- Life, liberty or security violated?
  - Detention, in any capacity, by its very nature deprives liberty of the person
  - Also torture on deportation, so life and security of the person are also violated.
- Was it in accordance with a principle of fundamental justice?
  - Impartial? Yes, the decision was objectively sound
  - Accused knew of the case? Yes, he had transcripts of confidential information
  - Accused right to answer? Yes, s84(1)(b) gives him a special advocate and he is entitled to cross examine.
    - In accordance with the principles of fundamental justice
- Section 7 was not violated

Conclusion:
New provisions of IRPA in conformity with *Charter* principles of justice.

Hold, Order:
Argument denied

Ratio:
Where an individuals life, liberty or security of the person is at risk, administrative reviews are subject to the principles of fundamental justice.

- But where full disclosure of information is not possible, an alternative process that is a substantial substitute for fairness, the principles of fundamental justice are satisfied.

This was a near carbon copy of the argument from *Charkaoui*, even though Parliament amended *IRPA* after *Charkaoui* to include that special advocate clause. Given the matter of national security, the court found that it was impossible to disclose all information to the accused, but the special advocate was a substantial substitute, that they concluded Harkat benefited from a free trial.

- As such, principles of fundamental justice were met, and the duty of fairness did not alter this decision.

<u>Constitutional Duty of Procedural Fairness – Duty to Consult</u>

The duty to consult is a newer legal norm in Canada, and deals with the way the Crown must govern themselves when dealing with Indigenous nations when their land or their rights may be adversely impacted by any proposed government action. Since 1990, the duty to consult and accommodate with Indigenous people has been considered a constitutional obligation in order to justify any infringement of Indigenous section 35 rights. This extends to

- Aboriginal Rights (*R v Sparrow, Haida Nation v BC*)
- Historic Treaty Rights (*Mikisew Cree v Canada*)
- Modern Treaty Rights (*Beckman v Little Salmon*)

The duty to consult fits snugly into the honour of the Crown. The Honour of the Crown, though an unspoken rule, is as fundamental to judicial independence and parliamentary supremacy as many other elements of the Rule of Law.

- It is also rooted in general fairness on the part of the government, which brings it into the sphere of influence of administrative law.

Guerin v The Queen [1984] 2 SCR 335

Facts:

The Musqueam Indian Reserve occupied 416 acres in the City of Vancouver, at land considered some of the most valuable in the city.

- The Shaughnessy Golf Club was interested in leasing the land for its golf course. The owner reached out to the Superintendent of Indian Affairs about the proposal
- The Superintendent met with the Band Council over the proposal. Oral agreements were made between the Band and the Crown. These included lease terms and money for the land, in a trust account in Ottawa for the Band. These items were not in the surrender document
    - The final lease was negotiated under different terms without the band consent.

The land was subsequently surrendered to the Crown

- The lease was not par with the Band's demands, and they did not receive a copy of the lease until twelve years afterwards

The Musqueam Band brought action on a breach of trust on the part of the Crown as the Crown was trustee of surrendered lands

Procedural History:

Trial judge found there was a breach of trust. The Federal Court of Appeal overturned the decision on the grounds that trusts were political tools rather than a legal obligation.

Issue:

Did the Crown violate their duty of fairness to the Musqueam Indian Reserve?

Rule:

Section 18 of the *Indian Act*

(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms

of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Analysis:

The nature of Indian title and s18(1) places on the Crown, an equitable obligation to manage the lands in the benefit of the Indians, and this is enforceable by the Courts. The breach of a fiduciary duty would make them liable to the Band in question.

- This is because Indigenous Nations have a personal and usufructuary right in the land, only alienable to the Crown through surrender
- The inalienability of Indigenous land is a way to protect Indigenous nations from exploitation. The obligation also imposes on the Crown itself a large discretionary power, to determine what would be in the Nations best interests

So, in the case here where the land was surrendered to the Crown, the Crown has an obligation to regulate the manner of which the Crown deals with the land on the Indigenous nations' behalf. The document of surrender requested that the Crown manage the land on such terms they "may deem conducive to our Welfare and that of our people". The fiduciary duty appears similar to that of a trust, but in nature is *sui generis*.

- Failure to follow conditions will be a *prima facie* case of breach of fiduciary duty
- The Band gave oral terms, that were not in the surrender document, on the matter of the lease with the Golf Course. The Crown was not allowed to ignore these terms simply because they were oral – to do so would be unconscionable
  - Upon finding the requested lease would not be possible, the Crown should have returned to the band to find the next plausible option, whereas they merely agreed to a different agreement.
- The existence of such unconscionability is key to the finding that the Crown breached it's fiduciary duty

The specific duty will depend on the surrender in question, but there still exists a general duty of honour for the obligation, more general than any surrender.

Conclusion:

Duty of good faith violated.

Hold, Order:

Appeal allowed.

Ratio:

There is a general duty of good faith required by the Crown, to follow their fiduciary duty and act on the Indigenous nations best interest. This extends to land that was surrendered to the Crown.

- A specific document (surrender document) will solidify the exact duty of fairness, but the general duty of fairness still exists

While this case was decided in 1984, it commenced prior to 1982, so this case did not have any element of s35 rights in them. The Supreme Court really goes into how public law duties do not usually encompass a fiduciary duty, but given the unique Crown-Indigenous relationship, such a duty exists.

- When the Crown negotiates on behalf of Indigenous nations, there will always be a fiduciary duty. The scope of which will depend on context.
- In this case, s18(1) of the *Indian Act* gave a lot of discretion to the Crown to make decisions. Notwithstanding this, there is an equitable element based on the fiduciary duty. The common law filled in the gap left by the legislation.
  - Similar to *Roncarelli* where there was large discretion granted, but the SCC in both cases said that it is bounded by the purpose of the Act. There is some limits asserted even if they are unspoken.
    - In this case, the limit was based on the fiduciary duty

- Section 18(1) did not create the fiduciary duty. The duty arises independently and is merely recognized by section 18. This was a pre-existing legal duty, independent of any statute, to negotiate for the duty of the Band.

- Because surrender of lands can only be through the Crown, the Crown negotiated between the Golf Course and Band as if they were the Musqueam themselves. They were thus required to put the Band's interest first. By negotiating (and agreeing) to terms that were not discussed with the Band, their interests weren't listened to, so the Crown did not act in the Band's interest.
    - Because the lease was inconsistent with the surrender, the conduct was unconscionable which attracts a remedy.

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

Facts:
The Haida nation resides on the Haida Gwaii islands, and lay claim to the islands and the surrounding ocean. These islands are heavily forested, including the cedar trees, which have, since time immemorial, played a central role in the culture and economy of the Haida nation. It is central to their conception of themselves.

- The islands have been logged, though some have maintained their old growth status.

The Government of BC issues a tree farming license ("TFL") to MacMillan, pursuant to provisions of the *Forest Act,* but transferred the TFL to another company, to which the Haida protested (and never consented to), but the license remained.

- The Haida then launched a lawsuit over the matter by claiming title to the land and the Crown breached this by not consulting with the Nation.

Procedural History:
Trial judge found the Crown had a moral, but not legal right to consult the Haida.

- The BC Court of Appeal reversed the decision and found the duty to consult and accommodate

Issue:
What implicit duties does the Crown have to the Haida nation before permitting TFLs?

Rule:
Section 35 of the *Constitution Act, 1982*

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Analysis:
The duty to consult is grounded in the honour of the Crown, which is always at stake when dealing with Aboriginal rights. The nature of the honour varies.

- Where the honour gives discretionary control over Aboriginal interests, the duty is fiduciary
- Here, rights have been asserted but not proven.
- It is a corollary of s35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This implies a duty to consult and, if appropriate, accommodate.

<u>When Duty to Consult arises</u>
Proving Aboriginal rights can take a very long time. What is to be done in the meantime? The answer depends on the honour of the Crown. It must respect the potential, if unproven interests. They may manage resources as before, but if the resource is exploited in the claims process such that it deprives the Aboriginal claimants of some of the benefit, then that was not acting honourably. The duty to consult is part of the duty of reconciliation and flow from s35.

- The duty arises when the Crown knows, or ought to know, of a potential Aboriginal right or title and considers or approves conduct that would adversely impact these interests.

- Knowledge of the right creates the duty to consult and accommodate. The extent is case dependent
  - A peripheral claim will only rise a duty to consult
    - Give notice, disclose, discuss issues
  - A stronger claim rises a more stringent claim, likely to accommodate.
    - If potential infringement is high, deep consultation and finding a satisfactory solution may be required.
- The content of the duty can be adjusted, not denying the duty exists
  - The duty is proportionate to the preliminary assessment of the strength of the case as to the existence of the right/title.
- At all stages, good faith on both sides is required. The Indigenous nation should not frustrate the Governments attempts at management.

Application to the Facts

1. Did the government have knowledge of the potential right?
   a. Assuredly yes. The Haida have claimed title for over a century and there was various complaints about the rate of logging in old growth forests. The Haida also objected to the TFL without their consent
   b. From this, there was at least a requirement of consultation prior to making the decision that adversely affected Aboriginal rights/title
2. What is the scope of the duty?
   a. Strength of the case
      i. The Haida continuously inhabited Haida Gwaii despite colonialization and never surrendered land and no federal legislation extinguished their right. Their culture depended on the red cedar trees.
      ii. There was a *prima facie* case for Aboriginal right to harvest red cedar
   b. Seriousness of potential impact
      i. Continued logging of a resource of limited supply (old growth forest) points to a large potential impact
      ii. Old growth forests, by definition, would take years to regenerate. Harvesting while deciding if the right exist could deprive the Haida of many rights for generations to come.
   c. Serious consultation required, perhaps to accommodate
3. When does the duty arise?
   a. If consultation is to be meaningful, it should be at the stage of granting or renewing TFLs
4. Did the Crown do this?
   a. The Province failed to meet its duty by not doing anything other than mere notice – indeed they failed to consult at all.

Conclusion:
Duty to consult, and accommodate, was not met.

Hold, Order:
Appeal dismissed

Ratio:
Legal duty to consult and accommodate. Consultation must be meaningful, but accommodation is case specific. There is no duty to agree. The duty to consult is an essential element in s35 demands.

This was the first case of its kind to reach the Supreme Court. They recognized that it had to establish the framework of the duty to consult for an Aboriginal claim has not been decided yet. Importantly, the duty to consult only arises where action that could have an adverse impact on a potential Aboriginal claim is contemplated – ie, the harmful impact hasn't actually happened yet. In this case, the Court needed to ask whether the duty to consult exists despite no title been proven.

- The Court said there still was this duty. The potential rights of an unresolved claim are still embedded in section 35 and the duty to consult is embedded in the Honour of the Crown.
- The scope of the duty will be a function of the preliminary assessment of the title claim. This incorporates (i) the strength of the potential claim (being a proven s35 claim) and (ii) the severity of the potential impacts on the potential right.
    - Weak claim, duty to consult on low end (notice and discussions usually)
    - Strong claim, duty to consult on the high end (negotiate and accommodate requests)
        - Most cases will be somewhere in the middle. This makes the duty flexible
        - This is very similar to the common law duty of fairness – notice/foreclosure, up to more active participation like a hearing/written reasons.
    - The scope of the duty is a question of law, and thus open to judicial review. Whether the procedure taken was fair, is a question of fact.

In *Haida Nation*, the government obviously knew of the potential right. They also knew the potential impacts would be quite strong because depletion of old growth forests would have impacts on Indigenous peoples for generations. This led them to believe that the duty to consult was very high, meaning a satisfactory interim solution should have been attempted. Failure to consult at all was *prima facie* case that they duty was infringed.

- Nevertheless, the court find that the duty rarely creates a duty for the Crown and Nation to agree, more just make a good faith effort at consultation and making plans for the benefit of the nation where possible. Only in the strongest claims will the duty to accommodate be founded.

Clyde River v Petroleum Geo-Services Inc, 2017 SCC 40

Facts:
Geo-Services applied to the National Energy Board (as in the *National Energy Board Act*) to do offshore gas extraction resources in Nunavut, as permitted by s3 of the *Canada Oil and Gas Operations Act*. They wanted to do seismic testing near the Inuit nation of Clyde River

- There was almost unequivocal proof that the testing would impact the marine environment and mammals in the area, which the Inuit of Clyde River depended on for food and income.
- The NEB launched an environmental assessment of the project and there were some community meetings to discuss with Inuit impacted by the testing.
    - The NEB approved the request, finding that adequate consultation had been done.

The Inuit of Clyde River filed a claim for judicial review with the FCA about the NEB approval.

Procedural History:
Federal Court of Appeal found a duty to consult was needed since the NEB decision still needed Minister approval, but this duty was satisfied.

Issue:
Is the duty to consult triggered if the decision maker is a Crown agency?

Rule:
Section 5 of the *Canada Oil and Gas Operations Act*

(1) The National Energy Board may, on application made in the form and containing the information fixed by the National Energy Board, and made in the prescribed manner, issue

(b) an authorization with respect to each work or activity proposed to be carried on

Analysis:
It is unequivocal that the Crown has the duty to consult, but does that duty extend to regulatory bodies when they are the ones dealing with the Indigenous group in question. 'The Crown' is considered the bodies holding executive power – namely Cabinet, which administrative bodies are not.

- Once administrative bodies are given power to execute executive power, the distinction between the Crown and the Administrative body is irrelevant.
- Any executive action, whoever does it, is considered the Crown's responsibility.
    - The ultimate decision will likely be the Minister's anyway
- The duty to consult is not only prerogative powers. The Crown can rely on regulatory bodies to consult, but ultimately is responsible to ensure the duty was fulfilled.

Conclusion:
Administrative body required to consult, though the Crown is ultimately responsible.

Issue:
What is the scope of the duty, and was it met?

Rule:
As per *Haida Nation*, the scope of duty depends on (i) the strength of the claim, and (ii) the potential adverse effects of the claimed right.

Analysis:
<u>What is the scope of the duty?</u>
As in *Haida Nation*, there is a flexible test for the scope of the duty. However, because the scope considers context, and thus money to conclude what the duty is, the circumstances are continuously examined as to the content of the duty. So, if more consultation is required is subject to change the entire timeline of the project.

- The strength of the claim was strong because of Treaty rights in the area
- The impacts were also large – the disappearance of marine mammals would deprive the Inuit of food and their culture
    - Deep consultation was required here.

<u>Was the duty met?</u>
The duty to consult was immediately triggered by the project. However, this duty was not met.

- Consultation was only environmental, not on Treaty rights
- No oral hearings, and chances to intervene were limited
- Substantive questions were not answered
- Some findings weren't even translated into Inuktitut.
    - The process and the substance of the decision were not fair

The Board should not have approved the project, since duty was not met.

Conclusion:
Duty was high, not met.

Hold, Order:
Appeal allowed.

Ratio:
Duty to consult is not limited to exercise of statutory powers – regulatory bodies with executive authority can consult, though the Crown has ultimate responsibility.

This case was the first to make clear that whatever party is executing administrative power, is responsible for consultation with Indigenous claims. However, the ultimate responsibility lies with the Crown. If the administrative body did not do adequate consultation, it is up to the Minister or Cabinet to ensure further, appropriate consultation is done, given the context.

<u>Exceptions to the Duty of Procedural Fairness</u>
Hearing rights (ie, rights of procedural fairness) being denied because of 1) the character of the decision maker, 2) the nature of the decision or 3) both is notoriously unclear. Decisions made by Cabinet on the recommendation of the Cabinet committee makes it more complicated. Cabinet does not have time to

approve everything on its agenda, so it usually has committees and hearings from particular groups or individuals who have specific interests in the matter.

- For Aboriginal claims, early consultation avoids conflicts and cumulative effects. Later consultation results in decreased power for Indigenous nations and their concerns will likely not all be addressed.

Knight v Indian Head School was a fundamental case on the exception of procedural fairness for legislative action. Knight was terminated with notice in line with his contract. But he wanted more notice and a hearing. The SCC found that no procedural fairness was from the legislation, though being treated fairly was guaranteed. In the end, they found the duty was met.

- This case was the first that didn't primarily care about categorizing the decision as legislative vs judicial vs quasi judicial.
- It found that legislative bodies making general decisions are not held to a duty of fairness, whereas administrative bodies making specific decisions are.

Canada (Attorney General) v Inuit Tapirisat of Canada [1980] 2 SCR 735

Facts:
The Canadian Radio Television and Telecommunications Commission ("CRTC") had the power to regulate the rate of utilities, including those of Bell Canada. This is grounded by section 64(1) of the *National Transportation Act*.

- Bell made application to increase its rate, but Inuit Tapirisat of Canada ("ITC") opposed this, and only favoured the increase if it would provide better service to Northern Communities.
- CRTC approved Bell's request.

The *Act* permitted appeals to Cabinet, so the ITC appealed this to Cabinet through the Department of Communications.

- The Department made a statement that included the facts, positions of the parties, and gave the Departments opinions about the appeal
- However, the ITC only received Bells submissions
- The Minister of Communications moved to dismiss the appeal

The ITC appealed this to the Federal Court for a declaration that the hearing should have been given and it did not comply with the principles of natural justice.

Procedural History:
The Federal Court allowed the Government's motion to strike the ITC appeal

- The Federal Court of Appeal allowed the appeal of the ITC, so the GoC appealed to SCC

Issue:
Is there a duty to observe natural justice in, or at least a lesser duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents under their submission of a petition under s64(1)?

Rule:
Section 64 of the *National Transportation Act*

(1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and with-out any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

Analysis:

Even with a duty of fairness, the statutory provisions that grant discretion must still be analyzed to see if the decision maker is explicitly subject to any rules of procedural fairness.
    - In exercising statutory powers, the Governor in Council (aka the Cabinet) must stay within the bounds of the law of the statute. Going beyond will bring in the courts to ensure statutes are carried out in their terms.

In interpreting s64(1), the Cabinet not only can vary any decisions made by the CRTC, but also is "empowered" to approve all charges for the use of telephones of Bell Canada.
    - Implicit in this is determining whether the charges are "just and reasonable" and not discriminatory

However, in exercising this power, Parliament has not imposed any burdens on how this reviewing function should be exercised, either in substance or procedure. It also has not imposed any procedural fairness requirements. So long as Cabinet follows the powers granted by the statute in exercising discretion, they have unlimited discretion.
    - *Obiter*: the court may respond with fairness if the condition precedent was not fulfilled or the Governor didn't even examine the petition at all

The nature of the body must be considered when analyzing the technique of review used by Cabinet. Cabinet must be able to listen to staff and personnel who have concerns of policy decisions around the petition. Parliament has imposed no burden the Cabinet in the procedure of hearing petitions.
    - This is heavily reinforced by s64(1) saying Cabinet may "of his motion" vary any order of the CRTC

Implicit duties of procedural fairness are not given in every case – it all depends on the statute and the intentions the legislative body had to grant the power.
    - Section 64 vests power so Cabinet can effectively respond to "political, economic and social concerns" and can do this by consulting all sources Parliament itself may do, absent other directions in the statue. This is seen as Cabinet can vary any decision acts on its own, at any time, and in his discretion.
        - (1) does not provide altered procedures should a party petition the Cabinet to exercise the same function

In sum, the discretion granted by Parliament to Cabinet is complete so long as they remain in the jurisdictional boundaries of s64(1)
    - This means the Cabinet does no need to give reasons, hold hearings or acknowledge receipt of the petition. Courts will not weigh in on if the procedure was well implemented, just that it was satisfied.

Conclusion:
Duty of fairness is not imposed by s64(1)

Hold, Order:
Appeal allowed

Ratio:
Where Cabinet is given a power that was once done by the legislature the common law duty of fairness is not necessarily applied. More generally, legislative decisions are not subject to the duty of procedural fairness.
- Courts will only ensure that the Cabinet made its decisions proportionate to the power it was granted by statute.

This case is a little bizarre, since the statute directed decisions to be appealed to Cabinet rather than Courts/administrative bodies. The powers under s64 were quite broad. It is the nature of that power that the Court said is determinative. In general, decisions made by Cabinet are not subject to the duty of procedural fairness.

- Given the nature of the body that is making the decision, the duty of fairness may not apply. In this case, legislative bodies do not have to abide by the duties of procedural fairness. Though

this was a Cabinet decision, which is executive, the duty of fairness does not apply because the statute granted Cabinet powers usually done by the legislative body.

- Decisions by Cabinet can be subject to judicial review, if they do something more than what the statute permitted them to do. In this case, if they didn't even review the complaint or the 'condition precedent' wasn't fulfilled.
    - In any case, executive decisions are also not subject to the duty of procedural fairness.

Also important was the decision being made. The discretion granted to Cabinet was very broad (they could confirm, vary, overturn). It was also of general application – every Canadian with Bell would be subject to the changes. This meant the duty was not extended. On the other hand, if the Cabinet made a decision of more individual impact, rather than general application, there would likely be a duty of procedural fairness required.

- So, in sum, if the decision is (1) legislative, or (2) on the broad application of policy, rather than adjudicative, the duty of procedure fairness is unlikely to extend to the decision maker, though the statute needs to be analyzed.
    - This is similar to the *Sobeys* case since that was also a policy decision which was challenged by the College. There was no adjudication of rights, just a challenge of the application.
    - Municipal councils and universities also make general policy claims that are enacted on a general basis, though they may impact certain individuals more than others.

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2018 SCC 40

Facts:
The federal government introduced (but had not yet ratified) two environmental legislations that impacted Canada's environmental protection regime. The *Canadian Environmental Assessment Act* and *Navigation Protection Act* amended existing legislation to repeal various protections.

- The Mikisew Cree were not consulted. They argued that the new legislation would damage their Treaty 8 rights to hunt or fish

The Mikisew Cree sought judicial review at the Federal Court to argue the federal government violated their duty to consult by failing consultation with the new legislation.

Procedural History:
The Federal Court sided with the Mikisew Cree

- Federal Court of Appeal allowed appeal as they found it legislative in effect

Issue:
Was the introduction of two new bills a violation of the Federal government's duty to consult, to the Mikisew Cree?

Rule:
Section 35 of the *Constitution Act, 1982*

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed

Analysis:
It is generally accepted that legislative functions do not cement a duty of fairness. Development of legislation in Parliament would *prima facie* not have a duty of fairness, nor a duty to consult. The duty to consult is more unique than the common law duty of fairness, but the conduct sufficient to trigger this duty must be by the executive, or those representing the executive.

- The doctrine would be ill-suited for development of laws. Courts should not trespass on this domain before the legislation is in effect
- There may be some role of courts in the process, but this is not so in this case.

Extending the duty beyond the realm of execution of laws and into the formation of them would unjustly allow courts to constrain on parliamentary procedure.
    - There is no duty to consult the Mikisew Cree about the passage of legislation
    - This is not to say there should be no consultation. Indeed, governments would do well to consult before enacting law that could constrain Aboriginal rights.
    - The Honour of the Crown is always at stake, and should an issue come to the Courts after enactment, consultation would bode the government well.
        - But this does not mean it is legally required.

Parliamentary sovereignty and parliamentary privilege justify the absence of a duty to consult in legislative processes.
    - As we saw in *Haida Nation*, executive action will be governed by the duty to consult.

Conclusion:
Duty to consult was not needed.

Hold, Order:
Appeal allowed.

Ratio:
No duty to consult for the passage of legislation, though it may be a good idea.

This case was kind of all over the place in a lot of ways. First of all, the Federal Court found that they actually did not have jurisdiction to hear the case as per the *Federal Courts Act*. So, this is a good lesson in getting the right court when filing.

But it also went on to show that the duty to consult/of fairness cannot extend to the passage of laws. To allow courts to govern the legislative process could allow them to completely stall or prevent legislation from being passed. Parliamentary privilege requires that law makers be able to freely debate and implement laws, and subject them to judicial review only once they are in effect.

- However, the Court says that it is a good idea to consult, if not required, under the Honour of the Crown, since this would be analyzed should the impugned legislation ever come to the Courts once in effect.
    - This approaches the need for consultation, so the door was left a bit open
- Additionally, executive action with Aboriginal claims always requires the duty to consult, and since the executive/legislative divide can be blurry in Canada, this area of law is not well settled.

Canadian Association of Regulated Importers v Canada (Attorney General) [1993] 3 FC 199

Facts:
The Minister of Trade changed the quota distribution for the import of chicks and eggs. The change was a significant change from the previous model

- The Canadian Association of Regulated Importers ("CARI") thus challenged this decision, saying they were not properly consulted and sought a mandamus

Procedural History:
The CARI was successful at the Federal Court

- The Federal Court of Appeal overturned the trial decision

Issue:
Was the duty of fairness (in this case, to consult) triggered by the ministerial decision?

Rule:
Section 5 of the *Export and Import Permits Act*

(1) The Governor in Council may establish a list of goods, to be called an Import Control List, including therein any article the import of which the Governor-in-Council deems it necessary to control for any of the following purposes:
(b) to restrict, for the purpose of supporting any action taken under the Farm Products Marketing Agencies Act, the importation in any form of a like article to one produced or marketed in Canada the quantities of which are fixed or determined under that Act.

Analysis:

Federal Court

Legislative decisions are usually those that apply to a large group of people. In this case, the decision applies to a very small portion of the population. The Minister was applying power granted to him by statute, and while general in nature, it was for a specific subsect and thus very particular. It's effect was considerable economic harm to the applicants. There was surely an implied principle of Parliament when enacting the legislation that the power be exercised in the principles of administrative fairness.

- Those who are affected, especially significantly economically disadvantaged should have at least some general notice of what was contemplated and be given the chance to respond *before* the decision.
- They didn't necessarily need individual notice, more of an 'fyi'.

A legislative decision (ie, 'policy') should not immunize it from judicial review. This case wasn't one where the Minister had discretionary power, it was a situation where the Minister set down the rules around which permits would be approved.

- Application granted

Federal Court of Appeal

Generally, the rules of natural justice are not applicable to legislative or policy decisions. It has also been specifically found that rules of natural justice are not needed when setting the quota policy, which is usually done by Cabinet. There is no reason to counter this. Any remedy that will be available will be political, not legal.

Conclusion:

No duty

Hold, Order:

Appeal allowed

Ratio:

Decisions of legislative power or policy (specifically quotas) are immune from duty of fairness.

Again, the court here finds that, while consultation may have been a good idea, it is not required. They found that if Parliament wanted there to be consultations, they could have required it. Policy decisions, even pursuant to a statutory power, are not subject to a general duty of fairness.

- However, there is a lot of disagreeing with this appeal, so there is certainly argument on both sides.
- The argument that the decision was applied to everyone (so general) negates the duty is a little muddy. If the quota decision impacts a specific quota of a specific corporation, there may have been a duty of fairness.

The *Dunsmuir* case found another exception: a public office holders employment. Their employment will be governed by their employment contract and any disputes can be resolved through contractual claims and any applicable statutes. In other words, they are not subject to any additional public law duty of fairness. The only remedies available would be contractual. From this, the Supreme Court gave exceptions:

1. Where a public employee is not protected by contract (judges, ministers)
2. Where office older is expressly subject to summary dismissal (no contractual protection)

3. Where a duty of fairness is a product of statutory power (through implication) governing the employer-employee relationship

Some Courts have ruled this exception also applies to public employees' employment beyond dismissal. The SCC rejected this in *Mavi*, saying it only applies to dismissal.

- People would generally prefer judicial review because it would be sent back to the tribunal and they could get their job back. Also, would get the pay you would have had had you not been fired
    - But in common law, you can only get damages.

Municipal Government Act, RSA 2000, c M-26
Section 206 (1) The appointment of a person to the position of chief administrative officer may be made, suspended or revoked only if the majority of the whole council vote to do so. (2) The appointment of a person to the position of chief administrative officer may not be revoked or suspended unless the council notifies the officer, in accordance with subsection (3), that it is proposing to revoke or suspend the appointment and provides the officer with its reasons. (3) The notification and reasons must be in writing and be served personally on the officer or sent by regular mail to the last known address of the officer. (4) If requested by the officer, council must give the officer or the officer's representative a reasonable opportunity to be heard before council.

In the Alberta *MGA*, the chief administrative officer is kind of like the CEO of Municipal Council. They report directly to elected officials, but also have statutory obligations.

- Section 206(2) requires the person to need notice for the reasons of their termination. This is thus an exception, to the *Dunsmuir* exceptions.
    - If requested, the officer must have a reasonable chance to be heard

Typically, termination clauses have 4 things that everyone wants:

1. Right to notice
2. Right to know why
3. Right to make submissions
4. Right to be represented by counsel

<u>Triggering the Common Law Duty of Fairness – Rights, Privileges or Interests</u>

Still, up until this point, we are not dealing with the review of substance of the decision on a reasonableness standard, just on the issue of process.

- Rights have a particular meaning where someone has a vested right
- Privilege is a lesser right – it can be limited. But that does not necessarily mean that procedural fairness does not apply
- Procedural fairness will apply even if you only have an interest in the outcome

Dairy Productions' Cooperative Ltd v Saskatchewan (Human Rights Commission) [1993] 4 WWR 90
Facts: The Saskatchewan Human Rights Commission appointed an officer to investigate a complaint of workplace harassment at the Dairy Productions Cooperative ("DPC", plaintiff). - They were to make a report if there was a sufficient bases for appointing an inquiry board to adjudicate the complaints under the *Human Rights Code*.

DPC was informed and the investigation proceeded. The DPC repeatedly sought to retrieve more information about the complainant. The officer concluded there was probable cause that the Act was infringed.

- The DPC was given all the complaints and details, though settlement failed.

DPC sought judicial review to quash the establishment of the board and the report.

Issue:
Did the investigating officer had a duty to act fairly?

Rule:
Section 16 of the *Saskatchewan Human Rights Code*

(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term or condition of employment, because of his or their… sex,… marital status,…

Analysis:
The officer did not have power to affect any of the substantive rights of the applicant, at most to determine if probable cause existed. The Commission then decided if the matter should proceed under s28.

- The next step being settlement also were negotiations that would not affect the applicant's rights.
- If this failed, and the Commission had to set up a board of inquiry, then the duty to provide the applicant with substance of evidence would arise.
  - The investigative stage does not affect the rights of an employee, and thus no duty of procedural fairness is needed.

Conclusion:
No duty in the case at bar.

Hold, Order:
Application denied.

Ratio:
Gatekeeping or investigative processes are preliminary and bring no right to fairness.

Simply put, because the investigating officer was doing a preliminary gatekeeping function, to determine whether further investigation was needed, he owed no duty of fairness, since there was no inherent right to it. The investigation that ensued (if they found probable cause), would be bound to procedural fairness.

- The Co-op saying they wanted to know more, means they want notice for the case to meet (what they're being investigated for). Usually, this is accompanied with wanting an opportunity to respond.
  - Issues aren't often clearly characterized as 'I want notice', so these hints should cue you off as to what they are looking for.

Human Rights Commissions are tribunals, specialized to deal with discrimination in society. Because these are broad mandates, they also have powers over process of investigation akin to administrative law. They are meant to level the field for complainant and the alleged discriminator. This avoids the need for lawyers and expensive feeds, and if they lose, there will be no costs against them (this is basically the gold standard for access to justice).

- Should investigation lead to a hearing, it would follow the full adjudicative model (like a courtroom). But the investigation is not the hearing, and there is no duty to fairness.
- Even in this case, the investigation had full disclosure and exchange of information.
  - The Co-Op just wanted more particulars (means they want lawyers).
- Investigative stages do not grant a right to process because the process does not affect rights

Courts are generally not going to interfere with an administrative process until they come to an end. Presumably the legislature intended it to be that way when the tribunal was made.

- Courts will see it through and only make a decision after it is done
    - There are some circumstances where the impact of the procedural unfairness is so severe that you could bring judicial review before it is finished, but that is no so here.
- Where an interim process leads to a full hearing with procedural rights, interim process will attract fewer rights

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

Facts:
Cardinal (appellant) was imprisoned at the Matsqui Institution. He allegedly held a guard at knifepoint for five hours. Charges of forcible seizure and attempted escape were laid.

- The appellant (and accomplices) were transferred to Kent Institution, a maximum security prison where the warden (respondent) put them in segregation, pursuant to s40(1)(a) of the *Penitentiary Service Regulations*.
    - Segregation is a form of confinement with serious restrictions on mobility, activity, and association (effectively solitary confinement)

The appellants segregation was reviewed once a month as per s40 by the Segregation Review Board. The Board recommended they return to the general incarcerated population, but the Director did not follow these recommendations. This occurred multiple times. They were in segregation for four months at the time their applications for *habeas corpus* were made.

Procedural History:
The Supreme Court of BC held the segregation was unlawful by denial of procedural fairness.

- BC Court of Appeal that a duty of fairness was owed, but found that it was not breached

Issue:
Does relief by way of *habeas corpus* with *certiorari* in aid permit the release of prisoners in segregation to the general population of the penitentiary on the ground that the segregation was imposed by breach of procedural fairness?

Rule:
Section 40 of the *Penitentiary Service Regulations*:
(1) Where the institutional head is satisfied that
    (a) For the maintenance of good order and discipline in the institution, or
    (b) In the best interests of an inmate

it is necessary or desirable that the inmate should be kept from associating with other inmates, he may order the inmate to be dissociated accordingly, but the case of every inmate so dissociated shall be considered, not less than once each month, by the Classification Board for the purpose of recommending to the institutional head whether or not the inmate should return to association with other inmates.

Analysis:
For the duty of procedural fairness, the Director was undoubtedly under such a duty in exercising his powers under s40. This duty applies to disciplinary proceedings within a penitentiary. There are no provisions in the legislation about fairness.

- Prison decisions must sometimes be 'on the spot' decisions and often judicial review must be exercised with restraint. The question is thus not whether there was a breach of prison rules, but a breach of the duty to act fairly in all circumstances which had a substantial injustice.
- The Directors substantive choices to originally start the segregation and to prolong it, was lawful and his discretion was carried out fairly.

However, due to the severity of the Director's decision on the appellants, procedural fairness required that the Director informed them of the reasons for his decision and give them a chance to respond – though this could have been informal.

- He had a duty to consider what the appellants had to say.

- This is the minimum and essential elements of procedural fairness.

This is consistent with the process of prison administration, and the concern that it should not be unduly burdened by unreasonable procedural requirements.

Conclusion:

Duty not met

Hold, Order:

Appeal allowed and trial decision restored.

Ratio:

Duty of fairness (give reasons, chance to respond) is owed pursuant to any discretionary power, for administration of prison decisions and imposition of segregation.

The court analyzed here how far administrative law will go. Does it extend to jail, since jails are publicly administered? In this case, the *Penitentiary Services Regulation* does not mention anything about procedural fairness, and the powers were meant to be highly discretionary. Before this case, courts wouldn't impose fairness requirements in jails since courts don't have expertise of jails or safety concerns therein, so it was long thought an officer's decisions were immune from fairness principles.

- However, this case found that if rights, privileges or interests are involved, and not legislative in nature, the duty of fairness will apply to prisons.
- "This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual"

The initial segregation was lawful. It was not based on a hearing since that would be impractical in the context of a prison setting.

- Continuing segregation will require fairness because that immediate safety risk is no longer present. This means the common law principle applies again.
  - Cardinal needed to know why the decision was being made and given the chance to respond to potentially clarify his impugned conduct
- This is an expansion of the scope of judicial review.
  - It also shows that context is important in determining the scope of the duty of procedural fairness – since a hearing was needed for continuing segregation, but not the initial
- Obviously in jail, you cannot have a formal hearing, so the decision to continue segregation needs contextual fairness. The person needs some protection, so they need to know their allegations and to respond. A right to procedural fairness is *not* the right to a court like hearing.

Recall that the remedy to denial of common law fairness invalidates the underlying decision. So, the stakes are just as big as a review on substantive review.

- Even if the outcome would have been the same had procedural fairness been followed, it still gets sent all the way back

Re Webb and Ontario Housing Corporation [1978] 22 OR (2d) 257 (CA)

Facts:

The Ontario Housing Corporation (OHC) owed high rise apartments in Toronto, managed by Meridian Property. They were leased to renters of low income.

- Webb and her children became tenants in 1970. Meridian recommended terminating the lease in 1973 because of the issues of her children.
  - OHC approved and an application to terminate was brought under the *Landlord and Tenant Act*.

Procedural History:

Webb applied to review the application of the OHC decision and it was stayed. The application was dismissed and Webb appealed.

Issue:
Was there a duty of fairness applied to the appellant, and if so, was it followed?

Rule:
As per *Inuit Tapirisat*, decisions of legislative nature are immune from duty of procedural fairness.

Analysis:
The appellant is a welfare recipient and was accepted as tenant because of this. The OHC could exercise its power of termination and deprive the appellant of the lease, if it did so fairly by telling her of the complaints and give her an opportunity to respond. There is a duty of fairness, because it was about the revocation of a benefit she was already entitled to.

- If no notice was given by the investigation by a public corporation in carrying out a public obligation is in danger of losing a substantial benefit without opportunity to respond, that is not fair.
- The respondent wrote to the appellant to inform her that her son was disruptive and if it continued her lease would be terminated. She was illiterate, but she had opportunities to seek clarification, and her children could read.
- The community relations worker also visited her to discussed the issues.
  - They gave her reasons and the opportunity to respond

There is certainly a duty of fairness, but it was met in the present case.

Conclusion:
There is a duty of fairness, but it was met

Hold, Order:
Appeal dismissed

Ratio:
Duty of fairness for a public organization required when it could deprive a substantial benefit the claimant is currently entitled to; needs reasons for the decision and a chance to respond.

This was the first case on the applicability of the duty of fairness in the context of a benefit, rather than a right or interest or privilege. The Court found that because she was entitled to this benefit, she was also owed a duty of fair procedure. So, she needed the chance to know why and to respond.

- However, this would not extend to a preliminary decision by the OHC about whether she was eligible for the benefit, since in that stage, she had wasn't entitled to anything.
- Eligibility they are granting her a right/benefit that she does *not* currently have – giving fair procedure to everyone who applies for welfare would be unworkable
- But, in this case the duty was met. She was written to about the issues, and a worker showed up to discuss.
  - She needed to produce evidence that she did not know of the warnings to evict
- The procedural rights, while they exist, are on the low end of the spectrum (Baker factors)

Re Abel and Advisory Review Board [1979] 24 OR 279 (CA)

Facts:
The Advisory Review Board (ARB) was created under the *Mental Health Act* to review annually psychiatric patients who were charged with criminal offences but not guilty by reason of mental disorder. They recommended release to the provincial Cabinet.

- Lawyers requested disclosure of the files of the institution about patients, especially those that would be submitted to the board.
- This request was denied. There was then application for review of this.

Issue:
Was the duty of natural fairness breached?

Rule:
Section 29 of the *Mental Health Act*

(1) Upon receipt of an application by the chairman, the review board shall conduct such inquiry as it considers necessary to reach a decision and may hold a hearing, which in the discretion of the review board mat be held in camera, for the purpose of receiving oral testimony.

(4) The officer in charge shall, for the purpose of the inquiry, furnish the chairman with such information and reports as the chairman requests

Analysis:
The patients only hope of release is if the ARB sides with them. Cabinet does not have to approve based on the report, but these could be very persuasive or decisive. If counsel wishes to represent their client properly, it is needed to examine such reports. An element of fundamental justice is that the person needs to know the case against them. Revealing reports is not always necessary, but there are some cases requiring full disclosure.

- There is the chance that the production of these records can cause harm to the administration of the Centre, and to the patient.
- The Chairman denied production that he had no jurisdiction. He needed no jurisdiction to hand them over under s29(4). Consideration was needed as to if they should be disclosed. The Chairman did not consider this and gave no answer, so this was a failure of natural justice.

Conclusion:
Procedural fairness failed.

Hold, Order:
Quash Chairman decision and remit back to Board.

Ratio:
When the process has sufficient proximity to the final decision, there is a duty of procedural fairness even in the case of legislative or preliminary steps.

This case reversed the general idea that there is no duty of fairness in the preliminary assessment. In this case, the preliminary assessment basically determined what the outcome was, so the Court found that the assessment was sufficiently proximal to the outcome, and that infused a duty of fairness.

- The nature of the right in this case, was that the only chance of release are from the preliminary assessment, and that is heavily determined by the process.
- So, rather than asking whether the decision was adjudicative, it should instead be asked whether the preliminary stage was a separate adjudicative stage, or one where all the heavy lifting is already being done, so the next step is really just a rubber stamp/limited degree of involvement.
    - The latter requires a duty of fairness.
    - This is why this case is coined the 'Proximity Case'
- If the Lieutenant Governor did a hearing after each preliminary step, there would be no duty because there is the function of the final level of fairness.
    - Rather, the Lieutenant Governor did the decision then and there.
    - Basically, whenever a board does something and the Minister will just sign off on whatever their employees did.
- This was *not* about the substance (he was not ordering the disclosure of documents), he was saying it was about the decision to not consider the release and lack of fairness from there.
    - Not saying that it has to be disclosed, saying that that decision maker *can* make that decision

This is about respect for the statutory decision maker, since they are a specialized body that the legislature has trusted them to make educated decisions on those cases.

Legitimate Exceptions

Recall the 5 Baker factors:

(a) The nature of the decision being made and the process followed in making it
(b) The nature of the statutory scheme and the terms enabling legislation
(c) The important of the decision to the individuals affected by the decision
(d) The legitimate expectations of the persons challenging the decision
(e) Defence to the procedural choices made by the decision maker

At minimum, fairness requires notice. At maximum, fairness requires a full hearing (right to call evidence, cross examine, make submissions and have a hearing). This is thus subjective.

- The list is not exhaustive and not all 5 need to be analysed.
- Though, in your analysis, introduce all 5, and consider all others. Not all are weighted equally.
    - Additionally, this duty is only at common law, and is subject to any statutory language

Legitimate expectations is a stranger factor of the 5, and the courts have analysed it specifically multiple times. Sometimes a procedural duty of fairness can be required from the legitimate expectations of the person affected, rather than the statutory provisions in question. It is *not* the subjective expectations of the applicant, rather the legitimate expectations anyone would be required in the circumstances. This usually entails what the person has been told would happen: what did the administrative decision maker, either specifically or generally (guidelines) they would do in the process?

- It is not necessary for the claimant to know these guidelines in advance of it happening. Even if the applicant doesn't know it in time, they can still hold the administrative decision makers to those representations.

However, legitimate expectations does not give substantive rights, like the duty of procedural fairness at large. It would not fetter any decisions following the appropriate procedure. If the agency made representations about what would happen in procedure, or what the outcome would be, the applicant would have *procedural* rights (even if the representation was substantive in nature). It will *not* impact the substantive decision made.

- It also does not apply to legislative decisions because the legislature must be free to legislate in their powers without fairness to every citizen of the country or province.

As per *Baker*, if the claimant has legitimate expectations that a certain procedure will be followed, this will be required by the duty of fairness.

- Similarly, if a claimant has a legitimate exception that a certain result will be reached (often from a representation), there may be a higher duty of procedural fairness.
- The principle is that circumstances affecting procedural fairness may be the promises of administrative decision-makers and it would be unfair to act counter to these or to backtrack on the promises without significant promises.

However, legitimate expectations do not apply to legislation. As found in the *Reference re Canada Assistance Plan (BC),* legislatures would be paralyzed if they were subject to procedural fairness.

- Canada made funding plans to provinces, that could not be amended without consent and notice of the provinces. When Mulroney enacted legislation that they would cancel the transfers, so British Columbia asked a reference as to whether they can do this.
    - BCCA said there was no legitimate expectations in legislative process, so there is no requirement.

Canada (Attorney General) v Mavi, 2011 SCC 30

Facts:
Mavi sponsored their relatives for permanent residency in Canada. As per *Immigration and Refugee Protection Act* and *Regulations,* the sponsor signed undertakings needed for the PR. These required them to reimburse the federal government for any benefits given to them via social assistance.

- Ontario attempted to collect this amount, but the sponsors argued they were owed procedural fairness
    - They argued they needed notice by the government of their intention and the opportunity to make representations as to their right to waive or delay the fees based on their financial situation.

Issue:
Does a duty of procedural fairness arise from the defendants' legitimate expectations?

Rule:
Section 145 of the *Immigration and Refugee Protection Act*

(2) Subject to any federal-provincial agreement, an amount that a sponsor is required to pay under the terms of an undertaking is payable on demand to Her Majesty in right of Canada and Her Majesty in right of the province concerned and may be recovered by Her Majesty in either or both of those rights.

Analysis:
The content of the duty of procedural fairness doesn't need an elaborate adjudicative process, but it does oblige governments to

(i) Notify the sponsor
(ii) Afford the sponsor the opportunity to explain in writing their financial circumstances that warrant delay of pay
(iii) Consider all circumstances
(iv) Notify the applicant of the government's decision

Given that this is legislative and regulatory nature, and the absence of statutory provisions, the duty of fairness does not extend to providing reasons of each case. This is a case of holding sponsors accountable so that public funds would not suffer for permitting the entry of family members that otherwise would not be allowed in.

<u>Doctrine of Legitimate Expectations</u>
When the government makes representations within the scope of their authority about an administrative process, these representations give rise to the legitimate expectation (clear and unqualified), the government is held to this so long as they were procedural in nature and don't conflict with their statutory authority.

- Proof of reliance is not required
- It would be a breach of the duty by the government to not live up to this undertaking
    - The decision maker is not bound to a specific right, just the procedure that was promised.

Government representations will usually be considered sufficiently precise for this doctrine

- The undertaking in this case confirms that the government can defer, but not forgive sponsorship debt
- The undertaking under *IRPA* by the government confirmed that the debt is not forgiven, but also represented that there is discretion to not take enforcement in situation of abuse or other appropriate circumstances
    - The sponsors could reasonably rely on this
    - These are sufficiently clear and do not contradict any statutory power.
- Given the legitimate expectations as a product of these, it is not open for the government to proceed without notice or chance to respond.

Conclusion:

Procedural duty from legitimate expectations is grounded.

Hold, Order:
Duty occurred but duty was met. Action dismissed

Ratio:
When the government makes representations within the scope of their authority about an administrative process, these representations give rise to the legitimate expectation (clear and unqualified), the government is held to this so long as they were procedural in nature and don't conflict with their statutory authority.

As this case showed, there is a duty grounded by legitimate expectations so long as they are "clear, unambiguous, and unqualified". Given representations made, legitimate expectations may be overwhelmingly important to overcome the other Baker factors to ground a certain duty of fairness.

- This duty required:
  - To be notified
  - To receive written submissions
  - To consider response submissions
  - To notify of the final decision
- The government was bound to their representation for procedural purposes, but they are not beholden to any specific result. So long as the procedure was fair, they could approve any decision they want.
- Another important finding was that the complainant did not need to rely on the representation in order to claim the duty of procedural fairness.
- Additionally, the representation must be within the scope of their authority given to it by statute.

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

Facts:
Agraira was once a member of the Libyan National Salvation Front (LNSF), which was classified as a 'terrorist organization' by Citizenship and Immigration Canada (CIC).

- As such, he was determined to be 'inadmissible', by satisfying section 34(1)(f) of *IRPA*.

Section 34(2) allowed the Minister to permit admission of someone who satisfied s34(1)(f). CIC made guidelines that evaluated the minister's decision and factors to consider.

- Agraira's application was rejected and the minister gave written reasons which focused entirely on his involvement with LNSF

Agraira sought judicial review, saying the minister's decision was unreasonable as it took too narrow of a view on 'national concern' as per s34(2).

- He argued the CIC guidelines considered humanitarian efforts.

Procedural History:
The Federal Court allowed the application of judicial review

- The Federal Court of Appeal allowed the appeal and dismissed the application.

Issue:
Was the decision unfair for not meeting the appellant's legitimate expectations?

Rule:
Section 34 of the *Immigration and Refugee Protection Act*

(1) A permanent resident or a foreign national is inadmissible on security grounds for
  (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
  (b) engaging in or instigating the subversion by force of any government;
  (c) engaging in terrorism;

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

Analysis:

The doctrine of legitimate expectations was a factor in *Baker* that lends itself to the common law duty of fairness.

- If a party has consistently adhered to a certain procedural practice in the past, the scope of the duty of procedure fairness would be broader than it would have previously been.
- Similarly, if representations made about the substantive result were made to the applicant, the duty owed to him in terms of procedure would be more onerous

The rules:

- This doctrine may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process
- Also, if the rules of procedure had voluntarily been embarked in a particular instance creates the legitimate expectation that it will be followed.
- The practice must be clear, unambiguous or unqualified.
  - This means if they were private law contract, it would be sufficiently clear to be enforced.
- Limited by not giving substantive rights (only procedural remedies)

Case at hand

The Guidelines were clear, unambiguous and unqualified procedural frameworks for the handling of applications, which created a legitimate expectation they would be followed.

- They were published by CIC, and publicly available and comprehensive
- The applicant could reasonably expect the application would follow this procedure

1. Following receipt for application of relief
2. Upon receipt, CIC prepares a report on the ground of inadmissibility
3. CIC report followed to National Security Division (CBSA)
4. CBSA prepares recommendation to Minister (includes all documentation)
5. Copy of recommendation to Minister is disclosed to applicant, who can make more submissions – all forwarded to Minister
6. Minister renders decision – entirely in their discretion
7. If negative, CIC issues a refusal letter.

According to the evidence, these guidelines were all followed. His legitimate expectation were thus fulfilled.

Conclusion:

No failure to meet legitimate expectations.

Hold, Order:

Appeal dismissed

Ratio:

A detailed procedural framework given by Guidelines governing the Minister's decision create a legitimate expectation to the applicant that those procedures would be followed.

In this case, the legitimate expectations were not explicitly said, rather a guideline on the Government of Canada website, which was comprehensive and fair. The Court found that even this is sufficient to ground a legitimate expectation that the procedure would be followed and amounts to a representation. Not only that, but if the body consistently adheres to certain procedural practices in the past in making the same sort of decision, the claimant is reasonable to believe it will be followed again, and cements a higher duty of fairness. The court likens this to the duty required as if it were a written contract.

- Additionally, if there was a substantive representation about the outcome, and it ends up being different, the procedural duty would be steeper (allow them to make more submissions about that).
- It won't bind the decision maker to that decision, and they can still contradict the outcome, as long as the procedural rights were greater than what they originally were.
- In sum, the "doctrine of legitimate expectations" is firmly part of procedural fairness in Canadian jurisprudence.

Other countries have followed different approaches when it comes to the "doctrine of legitimate expectations". Most notably, while legitimate expectations do not create any substantive rights in Canada, the United Kingdom has ruled that the same doctrine will create substantive rights.

- In the *R v Devon Health Authority* case, an elderly woman was put in a public home by the national health care services and required round the clock care. The Health Authority made representations that she "had a home for life"
    - The Government of the UK eventually decided to close the house and move the applicant
    - The House of Lords found that the "home for life" comment was a representation, and it was sufficiently clear. They found she had a substantive legitimate expectation that the home would stay open.
        - In Canada, this representation would have only grounded the procedural requirements of notice, opportunity to be heard, and given reasons why
        - So long as the Health Authority followed this (and more), they could amend their representation and move her no problem.
            - If not, it would be subject to judicial review and it could be a breach of procedural fairness and sent back so they could increase the fairness (give her a chance to be heard)
    - But, in the UK, they found she had more than procedural rights, but substantive rights. They thus quashed the decision to close the home.
        - The representation was very important for her, it was only made to a handful of individuals and the consequences to the Health Authority were only financial.
            - If the representation was made to an entire hospital, it may not have been quashed as this would be a lot to live up to

<u>Notice, Discovery and Delay</u>

Before *Nicholson*, the rules of procedural fairness only extended to judicial or quasi-judicial functions, but the *Nicholson* case extended the duty into the administrative realm when statutes are involved.

- The scope fluctuates between trial type decisions (dull disclosure, hearing), to a more informal one (written notice).

<u>Notice</u>

The most basic element of the duty of procedural fairness is the right to notice. This is pretty much the minimum that is required on the *Baker* spectrum when considering the content of the duty. Without notice, all other procedural rights cannot be exercised effectively, if at all. Most issues of notice fall to one of four categories:

1. Issues about form of notice
    a. Written or oral notice are almost always used
    b. Most legislation assume that written notice will be given, though oral can be sufficient (*Webb*).
    c. Most cases will need more formal notice since it is just how the system works; it is always good to have a paper trail.
        i. Use Baker factors; if steeper duty, oral likely not enough

2. Issues about the manner of service
    a. Personal notice is required unless the context allows something else
        i. Subpoenas, statements of claim (originating documents)
        ii. The more serious the implication, the more likely it is they will require personal service of notice
            1. Individual: actual, physical delivery
            2. Corporation: delivered in mail (corporations have registered address)
    b. Environmental assessments, that affect wide swaths of land and people, would not be able to be logistically served to everyone personally.
    c. As such, these are often subject to legislation on the manner.
        i. If no legislation exists, courts will allow public postings (newspapers)
3. Issues about timing of service
    a. Statutory provisions often state the rules for timelines
    b. Nature of the hearing (more serious, more notice they would need)
    c. The amount of time they need to prepare to respond will depend on the nature of the other procedural rights they have
    d. Adjournment would be sought if not enough time was given
        i. Involves costs and expense
4. Issues about the content of the notice
    a. Usually has to include notice of the hearing itself, the date and the time
    b. How much detail had to be provided will depend, again, on the Baker factors (seriousness, expectations…)
        i. If you have done something wrong and findings of misconduct, you will need some particulars

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

Facts:
In the 1980s, thousands of Canadians were infected with HIV and Hepatitis from blood/blood products. This forced provincial and federal ministers to do a public health inquiry under the *Inquiries Act*.
- The Commissioner set the procedures and rules.
    - Parties had right to counsel, right to have witnesses called, introduce evidence, receive all documents, hearings were public,
    - Assured that the product of the Inquiry would not be criminal or civil liability, but the root cause of what happened.

45 confidential notices, which names 95 entities, were delivered pursuant to s13 of the *Inquiries Act*. The notice included that the information could give rise to misconduct. They were given 20 days to respond. A number of the parties who received notices filed for judicial review

Procedural History:
Federal Court found that no misconduct can be found, but otherwise dismissed the application
- Federal Court of Appeal dismissed most of the appeals.

Issue:
Did the Commissioner exceed his jurisdiction in the deliverance of their notice?

Rule:
Section 13 of the *Inquiries Act*
No report shall be made against any person until reasonable notice has been given to the person of the charge or misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

Analysis:

Procedural Protections

Commissions should not set out conclusions on civil liability or criminal culpability, though they can make all relevant findings of fact and conclusions of misconduct on the facts if it fulfills the purpose of the inquiry. They can also make a finding that there was a failure to comply with a standard of conduct as long as they make it clear that finding is not binding.

- Procedural fairness is still needed to protect the reputation of parties.
- This also extends to notices given out in s13 of the Act – they must give notice of potential findings of misconduct which may be used against them on the final report.
- So long as they are issued in confidence, they shall not be scrutinized
  - Notices are to prepare parties to respond. This way, the only way their reputation would be damaged is if they made the information public, at their own doing. As such, the notices should be as detailed as possible.
- Even if the notice exceeds the jurisdiction of the commissioner, the report may not; unless the final report shows otherwise, it is assumed the commissioner will not exceed its jurisdiction.

The application at bar was not about the findings of the commissioner, but the notices. The Inquiry mandate is extremely broad: "to review and report on the events surrounding the contamination of the blood system in Canada in the early 1980s by examining… the organization products in Canada".

- This necessarily considers evaluating the conduct of the parties.
- The content of the notices does not indicate that the Commissioner investigated or contemplated reporting on areas that were outside his mandate.
- The notices were not objectionable. They indicated there was the possibility of a finding of misconduct

Though the notices may have included the term 'failed to do', that does not mean criminal or civil liability would be found. Commissioner stayed in his jurisdiction. Procedural protections were extensive and exemplary.

Timing

There was no statutory provision that the commissioner give notice as soon as possible when they foresee the allegations of misconduct, though this may be helpful. While it is ideal to have ample time to prepare, this is not always permitted in an inquiry – inquiries are not about criminal findings, merely about issues in a system and how to improve them. The nature of the inquiry was such that the findings may not be deduced until the very end of the process, thereby eliminating the chance for early notice.

- They should be given as early as feasible, but it is unreasonable to suggest that notices announcing potential misconduct should be given early.
- Timing of notices depends on context.
- Section 13 provided that no report can be made until they were given notice. This case was complicated, so the commissioner could provide them whenever feasible.

Conclusion:

Notices were no violation of procedural fairness

Hold, Order:

Appeal dismissed

Ratio:

Inquiry commission is still beholden to duty of procedural fairness, though the commissioner is not a tribunal and can only make findings that are not criminal or civil liability. The notice they give should reflect recognition of these constraints to be procedurally fair.

- The timing of notice will be contextual – the more complex, the more likely the notice will be closer to the end of the inquiry
  - Notice must be provided with enough time in the circumstances to give the party a chance to respond.

This case illustrates how little courts don't want to get involved in proceedings until they are over. So, going to court prior to the decision being rendered better be for a good reason.

- Courts will look at internal remedies that exist first. If the applicant has not yet followed these, the court will deny judicial review because they failed to exhaust the internal process.
- So, in applying for judicial review, the person has to completely pursue and exhaust their internal remedies (in statute) before going to court for non compliance (in this case, timing)

This case is the leading case on what is needed in notice. The more details that can be provided in the notice, the better. The people who received the notice were concerned that they did so on the last day of the hearing. But given the nature of the inquiry, it would have been unlikely to provide the notice any sooner. So long as the notices were given before the report (as per the statute, and this was done), there is no violation in terms of timing.

- Timing is important because if you knew of a potential finding of misconduct, you may have done something differently in terms of process and witnesses because you need to know the issues when you make your questions and arguments.
- Notice is required as soon as feasible, though this is contextual

Ontario (Human Rights Commission) v Ontario (Board of Inquiry into Northwestern General Hospital), [1994] 115 DLR 279

Facts:

An inquiry board was set up under the Ontario *Human Rights Code* to hear a complaint or racial discrimination made by 10 nurses employed by the Northwestern General Hospital.

- The inquiry made an order against the Human Rights Commission to order the Commission to provide respondents with all statements made by the complainants and investigators and to provide the respondents with the identity of all witnesses
    - The Commission applied for judicial review of the order.

Issue:

Was the Board acting in their authority when ordering disclosure of the documents?

Rule:

Section 12 of the *Statutory Powers Procedure Act*

(1) A tribunal may require any person, including a party by summons
  (a) To give evidence on oath or affirmation at a hearing; and
  (b) To produce in evidence at a hearing documents and things specified by the tribunal relevant to the subject matter of the proceeding and admissible at a hearing

Analysis:

The Commission rejected the *Stinchcombe* case (disclose all information prior to trial; don't attack by surprise) as it had no applicability to human rights litigation. Section 12 clearly recognizes the powers of the Board of Inquiry to order production of documents which are germane to the inquiry, subject to privilege.

- Justice is best served when the element of surprise is negated in trial and parties were prepared to answer on questions they prepared on the case to meet.
- Justice will be better served under the *Human Rights Code* when there is complete information available to the respondents.

The nature of the allegations must be considered before disclosing.

- In this case, the allegations were very serious, even if warranted – racial discrimination strikes at the heart of democracy in a pluralistic society.
- The respondents reputation was very much at stake, meaning the arguments should be made fair by disclosing it.
    - Any worries about the disclosure (employees being reluctant to be witnesses) can be addressed by the Human Rights Commissioner.

- This is preferable to the denial of procedural fairness of the respondents.

Conclusion:
No errors of procedural fairness.

Hold, Order:
Application dismissed

Ratio:
The power to compel production of documents must be provided for in statute.
- If allowed in statute, and the seriousness of the allegation supports disclosure, this is a valid order or request

The Hospital in this case obviously wanted to know everything that went into the inquiry so they could formulate a response. The court found that there is an obligation to provide relevant and material documents. This is found by:
- The statute (section 8/12) authorized the production of documents
- The severity of the allegation. Even if discrimination was found, there were potentially profound impacts to the Hospital's reputation for such a charge.
- Procedural fairness is best when there aren't any surprises at trial (*Stinchcombe* principle).

Most statutes nowadays will set out provisions to compel the production of documents in the interest of procedural fairness.

Delay

How long should administrative action take? How long is too long to deal with a complaint?
- If a profession is at stake, there cannot be delays that impact that persons ability to work.

Law Society of Saskatchewan v Abrametz, 2022 SCC 29

Facts:
The Law Society of Saskatchewan (appellant) disciplined Peter Abrametz (respondent) after suspicious account transactions he had done.
- The audit investigation began in 2012 from his irregularities of a trust account
- He was served notice of interim suspension in 2013 but allowed to continue practice with restrictions.
- A final report was submitted in 2015 and a Hearing Committee was assembled.
- The matter was heard in 2017, and a decision rendered in 2018 (guilty on 4 charges)
    - He was found guilty of four charges of "conduct unbecoming of a lawyer".
- He applied for a stay of proceedings because of the delay the Commission had taken
    - His penalty was issues in 2019: he was disbarred without right to apply for readmission for almost 2 years.

Procedural History:
The Hearing Committee did not find the delay sufficient to stay proceedings
- The Saskatchewan Court of Appeal allowed the stay appeal.

Issue:
Was the delay in the proceeding an abuse of process?

Rule:
Doctrine of Abuse of Process in Procedural fairness from *Blencoe*
1. Delay must be inordinate
2. Delay must have directly cause significant prejudice

3. Delay must amount to an abuse of process.

Analysis:

Abuse of process is a question of procedural fairness in the context of administrative proceedings.

Step 1: Delay was inordinate

Contextual factors need to be considered (not exhaustive):

1. The nature and purpose of proceedings
    a. Disciplinary proceedings are to protect the public and regulate the profession. Clients and patients are in a vulnerable position in a legal/medical professional relationship.
    b. Delay can be detrimental to professional reputation. It should be done promptly
    c. In this case, the delay was long, but not inordinate. The case was complex and required a long hearing time. Many of the delays were from Mr. Abrametz himself as he requested multiple stays.
2. The length and causes of delay
    a. Duty of fairness is relevant at all stages in the process.
    b. Delays can be justified in context (if parallel to criminal proceedings)
    c. If cause of delay is from a complaining party, it cannot be abuse
    d. If the delay is an inherent part of fair process, also not abuse
    e. Delay can be waived if they ask/consent/acquiesce to it.
3. The complexity of facts and issues

In this case, the delay was long, but not inordinate. The case was complex and required a long hearing time. Many of the delays were from Mr. Abrametz himself as he requested multiple stays.

Step 2: Significant Prejudice

If the delay alone would lead to abuse of process, it would be tantamount to imposing a judicially created limitation period.

- Only when there is detriment to an individual can there be abuse.
- The prejudice must be from the *delay*, not the *allegation* itself. If the allegation of harassment is lobbied, prejudice will arise with or without delay. The delay itself must be the issue. Prejudice is a question of fact.
- Abrametz called of four prejudices: media attention, practice conditions, impact on his health and impact on family/employees.
    - None, individually or cumulatively were caused by delay
    - No proof of significant prejudice was shown to establish this branch of the test

Step 3: Final Assessment

If the delay was manifestly unfair to the party to the party to the proceedings, or in some way brings the administration of justice into disrepute, it is abuse.

Conclusion:

No abuse of process.

Hold, Order:

Appeal allowed.

Ratio:

Whether these is an abuse of process is based on a standard of correctness (*Vavilov*)

Abuse of process is a question of law. It occurs when (*Glencoe*):

1. It impairs the parties ability to answer the complaint
2. Significant prejudice results from the inordinate delay
3. Final assessment on if it would bring administration of justice into disrepute.

There was a lot of interest in this case. Administrative proceedings are very broad, and the kinds of proceedings for professional disciplinary procedures for misconduct are of huge interest since they have potentially huge impacts.

- These proceedings almost appear to be akin to a criminal procedure.

When categorizing standards of review, abuse of process is about fairness, and the procedural fairness is reviewed on the standard of correctness. Administrative tribunals have to get the issues right. If not, the remedy is to go back and do it all over again. For abuse of process there are two branches (the first was not discussed in *Abrametz*)

- Branch 1: you would prove there is real prejudice to hearing rights (for example, have witnesses died because the delays were so long)
- Branch 2: where delay has not affected the fairness of a hearing, there are three steps
    - Is the delay inordinate
        - Who caused it, how complex were the issues?
    - Has the delay caused significant prejudice
        - The delay has to cause prejudice, not the allegation itself
        - This is a question of fact
    - If one and two are proved, is there still need to prove there is an abuse of process?
        - A little weird… the test for 'is there an abuse of process' includes a branch saying 'is there an abuse of process'
        - While confusing, it is possible that even if 1 and 2 are met, it isn't considered an abuse of process
- Once abuse of process has been found, it does not stay the proceedings, there are other remedies (more to come), in the professional regulatory context, these could be a reduction of sanctions or costs
- Analysis here is the broad area of the delay of administrative law, but the remedies are focused on the professional regulatory area, where costs and sanctions are serious
    - In any case, the statutory language is paramount
    - If they don't have the statutory power to award costs, that is not an arrow in their quiver
        - They need the statutory power to begin with, they can't just award remedies that may be available in other processes
        - Statutes are great, because if they set out procedural requirements, you don't need to go through Baker factors. Unfortunately, statutes that do this is rare.
    - Stays of proceedings are only appropriate in the clearest of cases on the high end of the spectrum

All to say, abuse of process is a high bar, and the remedy may not be totally what the applicant wants.

Examples of statutory appeal:

Administrative Procedures and Jurisdiction Act, RSA 2000, c A-3
Section 3 When (a) an application is made to an authority, or (b) an authority on its own initiative proposes to exercise a statutory power, the authority shall give to all parties adequate notice of the application that it has before it or of the power that it intends to exercise.

The APJA is nice because it has regulations and a list of administrative tribunals that are subject to them. Another Act can also say that the APJA procedural provisions apply

- If neither of these occur, the APJA is irrelevant.

Veterinary Profession Act, RSA 2000, c V-2

Section 39
The Hearings Director must
(a) at least 30 days before the hearing, give the investigated person a notice to attend and give reasonable particulars of the subject-matter of the hearing.

Disclosure

Disclosure is the second of the 'pre-hearing' stage. In most cases, there won't be a hearing at all. Usually a decision is made without a hearing, so when it comes to disclosure, we are talking about pre-decision making.

- So, when it comes to the Baker factors, these are only used for assessing what the scope of the duty is once you have determined a duty is owed

Administrative Procedures and Jurisdiction Act, RSA 2000, c A-3

Section 3
When
(a) an application is made to an authority, or
(b) an authority on its own initiative proposes
to exercise a statutory power, the authority shall give to all parties adequate notice of the application that it has before it or of the power that it intends to exercise.

Section 4
(1) Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority
(a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,
(b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail
(i) to permit the party to understand the facts or allegations, and
(ii) to afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations,
and
(c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

Section 6
Where by this Part a party is entitled to make representations to an authority with respect to the exercise of a statutory power, the authority is not by this Part required to afford an opportunity to the party

(a) to make oral representations, or
(b) to be represented by counsel,
if the authority affords the party an opportunity to make representations adequately in writing, but nothing in this Part deprives a party of a right conferred by any other Act to make oral representations or to be represented by counsel.

The APJA is Provincial, so only applies to the Provincial tribunals under Alberta legislation

- Nonetheless, sections 3 and 4 are codifying some rules of procedural fairness.
    - Section 3 enumerates that adequate notice is needed (common law will fill us in on what adequate means)
    - Section 4 deals with disclosure; disclosure of the decision maker of the information that it has of the relevant issues to be decided
        - This is, in effect, the right to call evidence, the right to receive what the administrative decision maker has (4(b))
        - Knowing the case to be met (4(b)(i)) and having the opportunity to respond (4(b)(ii), 4(c))

There is a difference between Argument and Representations vs Evidence

- Evidence are the facts that are relevant to the issues in dispute – the facts that you have to adduce what happened.
    - Oral testimony: the witness gives what happened, it does not argue
    - Affidavit (a sworn statement)
    - Tribunals are the masters of their own procedure, so the rules of evidence don't apply
- Representations/argument: you try to convince the decision make that when you apply the facts (ie, the evidence) it should come to X conclusion
    - This is more than evidence; if you start to give evidence that was not in an affidavit, your opposing counsel will say the counsel is giving evidence and have it struck
    - This is why they are separated in the APJA (4(b)(ii) vs 4(c))

Section 6 deals with legal counsel and oral representations

- If a party can make representation, the authority does not owe them an opportunity to be represented by counsel if they have an opportunity to "adequately" make representations in writing. For those bodies, there is no legislative right to representation and can potentially exclude common law fairness
- You would argue that a person cannot make representations adequately in writing

While this sounds great and like there is a whole bunch of codified procedural rights, the APJA only applies to the tribunals referenced in the *Authorities Designation Regulation*, which is only two tribunals, or if an Enabling Statute has a provision saying the APJA provisions apply:

- *Consulting Engineers of Alberta Act,* ss 13, 14
- *Emergency Health Services Act,* s34(2)
- *Child, Youth and Family Enhancement Act,* s119(3)
- *Early Learning and Child Care Act,* s 20
- *Family Support for Children with Disabilities Act*, s 9

There are two reasons for adopting the APJA:

- Belief that the common law is insufficient, and the courts won't make appropriate changes
- Desire for distinctive attributes in the form of legislation
    - Difficulties in drafting and to accommodate the diversity of agencies

Authorities Designation Regulation, Alta Reg 64/2003
Section 1

The following authorities are designated as authorities to which the Administrative Procedures and Jurisdiction Act applies in whole:

(a) the Land and Property Rights Tribunal;
(b) the Natural Resources Conservation Board.

Why are most administrative tribunals not subject to these rules?

- Most statutes make their own procedures and rules themselves
- Most tribunals have their constituting enactment, and there are specific rules within them, or it gives those bodies to make their own procedures
    - It would be incumbent on that body to adhere to fairness in their procedure
- APJA guarantees production of evidence and to make submissions, but not an in person hearing
    - This already establishes a pretty laborious system if procedural fairness would have otherwise not been granted, so it makes sense why most don't conform with it

Typically, a party is generally entitled to an adequate opportunity to respond to decisions and know what evidence and representations have been given before a decision is made (*Kane v Board of Directors of UBC*)

- Disclosure: disclosing to parties of information that the agency has about the decision to be made
- Pre-hearing discovery is an element of both disclosure and official notice
    - Limits to access due to confidentiality is a big issue
        - Usually approached from common law

Just because information is exempted from disclosure under legislation does not mean its disclosure will be denied in hearing where procedural fairness applies

- Federal legislation is usually without prejudice to other laws governing access to information

Mission Institution v Khela, 2014 SCC 24

Facts:
Khela (respondent) is a federal inmate. He was serving a life sentence for murder. After 3 years at a maximum-security institute, he was transferred to Mission Institution, which was medium security.

- An inmate was stabbed in the Mission Institute. One week later, the Security Office received information that Khela was involved in the incident.
- The report created showed that Khela hired two inmates to carry out the stabbing in exchange for heroin.
    - He was immediately transferred back to a maximum-security prison on an emergency basis involuntarily.

Khela received an Assessment and Notice of his transfer. They stated the report was the primary reason for the switch.

- It did not contain information on who the sources were, what they said, or if they were reliable
- He wrote a written rebuttal asking about his ranking and the sources
    - In response, he received a Decision Sheet saying the warden decision is final and he was being moved.

Procedural History:
BC Supreme Court found the decision violated procedural duty of fairness

- BC Court of Appeal dismissed the appeal.

Issue:

Was the Assessment and Notice provided in accordance with the duty of procedural fairness?

Rule:

Section 27 of the *Corrections and Conditional Release Act*

(1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.

Analysis:

As per the CCRA, inmates have to be given all information considered when making a decision, and the disclosure must be within a reasonable time before the decision was made. The onus is on the decision maker to establish it was.

- S27(3) provides exemptions to this general rule. If the commissioner believes the disclosure would impact the safety of a person, the penitentiary or an investigation, it can be withheld.

It is clear that information was used that was not disclosed to Khela. She also did not summarize the missing information to him.

- This withhold was not justified under s27(3), so is an infringement of the statutory requirements for a duty of procedural fairness.
- She should have disclosed the reliability of sources, the specific statements and the scoring matrix that placed his security needs.
  - She found the information corroborated previous suspicions
- Her statements did not disclose enough information for Khela to adequately respond.
- 27(3) may have been applicable, but this was not raised by the appellant.
- Her failure to include the scoring matrix was materially unfair, as was not providing the methodology of the matrix.

Conclusion:

Duty not met

Hold, Order:

Application dismissed

Ratio:

To be lawful, a decision to transfer an inmate to a higher security penitentiary must be procedurally fair. It must meet statutory requirements.

Because this is federal legislation, prisoners can choose judicial review (federal court) or seek *habeas corpus* (provincial superior court)

- In this context, his liberty is at stake, but his innocence is not.
- The *Stinchecombe* case requires disclosure of all the evidence that the Crown has.
  - Disclosure in *Stinchcombe*: guilt or innocence needs disclosure
  - Disclosure in *Khela*: administrative, needs disclosure of whatever they were going to use
    - This means that disclosure is different in different contexts
- In this case, there was a statutory obligation of disclosure, that was not complied with, and did not provide all the information. What if the individual wanted to challenge the standard itself?
  - Say disclosure in s27 was met, the only other avenue would be a Charter challenge, that it is inconsistent with his s7 and principles of fundamental justice rights

        - Procedure rights are a principle of fundamental justice

This case is similar to *Gallant v Canada (Deputy Commissioner, Correctional Service Canada)*

- He was sentenced to 25 years and had allegations of bad behaviour
- So, this was internal discipline, not the finding of criminal culpability
    - He was told of the allegations, but not the details
    - He was going to be transferred to a maximum security prison form British Columbia to Saskatchewan
        - They did not disclose who gave statements since it would endanger that prisoners safety for being a snitch
    - The duty of fairness exists in the prison context of administrative law, but those have to yield to safety concerns of other inmates
        - The transfer was challenged under a s7 claim, and his deprivation of liberty was established, but it was justified under s 1
        - He could not answer allegations, because he didn't know where it came from, but this was justified
- Opportunity to being heard is guaranteed in PFJ, but those do not have the same as administrative fairness principles, which have narrowed needs
    - Confidentiality concerns about disclosing the identity, relieves the warden of their duty of fairness (it overcomes it completely)
    - Another judge says that confidentiality merely informs the nature of fairness
    - Could say that this is a factor that could be added to the Baker factors in terms of figuring out the content of the duty (this was pre Baker)
- Administrative law is all context, so interest overriding others is needed

Qikiqtaaluk Corporation v Nunavut (Commissioner), 2009 NUCJ 6

Facts:
Nunavut land claims agreement authorized the Nunavut government to implement procedures for Inuit businesses under the NNI.

- Qikiqtaaluk (QC) bid for a provision of medical boarding facilities but was unsuccessful.
- They appealed the bid to the Contracting Appeals Board.
    - They sought pre-hearing disclosure of all information and documentation, the methodology to reach the conclusion, and their score.
        - The Board refused.
- QC applied for judicial review

Procedural History:
On judicial review, the Court balanced confidentiality of business information against review of documents

Issue:
Was disclosure of requested information required by the Board in duty of procedural fairness?

Rule:
Article 24 of the *Nunavut Land Claims Agreement*
Government procurement policies follow a similar procedure: governments put out a request for proposals, people submit tenders. Adjustments are made on the scoring of bids based on business operations in Nunavut or Inuit firm status

Analysis:
The information requested is confidential business information. Since there were only two bidders, telling information about the other, even without naming them would effectively

identify the business, giving the other business information about the successful business, which would not be in the best interests of the winning bidder. The Board has to give assurance that the proponents bid will be considered. Bidding is to be confidential to protect business of other competitors. The NNI language is unhelpful how much disclosure is permitted in fairness sake.
    - There is an appeals process. But no disclosure is laid out, so there is no information on which to make an argument, as the only information they get was that it was assessed.
    - Board indicated it had no ownership of the information. All information was confidential to the government. All parties have interest with those details not being made public.
        - Accountability, fairness, openness and transparency are needed.

Conclusion:
Disclosure of winning bid information not required

Hold, Order:
Appeal dismissed

Ratio:
Appellant is only entitled to information that would permit a fair, effective and transparent appeal

The logic of this case makes sense – if the Board disclosed the other bidders information, the unsuccessful bidder would have business information on the other. So, again there is a weighing of interests, this time between business confidentiality and procedural fairness. However, it would be ineffective appeal process if the unsuccessful bidder gets no disclosure. They would have no basis on how the decision was made

- Can request the rating of *their* proposal, which will be redacted by the authority and that protects the business information of the other proponent
    - So, they will disclose the relevant information for fairness and an effective appeal (the appellant's information on the standards) but not the details of other parties on the interest of confidentiality.

Thus, as a general rule, appellants are only entitled to certain information to permit a fair, effective, transparent appeal that balances the interests of confidentiality

All this talk of disclosure inevitably brings up issues of FOIP.

Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25

Section 6

(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

For starters, FOIP only applies to public entities disclosing private information. To the extent that someone applies for information of a public body, this is a way to find out what information the public body has. FOIP is not just accessing your own information, it is also getting records of all public knowledge.

- Downside of using FOIP is that it is time costly (requests can take 30 days to answer, but they can extend another 30 days and then additional extensions can be requested by the Commissioner)
    - If you have time on your hands, this may be the way to go
    - Often, the documents will be refused or heavily redacted based on legislative provisions
        - If you want a review, you request an inquiry
        - That inquiry goes in a big pile so good luck

Discovery and Disclosure are not the same thing.

- Discovery is the ability of the decision maker to order documents that are of one party to give it to the other
    - Look to the statutory procedures for this, they are usually laid out in there
    - *Webb* case; there was no adversarial information, but there was still information that was only in one party's hands
- Disclosure is the release of materials in the hands of the decision maker
    - Sometimes the statute in question doesn't even apply to the decision maker in question; if they aren't the legislation won't tell you anything about the duty.
    - Are there procedural provisions (requirement of notice)
        - "reasonable or adequate" in the statute will still need common law to determine what is reasonable
        - Unless elements of fairness are explicitly excluded, the common law can require fairness, but they cannot extend timelines if laid out in the statute, with the exception of a constitutional challenge, since that is trump card
    - Disclosure has a lot of factors
        - Balancing the interests of the person subject to the process to know the case to be met, and the concerns of the public safety/privilege/confidentiality of the other party

<u>Right to a Hearing and Right to Counsel</u>

<u>Right to a Hearing</u>

The APJA dealt with a lot of different procedural needs, but it is silent on the right to counsel

- Courts are open to the public, so you can see how judgements are made or can ask for a search of any person's judicial history
- This allows people to know how the law is interpreted. Access to justice, legitimacy, transparency, law reform (if people see how the law is administered and do not like it, they can try and instigate change in the law via democracy)
    - Openness to courts is consistent in all courts, unless:
        - *Dagenais v CBC, R v Mentuck, Sherman Estate v Donovan*
        - 1) court openness poses a serious risk to an important public decisions
        - 2) the order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent the risk
        - 3) the benefits of the order outweigh its negative effects
    - Openness for administrative tribunals is less clear.
        - Many tribunals are presumably open to the public
        - Boards that are more adjudicative are more public (like the LRB, HRCB, ACWCB)
        - Fairness in the context of administrative tribunals, the rationale for change to law will apply to exercise of statutory powers exercised by tribunals

Oral Hearings generally means a face-to-face encounter with the decision maker. The contrast is often letters or emails

- The right to a hearing entails many other aspects. For example:
    - Right to present evidence
    - Right to counsel
- The norm used to be giving an oral hearing as natural justice, but this was before court-tribunal allocations of powers.
    - With the common law duty of procedural fairness emerging, the presumption that every received oral hearings was absorbed into the fairness duty
        - As all other procedural rights, a right to a hearing is context dependent. The court did not explicitly delineate when this is needed in *Baker*

Khan v University of Ottawa, [1997] 34 OR 535 (CA)

Facts:
Khan (plaintiff) was a second-year law student at the University of Ottawa (defendant). She failed her Evidence course, which caused her GPA to dip below the faculty minimum and she had to do another semester of courses.

- She appealed her grade on the ground that she submitted a fourth answer booklet that was not graded.

She completed her exam in 2 hours in the three booklets provided and labeled them '1/2/3 of 3'. After realizing she had more time, she took a fourth booklet to supplement her answers to multiple questions. She wrote "INSERT" in red ink on the 4th booklet.

- She wrote nothing on the first 3 to indicate there was a fourth booklet.
- After finding out she failed, she reviewed her exam and noted that the fourth booklet was not marked. The fourth booklet was never found.

Procedural History:
The Committee and the University Senate dismissed her appeal. She then sought judicial review.

Issue:
Was the denial of a hearing a violation of her procedural rights of fairness?

Rule:
Para 12.03 of the *Faculty of Law Regulations*

(a) Students are entitled to have a grade reviewed where it appears that the grade assigned to a student's work may be the result of significant error or justice
(b) Students who appeal to the Examinations Committee have the onus to identify specific facts or evidence suggesting that a significant error or injustice may have occurred.

Analysis:
A law student threatened with the loss of another semester is entitled to a high standard of justice because the effects can be very severe. The Committee admitted that failure to mark a fourth booklet would satisfy the "significant error or injustice" of para 12.03 the *Regulations* and the issue was thus whether the fourth booklet existed. If it existed, she would have the opportunity to re-write the grade.

- That being the issue, her only evidence is her word. If the Committee believed her, she was entitled to relief.
    - Ie, they had to determine whether they believed her or not
- The three factors provided by the Committee in their decision were circumstantial evidence. Ms. Khan had explanations for all their reasons, and this entitled her a chance to explain.
- This is not a case of students wanting a better grade and seeking an appeal. This case is distinguished because it centers around her credibility.

- Credibility arguments require hearing both sides of the argument
- This has to be done in person, since credibility is culture specific
- Issues of credibility will often need an oral hearing

The case at bar required at least an oral hearing for Ms. Khan, because her credibility was a major issue. Such a hearing required:

1. Where she had an opportunity to appear in person and make oral representations
2. Committee should have considered the procedures followed and made reasonable inquiries to make sure they were sufficient
3. The Committee should have given Ms. Khan an opportunity to correct the factors of their decision.

The Committee did not believe Ms. Khan's explanation without hearing from her. By doing do, the Committee did not observe these three principles, and thus denied Ms. Khan her procedural fairness.

Conclusion:

Duty of procedural fairness breached.

Hold, Order:

Appeal allowed

Ratio:

Where credibility is an issue, the applicant is entitled to a hearing to explain their rationale behind the reasonings of the decision.

Dissenting:

This was not an issue of credibility. There were no allegations against her and the proceedings were not adversarial. The only criteria was that she deserved the opportunity to be heard, which the records show she was.

- It is well established that a full hearing is not needed to fulfill procedural justice.

This case was made more complicated than it had to be, at the end of the day, it was all credibility. Did the decision maker believe Khan or not?

- This was an internal appeal (from statute) which is different than judicial review (courts)
- Traditionally, courts would give deference to students in academic cases, but this was not about her grade, it was just about if there was a 4th booklet.
    - A grade appeal is different than an appeal on credibility

In issues of credibility, the seriousness of consequences are high. Recall that this is a Baker factor, as is the nature of the decision being made. Since the nature of the decision being made was credibility, it would tend to a higher level of procedural fairness

- If there is a disagreement about what happened, and that is relevant to the decision being made, that is a very important factor
- Since credibility requires face to face assessment (ie, a hearing), which Khan did not receive, the trial was fatally flawed.
    - Even if the judge thought the outcome would have been the same if there was a hearing, the decision cannot stand because the step was skipped

The dissent found a full hearing would put undue hardship on the university (costs and delays). Since the Commission was aware of the quality of work in the first 3 booklets, "more of the same would have brought no benefit" (yikes).

Right to Counsel

In most hearings, the right to counsel is presumed, and is often codified, Ontario, Quebec and BC have all done so. In contrast, section 6 of the APJA provides counsel is not a necessary component of the procedure, meaning the common law or other statutes are to deal with the issue.

Re Men's Clothing Manufacturers Association of Ontario and Toronto Joint Board, Amalgamated Clothing and Textile Workers' Union, (1979) 26 OR 20 (Div Ct)

Facts:
Disputes in the Toronto men's clothing industry were resolved by arbitration without lawyers. A grievance was filed and the association opted to change its practice and use lawyers.

Issue:
Do arbitration proceedings have an absolute right to legal representation? If not, when is it permitted?

Analysis:
The collective agreement only refers to arbitration as a solution, not referencing legal representation. For some 60 years, lawyers were absent the process. The procedure without lawyers developed in a highly informal manner, often just putting the facts out without witnesses. This greatly expedited the arbitration process.

- This cannot be said to be because lawyers were not involved, but that does not mean that introducing lawyers could reduce the efficiency of arbitrations.
- This simple history leads to hesitation in granting a right to counsel.
    - It has been effective because of the unusually responsive traditions of the industry, rather than logic of legal analysis.
    - Introducing lawyers could lengthen the process or increase costs and altogether deter arbitration
    - This does not mean lawyers are not permitted. Certain issues, especially larger ones with impacts on general legal rules.
        - With mutual consent of the parties, lawyers should be allowed

Conclusion:
Lawyers not an absolute right for arbitration proceedings.

Hold, Order:
Application granted

Ratio:
Right to legal representation not guaranteed, though can be allowed with mutual consent.

Dissenting (Southey):
Not in the arbitrator's jurisdiction to not allow lawyers.

Arbitration (before lawyers were involved) was a weeklong process max. With lawyers it could stretch to months, and the court find the "egregious introduction of lawyers puts all of this at risk".

- All procedural rights come with costs
- This one is particular – if one side gets a lawyer, the other side could too
- Its clear there was a right to be represented by agents (corporations need to be represented by someone), and if this were the case, the arbitrator was wrong to limit the kind of agent they could have (couldn't exclude legal counsel)
    - There must be a statutory provision required to exclude legal counsel
    - Complexity of the issue warrants legal counsel; the more complex the issue, the more the facts are important, the more lawyers should be allowed if not required

New Brunswick (Minister of Health and Community Services) v G(J) [1999] 3 SCR 46

Facts:
JG was a mother who opposed the application by the child welfare authorities to renew an order putting her three children in the custody of the state

- It was a New Brunswick policy to prohibit legal aid certificates in these cases.
- The mother argued that s7 of the *Charter* required that a mother be provided with counsel in cases such as this.

Issue:
Is the government under an obligation to provide state funded counsel for custody hearings?

Rule:
Section 7 of the *Charter of Rights and Freedoms*
Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Analysis:
The interests at stake are unquestionably high in this case. Few state actions could have a more profound impact on a child and mother. They were already separated for 6 months prior to this. The profound psychological burden on parents would engage s7 for security of the person. This would require a high degree of fairness

- Is prohibiting counsel a principle of fundamental justice?
  - No. Procedural fairness in this context requires consideration of:
    - Impact of interest of applicant
      - Tremendous impact on the mother
    - Complexity of proceedings
      - Any proceedings to remove children from their mother will be very taxing and complex
    - Sophistication of the applicant
      - Would benefit from the additional help
  - In proceedings as serious and complex, an unrepresented claimant will ordinarily need to possess high education to effectively present their case.
  - Given these factors, it is apparent the applicant needed counsel
- The potential violation of the appellants right to security of the person would not be in accordance with the PFJ if unrepresented.

The great consequences entitle the mother to a custody hearing with the assistance of a lawyer to guarantee the fair hearing, this requires adversarial with evidence, cross examination, objections and legal defences. All other parties have counsel, so should the mother.

- New Brunswick was under a constitutional obligation to provide counsel

Conclusion:
Counsel required to be given

Hold, Order:
Appeal allowed

Ratio:
In proceedings as serious and complex with grave consequences, representation is needed.

- If a lawyer is needed for procedural fairness, one can be ordered under s24(1) of Charter

This case obviously required counsel to be given. But, this is a case by case basis, so not everyone in a similar hearing will require counsel. Factors to consider:

(a) Impact of Interest on Applicant
(b) Complexity of Issue
(c) Sophistication of Parties

This was the highest degree of severity, which required high degree of fairness. Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby risking the violation of both the appellants and her children's s7 rights. A parent is in a unique position to show her children

are fine, and if they cannot show this, the judge may be ill informed on the future of the child when the child could have been best of staying with the parent. Best interests of the child must come first. In the cases where a lawyer was needed for procedural fairness, as this case was, one can be ordered by the remedy s24(1) of the Charter. Section 7 engaged since security of the person was at stake

- This is not always required; a hearing can be fair without counsel, and without violating the individuals right to life, liberty or security of the person.
- Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.
- In sum,
    - Principles of Fundamental Justice require a fair hearing
    - For a hearing to be fair, counsel was required (context specific)
    - Section 24 can grant a remedy for apportionment of counsel
    - New Brunswick was under a constitutional obligation to provide counsel

<u>Right to Cross Examine and Duty to Give Reasons</u>

Cross Examination is a procedural step that is a central step for the adversarial stage. It is essential to truth finding because if both parties are contradicting eachother, they will both introduce the best evidence they can adduce to try and convince the decision maker.

- To get to the end conclusion, it requires examination of the other side's evidence
- Lawyers always ask pointed questions, never "what happened?", it will be "and then [x] happened, rights?"
    - Try to put statements to them and try to get them to adopt your evidence
- Oral hearings before an administrative tribunal decision maker is the same process

Administrative Procedures and Jurisdiction Act, RSA 2000, c A-3
Section 5 When an authority has informed a party of facts or allegations and that party (a) is entitled under section 4 to contradict or explain them, but (b) will not have a fair opportunity of doing so without cross- examination of the person making the statements that constitute the facts or allegations, the authority shall afford the party an opportunity of cross-examination in the presence of the authority or of a person authorized to hear or take evidence for the authority.

When Section 4 of the APJA kicks in and entitles a complainant to disclosure of the facts and gathering of evidence, section 5 kicks in and states that the complainant is entitled to contradict or explain them

- 5(b) also grants the power to cross examine the person who has the allegations.
- Basically if (and only if) section 4 applies, section 5 kicks in to allow the complainant a fair opportunity to argue their case and cross-examine
    - This would require the lawyers for the complainant to convince the authority that they wouldn't have a fair opportunity to argue their case without cross-examination.

Ontario's s10.1 of the *SPPA* also allows the same rights, to call and examine witnesses and conduct cross-examinations of witnesses "reasonably required for a full and fair disclosure" of all the germane facts. The "reasonably" language is always where lawyers come in since no one knows what it means so lawyers can go and argue that element.

Innisfil v Vespra, [1981] 2 SCR 145

Facts:
The town of Barrie filed an application to annex parts of the Innisfil, Oro and Vespra townships. The Ontario Municipal Board projected a very large population of Barrie and strongly considered this element.

- The Ontario Minister forwarded a letter to the Board detailing a study of the population, and the Board said it was bound by the government policy and would not allow cross-examination of the letter.
    - The Board then issued the annexation board based on the population figures
- Innisfil applied for judicial review on the basis that it was denied natural justice

Procedural History:
Ontario Divisional Court found natural justice was denied; the Board was outside its jurisdiction.

- Ontario Court of Appeal allowed the appeal that Board was within jurisdiction

Issue:
Was Innisfil allowed a chance to cross examination within the bounds of natural justice?

Rule:
Section 10.1 of the *Statutory Powers Procedures Act*
A party to a proceeding may, at an oral or electronic hearing,

(a) call and examine witnesses and present evidence and submissions; and
(b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding

Analysis:
The right to cross examination is a key element of the adversarial process. In this case, it would be doubtful – if not impossible – for Innisfil to advance it's case without cross-examining. They thus have the right and can dictate how they exercise it.

- Agencies are always bound by their statutes. The Municipal Board is bound by the *Municipal Act*. This means any impact to procedural fairness must be within that statute.
    - The statute would have to be very explicit to allow the executive branch to give policy decisions to tribunals to prevent cross examination.

Conclusion:
Cross-examination required.

Hold, Order:
Appeal allowed

Ratio:
The statute and nature of the hearing will determine if a hearing is needed. When the hearing is more adversarial in nature, cross examination will be more necessary, The statute must be interpreted if it grants the right to cross examine.

An important overall theme of this case is that cross-examination is a vital element of adversarial systems, and if the applicant would be unable to argue its case without cross examination, it should be allowed. But again, this is all dependent on statutory language. The statute, coupled with the nature of the decision will determine if there is a right to cross examination.

- If the decision is akin to the adversarial process, cross-examination is needed
    - This means that if calling evidence is allowed, it is more adversarial and thus cross-examination is needed
    - In other words, when a hearing is contemplated, usually cross examination needs to be part of it
- If the hearing is more about community interest, cross-examination is likely not needed.

So, even if a cross examination is required, what does it look like?

Djakovic v British Columbia (Workers Compensation Appeal Tribunal), 2010 BCSC 1279

Facts:
Djakovic (plaintiff) sustained lower back injuries that (allegedly) occurred during physio treatments. He alleged the clinic asked him to do an exercise that cause pain and leg paralysis with two staff members witnessing it.

- He claimed WCB, but his claim was denied, so he appealed to the Workers Compensation Appeal Tribunal

Procedural History:
Workers Compensation Appeals Tribunal

- Counsel asked that the staff members be present for cross-examination, but the vice-chair requested written statements instead.
    - When the written statements by the staff members denied seeing any injury claimed by Djakovic, counsel requested they be subpoenaed and cross examined since the statements were "vague and contradictory"
        - The vice chair denied and dismissed the appeal.

Issue:
Was Djakovic's procedural fairness rights infringed by not allowed cross examination?

Analysis:
Central to the duty of fairness is the complainant must know of the case it has to meet and is entitled to respond before a decision is made. The hearing deals with the 'case to meet' requirement, whereas the nature of the hearing, and the right to cross examine in particular satisfies the 'right to respond' requirement. The *Baker* factors need to be considered:

1. Nature of decision being made
    a. Strong similarity to court process; WCAT have rules on disclosure, subpoenas and oral evidence and often cross examination
2. Nature of statutory scheme and terms of legislation
    a. No further appeals from WCAT are provided in the *Workers Compensation Act* means the WCAT decision is determinative
3. Importance of the decision to individuals affected
    a. Serious injuries claimed, indicating a stringent procedural protection
4. Legitimate expectations of person challenging decision
    a. Not relevant
5. Deference to procedural choice of decision maker
    a. Act allows WCAT to make its own procedures so some deference is given

The factors indicate that Djokovic is entitled a high degree of procedural fairness. The denial of cross-examination was an unacceptable denial of procedural fairness.

- The issue that Djakovic wanted to solve for cross examination was central to the case
- The written statements to the Tribunal were unsatisfactory.
- Significant rights were at stake for Djakovic and questions of credibility were at issue
    - The decision maker said there was little utility for cross examination, but this is simply untrue given the issue turned on it.

Not a question of if the Tribunal had the information before it to make a decision, it is a question of if Djakovic was given "free and fair" opportunity to present his case.

Conclusion:
Cross examination required

Hold, Order:
Appeal allowed

Ratio:
Baker factors are to be used to determine whether procedural fairness was high enough to require cross examination in order the meet the case faced.

In the WCB context, there are many questions. Whether the persons injuries exist, whether they were caused by work related matters, and whether the nature of the injury is being exaggerated.

- This means the facts are live and central issue. Whether the injury happened is something the applicant has to prove.
- When the Vice-Chair said no cross examination was required because the witness statements answered it such that subpoenaing them wouldn't gain anything violated procedural fairness. While there it some deference given, it is not determinative. This was the central issue of the claim, so he ought to cross examine the determine the things necessary to prove his case
    - Advantages to writing: efficiency, less expensive
    - Disadvantages to writing: writing allows the person to think about the answer and make it ironclad, whereas examination gets the honest and real reaction.
        - Issues of credibility are live by either telling the truth or not, trying to get evidence from the other side will corroborate what he is saying.
- Baker factors but also centrality issues are to be considered. It was adversarial in nature, so cross examination should have been given

<u>Reasons</u>

Pre-*Baker*, common law did not create a duty to give reasons, but *Baker* represented a change in the law with the duty to give reasons.

- Reasons reduce arbitrary or capricious decisions and reinforce public confidence in the judgement and fairness of administrative tribunals
- Reasons are invaluable to a decision being appealed, questioned or considered on judicial review and those affected are more likely to be treated fairly if reasons are provided.
- Three cases where some form of reasons would be required:
    - decision has a significant importance on the individual
    - when there is a statutory right to appeal,
    - other circumstances

However, *Newfoundland Nurses* (2011 SCC 62) found that the reasons don't have to include all the arguments/statutes/details that the reviewing judge would prefer to be valid under a reasonableness analysis.

- If the reasons allow the reviewing court to understood why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, it is reasonable
- When there are provisions that require reasons, simply giving reasons can satisfy them, even if they are garbage.
    - On the other end, sometimes it requires the reasons to be adequate, which gets us to substantive review.

Administrative Procedures and Jurisdiction Act, RSA 2000, c A-3

Section 7
When an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
(a) the findings of fact on which it based its decision, and

(b) the reasons for the decision.

Section 7(a) and 7(b) are different.

- (a): Finding of fact of which the decision is being made means that if facts are contested, the decision maker needs to set out which are right, and articulate why they picked one over other
    - Questions of fact
- (b): The reasons for the decision are applying those facts to the legal framework to get to a conclusion
    - Questions of law

In *Vavilov*, while the main takeaway was the complete overhaul of a reasonableness analysis, the SCC also makes findings about reasons. They found that reasons are not needed for all administrative decisions. The cases in which reasons tend to required are

1. When the process gives a party participatory rights
    a. Reasons show that the parties arguments were considered and demonstrate that the decision was made in a fair and lawful manner as a shield from arbitrariness
2. When the decision is adverse to the party and could have significant impact on them
    a. Drafting requires decision makers to examine their own thinking and better articulate their own analysis
3. Right of Appeal
    a. If legislature allows a judicial appeal, legislature intends the court to be involved in the administrative procedure, so reasons must be given in the case that a court takes it up
        i. Not in judicial review (always) since the intent was the administrative body to make the final decision

An application (compared to an appeal) may not need reasons, but you would weigh in how much that would be determinative of the outcome. Is it contested? Are parties arguing about why discretion is exercised in a certain way?

- What some tribunals will do is grant whatever the application is (for example, an adjournment) and give reasons when they issue substantive reasons at the end of the day
    - Broad, policy based decisions likely don't need reasons (nor would bylaws) though they still may go to court.

Wall v Independent Policy Review Director, 2014 ONCA 884

Facts:
Wall was detained at a G20 summit and launched a complaint with the Police Review Director through the *Police Services Act* accusing the officers of misconduct, who were eventually prosecuted.

- Another report was sent to Wall which showed the higher-ranking officers requested his treatment, so Wall took action against those officers as well.
- The Police Review Director blocked it since the limitations period had expired

Procedural History:
Ontario Superior Court found the Director breached procedural fairness by not giving reasons

Issue:
Was Wall entitled to reasons for the dismissal of his application?

Rule:
Section 60 of the *Police Services Act*

(2) The Independent Police Review Director may decide not to deal with a complaint made by a member of the public if the complaint is made more than six months after the facts on which it is based occurred.
(7) If the Independent Police Review Director decides not to deal with a complaint . . . in accordance with this section, he or she shall notify the complainant and the chief of police of the police force to which the matter relates in writing of the decision, with reasons, and in the case of the chief of police, shall also give notice of the substance of the complaint

Analysis:
The Director argued that he was making a screening decision rather than a full administrative decision and his notification of rejecting the application was sufficient reasons. Section 59 requires every complaint be reviewed subject to s60

- So, while reasons were given, they were underdeveloped and succinct, coming close to no reasons at all
- Section 60(2) allows the Director to not take up an application if it has been more than 6 months (discoverability), so the Director's decision was not wrong.
  - 60(7) requires a rejection to be given reasons. So, while the Director's decision was correct within his discretion, not supplying adequate reasons is a breach of procedural fairness.
  - By not giving adequate reasons, we are left unsure if he considered all the factors laid out in 60(3), which is required in order for him to reject the application under 60(2).

Conclusion:
Reasons were required.

Hold, Order:
Appeal dismissed

Ratio
Discoverability applies in complaints to officers within the *Police Services Act*.

Where procedural fairness requires the decision maker to provide reasons, they should be adequately detailed to meet statutory requirements

Screening can halt a decision altogether, as it may be a final decision in relation to the complainant. If made one way, the investigation will proceed, if made the other, it will end. Only in the latter is it a final decision.

- This means that the decision maker in screening needs to consider the nature of the decision being made when finding if it proceeds or dies.
- Usually statutory appeals require reasons, but there was no statutory appeal in the *PSA*
  - Judicial review was not precluded
- Section 60(2) allowed the Director to make the decision he did. Since it was over 6 months, he did not have to take the application. But in order to justify this decision, 60(7) required the Director to provide reasons. And in providing those reasons, it must be shown that the Director considered all the factors laid out in 60(3) (the factors are required to be considered to reject an application under 60(2)). Without proof that 60(3) factors were considered, 60(2) could not be effectively used.
  - All to say, the Director could have made the decision they did. But it required reasons under the statute
  - The Director also did provide reasons. But they were inadequate, since they did not show that the Director adequately considered 60(3) factors in order to exercise 60(2)
    - So, his reasons did not satisfy statutory requirements.
    - As such, his decision was a breach of procedural fairness.

Normally, preliminary or screening decisions don't require reasons, but the statute required them in this case. And implicit in the statute was that they must be of adequate quality.

- Reasons, when they need to be adequate, cannot simply recite facts and submissions and offer a conclusion. The line of thought and justification must be shown.

This class kind of brings up the "No Reasons" vs "Some Reasons" vs "Good Reasons" debate, which is a subset of the Procedural vs Substantive rights questions.

- If reasons are required, they can't just be a statement of conclusion
- Need to set out findings of fact. If there is an exercise of discretion (to not investigate), you have to set out why you are doing it in that way
    - Some *Roncarelli* logic – discretion is not without boundaries
    - Decision maker should set out their reasoning process
        - Stating "having taken all matters into consideration" does not cut it since they need to demonstrate they are actually grappling with the issues.

So, reasons can be boiled down to three questions.

1. Is procedural fairness required?
2. Is this a situation where reasons are required?
3. Are the reasons given actual reasons?
    a. Set out rationale, or restating the conclusion?
        i. Conclusion is just a breach of obligation of procedural fairness.
    b. Even if there are *enough* reasons, that does not mean they are *reasonable*. This means there is a thin dividing line between there being enough reasons (procedural) and if the reasons themselves were adequate (substantive)

CHAPTER 3: BIAS AND IMPARTIALITY

Reasonable Apprehension of Bias

The second limb of Natural Justice is the Rule Against Bias ("RAB"), the other being the duty of procedural fairness. By virtue of everyone's backgrounds, personality, profession, all adjudicators have biases and predispositions. All biases cannot be disqualified, but impermissible ones must be.

- Bias is aimed at associations that would likely give rise to predispositions, but courts will not eschew into the adjudicators mind, but rather ask if their personal position would create a sufficient risk that an impermissible degree of bias exists
    - It is impossible to dissociate biases in another's mind
    - Trying to inquire into another's mind would require cross-examination which could compromise impartiality
    - Public is entitled to the knowledge that the decision maker is impartial which is eroded if the facts create an impression that the decision maker was pre-disposed to a decision
- Administrative decision makers have another hurdle since they are not reviewed heavily like judges are when they are appointed. Administrative decision makers have a wide range of jobs, with the administrative duties often a small portion of them, meaning they can't be analysed for bias. They are supposed to be experts analysing with high policy oriented topics
    - More lenience is given for discretionary power with more policy oriented tasks than the domain of adjudicative decisions that involve answering questions of law.
    - Tribunals are not meant to resemble courts, especially when the legislature grants them power to make their own procedure or determine the procedure themselves
- Most regulation of bias comes from common law but section 7 does come into play sometimes.
    - Any perception of pecuniary interests, relationships between parties, and preconceived attitudes erodes the publics perception of the administration of justice. Decision makers,

to be impartial must approach a decision with an open mind and without bias, actual or perceived.
    - Independence is also needed. If judges decisions, or judges themselves, could be dismissed by governments, there would be a general idea that judges will not want to cross governments. Independence is a cornerstone of impartiality
- The sliding scale of adjudicative decisions on one end and legislative on the other will inform the degree of impartiality required.

There are a lot of elements at play when assessing if there is a RAB
- Actual pecuniary or other interest in the question
    - If the decision maker is affected by the decision or has a financial interest in the outcome, they cannot make the decision
- "justice but not only be done, but also be seen to be done"
- Focus is not on the mind of the decision maker, but on the impact on a reasonable person
- Test for RAB from *Committee for Justice and Liberty v National Energy Board,* [1978] 1 SCR 369
    - "[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded people, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.'"
    - In more succinct terms, would a reasonable person, viewing the matter practically conclude that a decision maker would not decide the issue fairly?
- Perhaps they don't have a pecuniary interest must an association via friends/family/profession of the matter in question to create a RAB

This is important, since the RAB is not on the actual state of mind of the decision maker, since the decision maker needs to seem impartial for the public to believe in the avenue available to them.
- Basically ask if what they say they think may not actually be what they think.
- It has to be RAB since we can't look into the subjective mind of the decision maker. If otherwise, everyone who is unhappy with a decision will claim the decision maker was biased.

There are technically 4 categories of RAB
- Antagonism during a hearing by a decision maker towards a party
    - Decision maker needs to be careful in how they appear in a hearing
    - If they ask witnesses inappropriate questions, it appears unfair
        - Aggressive questioning, rolling of eyes, making notes during one sides submissions but not the other, different treatment, asking offside questions
    - Judges are also not supposed to do this, but they can get away with a lot more
    - Outside the decision room is also judges; if interactions outside can create a RAB, the decision maker should not be used.
- Association between one of the parties and the Decision Maker
    - Decision makers are often taken from the area of practice they are in
    - An HR tribunal appointee probably worked in HR law previously
    - This comes with baggage of associations, and should disqualify the decision maker if proven
    - Administrative decision makers benefit from the presumption of impartiality, the onus is on the claimant to prove a RAB
- Involvement by a decision maker in a preliminary stage of the decision

- If the decision maker had previously made a decision on the matter being reviewed, there is the obvious element that they will favour their own decision and should not be allowed to do so
- If there is statutory authorization, this is more allowed
    - This brings up a very important point. Just like procedural fairness, general common law around RAB is always subject to legislation, and statutes can displace common law RAB rules.

Health Professions Act, RSA 2000, c H-7
Section 71 Any person who has investigated, reviewed or made a decision on a complaint or matters related to a complaint may not subsequently sit as a member of a council, tribunal or committee while it is holding a hearing or a review with respect to that complaint.

Municipal Government Act, RSA 2000, c M-26
Section 172 (1) When a councillor has a pecuniary interest in a matter before the council, a council committee or any other body to which the councillor is appointed as a representative of the council, the councillor must, if present, (a) disclose the general nature of the pecuniary interest prior to any discussion of the matter, (b) abstain from voting on any question relating to the matter, (c) subject to subsection (3), abstain from any discussion of the matter, and (d) subject to subsections (2) and (3), leave the room in which the meeting is being held until discussion and voting on the matter are concluded.

- So, if a decision maker is involved in a previous case, they aren't necessarily blocked from appearing in a subsequent case, but can be blocked based on context
- If it is sent back (remedy for procedural fairness issues), the same decision maker will make the decision anyway

- Attitude of a Decision Maker towards the outcome
    - Individual is looking for an outcome prior to the hearing even starting
    - Was their mind already made up such that the hearing was useless?

Pelletier v Canada, 2008 FC 803

Facts:
A retired judge (Mr. Gommery) was appointed as commissioner of a 9-month inquiry into the misuse of government funds which was aimed at enhancing federal visibility in Canada. There was extensive media coverage of this and is thought to be the reason the Liberal government lost the 2006 election.

- After about 3 months of the inquiry, Gommery made various comments to media sources saying things like the program was "catastrophically run" and that he was "coming to the same conclusion as the Attorney General".
- The report criticized former prime minister Jean Chretien and his chief of staff, Jean Pelletier. The pair claimed a reasonable apprehension of bias.

Issue:

Did Gomery have a reasonable apprehension of bias in his role as commissioner of a government inquiry?

Rule:

R v Gough: The determinative test of apprehension of bias is whether a reasonably, well-informed person, viewing the matter realistically and practically would conclude that there was a reasonable apprehension of bias.

Analysis:

An informed person, viewing the matter practically and realistically could find a reasonable apprehension of bias. His hearing statements indicated that he had already formed conclusions about issues he was currently investigating before hearing all evidence. His media statements (before the inquiry was completed) stated that he was coming to the conclusion that the government program was run in a "catastrophically bad way". There is no way that a commissioner could be coming to a reasonable conclusion after only 3 months of a 9-month hearing.

- Section (iii) of his mandate stated that he had to investigate the management of the programs by government officials at *all* levels of governments. He was not in a position to conclude there was mismanagement without first hearing from all levels.
  - This is reinforced because he concluded that the Program was run out of the PMO
- He made these statements before hearing the testimony of the people he thought to be in charge of the program.

To call the program management "catastrophic" before it was over undermined the entire purpose of the inquiry. He had a duty to not reach any conclusions before hearing all evidence and witness testimonies. The object of the inquiry was to get the truth.

- He said he was just confirming the conclusions made by the then Attorney General after the process was only 1/3 done leads the reasonable person to believe the Commissioner had prejudged some of the very matters he was tasked to investigate.
- He stated that Mr. Chretien's answers in testimony "gave him everything that he needed". This raises doubts as to his impartiality or if he was in search of specific answers that supported pre-determined conclusions.

The determinative test is established

- It is not a function of the Commissioner to grant press interviews. Media is not an appropriate forum to deal with while presiding over an inquiry. The only appropriate forum to deal with is the Inquiry itself.
- To do otherwise strikes doubt into the minds of the public on the fairness of the inquiry.
- First and foremost, it is the decision makers role to make an impartial decision, not to become active participants in the media, even after the inquiry is over.

Conclusion:

Reasonable apprehension of bias

Hold, Order:

Action allowed

Ratio:

When analysing if there is a reasonable apprehension of bias, the decision maker should remain subject to impartiality and be open to persuasion (open mind, closed mouth). Indications that the decision maker has made a decision before hearing all sides violates this

When the Commissioners statements demonstrated a pre-judgement of the issues before the evidence was heard, it was almost impossible to not find a RAB. This is important because the decision maker must not only have a RAB going into the trial, they must exhibit it along the whole process until they have heard both sides, all evidence and can weigh them to make an unbiased decision.

- By him saying "catastrophically", there was an indication that the balance of the hearing was perfunctory and the conclusion was foregone, so why do the rest of the 6 months?
- Also indicates that he was looking for evidence to justify an outcome
    - While he also publicly stated that he was impartial and had not made up his mind, this is largely irrelevant, since he had already created a reasonable apprehension of bias.
    - There was a perception that he liked media attention since he said far too much about a proceedings before they were even close to finished.
- "A reasonable, well-informed person, viewing this statement, would conclude that, instead of sitting as a dispassionate decision-maker presiding over the hearings with no pre-established ideas regarding the conclusions he would eventually reach after hearing all the evidence, the Commissioner had a plan or checklist of the evidence that was expected and which was required in order to support pre-determined conclusions"

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

Facts:
The N&L Public Utilities Board was responsible for regulating Newfoundland Telephone company (plaintiff). The Board Commissioners were appointed by the Minister.

- One commissioner, Mr. Wells, was a previous municipal councillor and known advocate for consumer rights
    - When appointed, he said he wanted to pay an adversarial role to continue this advocacy
    - Legislation did not prohibit nomination of commissioners of specific groups
- Wells and four other commissioners conducted a public hearing into an accountants report to the NTC
    - Wells described the packages of the NTC executives ludicrous and unconscionable
    - He made various other statements showing his dislike for NTC

The NTC opposed Wells position on the Commission, but the Board rejected it. Wells made various comments criticizing the NTC executives salaries while still offering very high rates to the public (as the sole provided in NL) before the Board released its decision.

- The Board ended rejecting the request for higher pensions and ordered the money go back to decreasing rates but made no comments on executive's salaries.

Issue:
Did Wells disqualify himself by showing a reasonable apprehension of bias?

Analysis:
Only boards that have investigative, prosecutorial or adjudicative roles can regulate complex, monopolistic industries that supply essential services. There should not be the undue concern that the Board members will act unfairly.

- A person who advocates for consumer protection can input this viewpoint. But they must also strive for fairness and a just result when engaging in the prosecutorial nature of the decision.
- These people should be held to similar decisions as Courts and avoid any reasonable apprehension of bias
    - On the other side are boards with planning and development roles.
- To disqualify Board members, the challenging party must establish there has been a pre-judgement of the matter such that any contrary evidence will be futile
- A strict application of the rule against bias might undermine the very role which was entrusted to them.

A board that is involved in policy formulation should not be susceptible to bias charges because of strong opinions. There should be a flexible approach to find the standard that is

needed when exercising discretion. Board members can draw on relevant expertise and background knowledge and understanding, but it must be applied to the evidence presented to the Board.
The Board regulates the monopolistic NTC. They can unilaterally investigate the NTC but must do so with procedural fairness – adequate notice, right to enforce attendance of witnesses and to make submissions.
- This decision making is closer to legislative decision making than adjudicative
- The Board, under s79, can act as investigator and thus be closer to adjudicative.

Mr. Wells as a commissioner could make statements about the investigate process without irreparable damage (though would be better to say nothing).
- As long as the statements don't indicate that any contrary points will be futile, it should not be attacked by bias allegations.
- His statements prior to trial do not indicate his mind was closed. It was a colourful statement that the salaries seemed unreasonably high.
  - It would be closed minded if the statements indicated that no matter what is adduced his mind is unchanged.
- However, his statements after the hearings began, cumulatively lead to the conclusion that a reasonable person who have an apprehension of bias.
  - It was clear that his mind was closed even before all evidence was heard
  - Not only was there bias, but also a closed mind
- Once the hearing was ordered, the NTC was entitled to procedural fairness and once investigation started, the closed mind test was applicable. Once in hearing, an even higher duty of fairness was needed.

Conclusion:
Disqualified for bias

Hold, Order:
Hearing was unfair and invalid. The Board declaration is null and void.

Ratio:
Once a hearing was ordered, procedural fairness is required and once investigation started, the closed mind test was applicable. Once in hearing, an even higher duty of fairness was needed.
- The determination is flexible and context dependant.

This case makes it no so clear cut – there is nothing inherently wrong about boards including people with different perspectives. The requirement for impartiality exists on a spectrum.
- Where the decision is more adjudicative, the more RAB will be likely to disqualify a member
- Where the decision is more legislative, colourful statements will not disqualify a member so long as they don't create a reasonable inference that their decision has already been made
  - This is because there is a valid purpose to having someone who represents various stakeholders on a board.
  - This is the "closed mind test"; if the decision maker has demonstrated that they have made up their mind before the trial is over, that will disqualify the decision for a RAB
- So it can be said, that at the investigative stage (of a more legislative decision), there is more flexibility and the "closed mind test" operates
- But at the hearing stage, the more rigid standard are and the normal RAB test operates.
  - Even if they are biased, so long as they keep their trap shut, we don't really care
    - Meaning it is not concerned with subjectivity
  - Conclusions made before evidence will never be regarded fondly.

Old St. Boniface Residents Association Inc v Winnipeg (City), [1990] 3 SCR 1170

Facts:

Winnipeg council approved a proposal to build two condominium towers in Old St. Boniface. Old St. Boniface Residents Association (plaintiff, appellant) community group opposed this on the basis that one councillor was involved in the proposal (he represented the city in the planning stages and an advocate in the meeting where the proposal was approved).

- He did not disclose his involvement.

Issue:
Was the councillor's decision disqualified because of apprehension of bias?

Analysis:
All factors need to be considered under which a committee operates in order to adduce the procedure that must be followed. The legislation requires councillors to attend, but nothing that they are only to act in the capacity as councillors.

- The election of a councillor may have *depended* on their position over certain projects
- In the development of projects, many councillors are expected to aid either side and will take a side naturally.
- The degree of prejudgement would run afoul of the ordinary rule which disqualifies a decision maker on the basis of a reasonable apprehension of bias.
- It could not be argued that Legislature intended this doctrine to apply to Municipal councillors.

Their view would have to be that their decision was made and any argument is futile. Presence of bias will not be sufficient. Otherwise, most councillors would be disqualified since most attend public meetings about the projects.

- The councillor previously supported the project but there is no evidence that it went further than that.

Conclusion:
No disqualification.

Hold, Order:
Motion denied

Ratio:
Legislative decisions cannot be subject to the same reasonable apprehension of bias provisions since politicians presumably have an opinion of their constituents of various items. Even if bias is perceived, there will only be a disqualification for bias if the person's position was incapable of being changed.

Again there is context that needs to be considered. On something like a Municipal Board, when compared to an adjudicative decision-making process, a councillor is entitled to act as a Councillor when they sit on Municipal Council to make decisions in their municipality. Political considerations may lead to strongly held views, which is expected on a Municipal Board. It would be disingenuous to assume they would not always be acting with some kind of prejudgement.

- You need to look at the nature of the body itself, similar to their discretion permitted.
- Because it is democracy, political considerations will have representatives necessarily having opinions of their constituents on various matters.
- Test for legislative decisions: is the decision maker's mind open to persuasion?
    - If any representations to the contrary would be futile, no matter how damning or convincing, then the RAB is sufficient to invalidate the decision
    - This is an a less stringent test, like the investigation test in *Newfoundland Telephone*

Seanic Canada Inc v St. John's (City), 2014 NLTD(G) 7

Facts:

Seanic wanted to develop an old folks home on land in St. John's that was initially zoned as residential, so they applied for re-zoning. There were concerns that the project would reduce views and increase traffic congestion.

- St. John's refused to re-zone, with one councillor in particular being a steady opponent of the project. At a council decision, he indicated that he had made up his mind to oppose the application.
    - Seanic argued this was a reasonable apprehension of bias

Issue:
Did the councillor disqualify himself for close mindedness?

Rule:
St Boniface: if the councillor's conduct suggests that their mind is already made up and unable to be persuaded, that is sufficient to ground a reasonable apprehension of bias.

Analysis:
The councillor came to council with a closed mind such that any alternative was futile. It is even more concerning because this was against public interest and not because of planning considerations. The regulatory regime of development, in particular the changing nature of municipal planning bring a degree of independent judgement from councillors. Decisions need to be made after hearing the applicant and adherence to adequate legislation. They must respect colleague points and where there is prejudgement, objectively consider if that position should be maintained.

- The councillor in this case did not do this.

Conclusion:
Obvious bias - disqualification

Hold, Order:
Councillor disqualified

Ratio:
Councillors must listen to views expressed by colleagues, respect how discretion is to be exercised, and where there is a degree of pre-judgement, honestly and objectivity consider whether their position on the panel should be maintained.

The test in *St. Boniface* does not outlaw a councillor from leaning one way or another, and will not disqualify them unless the court is satisfied that their mind cannot be dislodged.

- Since the councillor came in with a closed mind, any argument to the contrary was futile, he demonstrated bias. The closed-minded test does not require councillors to stay in a mind of uncertainty until the vote. This is seemingly at odds with *St. Boniface*, who required an open mind test.
    - By the NLCA saying that there is no requirement to maintain a façade of an open mind until the vote is taken, because it is not improper to take a position based on constituents views, is putting *St. Boniface* into consideration.
- The remedy in this case was to send it back.
    - Since the vote was 7-3, there was the argument that his vote didn't actually do anything to change the outcome
    - But the court found the entire process was tainted by his bias, so it should be sent back.

<u>Impartiality and Independence</u>

Impartiality and Independence are closely related, but they are still separate and distinct requirements of natural justice.

- Impartiality: a state of mind/attitude of a tribunal as lacking bias (actual or perceived) in relation to both the issue and the parties before it given a particular bias

- Independence: it is not just a state or mind/attitude of judicial functions, but a status of separateness of the judicial from the executive branch of government. This rests on objective conditions or guarantees
    - This is anchored in s11(d) of the Charter; it embodies the traditional constitutional value of the judiciary being independent of the executive branch
- It is required that judges exert both impartiality and independence, but administrative tribunals are held to slightly different standards. There is some doubt to this, since lots of tribunals would do jobs that Superior Courts would do anyway.

It is not unusual for prior involvement of a decision maker, featuring in another or the same capacity of a matter already heard before the tribunal or has been involved in the investigation and decision to proceed with the matter. This is more an issue when the issue is appealed and the original decision maker sits on the reviewing panel, essentially hearing the same case twice, and usually constituting a reasonable apprehension of bias. However, reconsideration by the decision maker of its decision would not necessarily do so.

- The most common solution to issues of reasonable apprehension of bias in these cases is statutory authorization. The statute can always clearly displace the common law, including any requirement on impartiality or independence.

Brosseau v Alberta Securities Commission, [1989] 1 SCR 301

Facts:
Brosseau (plaintiff) was a corporate lawyer who prepared documentations for a dial mortgage company. He filed with the Alberta Securities Commission ("ASC"). The company later went into bankruptcy and the ASC later launched an investigation into Brosseau.

- Brosseau argued that the ASC had institutional bias because the Chair of the committee did various tasks in the process, including initiating the investigation, prosecuting and then acting as a judge on the panel for the case.
    - In effect, they did both investigative and adjudicative tasks
- The ASC argued that the dual role was required in the *Securities Act*.

Issue:
Was there institutional bias against Brosseau, and was it justified in statute?

Rule:
Section 165 of the *Securities Act*

(1) The Commission may order that
    (a) trading cease in respect of any security for a period of time as is specified in the order, or
    (b) that a person or company cease trading in securities or specified securities for a period of time as is specified in the order.
(2) The Commission shall not make an order under subsection (1) without conducting a hearing.

Analysis:
Since the Commission is a creature of statute, to disqualify it from hearing the matter would require the finding that it was going beyond its statutory duties. The legislature was free to choose to structure of the administrative tribunal. They can also allow overlap of functions normal in judicial proceedings to achieve the statutory purpose.

- If such overlaps are warranted by the legislation, it will not be generally subject to the doctrine of reasonable apprehension of bias per se
- The ASC argued that while there was no express overlap of functions in the Act, it could be found in the general scheme

- Section 28 allows the full scale investigation by the ASC. Because of the formalities around a s 28 investigation, and the broad powers given to the ASC in it, the ASC must have implied authority to conduct a more informal internal review.
- It is not reasonable to say the ASC needed express statutory authority to review documents; in order to order an investigation, the ASC must first investigate the facts and if there were regularities, let it proceed

The ASC both orders the hearing and decides the matter, and the claim of bias cannot be used since the ASC does the initial preliminary review .

- The Act makes it clear the ASC is not meant to act like an act like a court in this initial stage and activities that are "biased" are actually required for the operations

Conclusion:
Statute justified the bias.

Hold, Order:
Appeal dismissed

Ratio:
So long as a the tribunal does not act outside statutory authority, fulfilling statutory duties on both adjudicative and investigative sides will not create a reasonable apprehension of bias.

While it is a principle that no one should be a judge in their own case, the court finds than an administrative body being part of the investigation and the adjudicatory decision is not sufficient to establish a prima facie RAB

- Often the statute will authorizes a body to wear two hats with respect to investigation and subsequent adjudication, and this serves as an exception to the rule against bias.
- Anytime that someone is occupying more than one role, there should be questions of bias, which the first step is to look at statutory authorization of this.
  - It can also arise by implication – if the statute doesn't explicitly state that the dual function is allowed, but it is necessary to fulfill the statutory obligation, then it is effectively a dual role
- Context is important. Roles and what is permitted will be interpreted with regard to the protection of the public.
  - So, even if there is a perception of bias, statutory authorization will allow it and the only way to otherwise ground the claim would be a constitutional argument.

2747-3174 Quebec Inc v Quebec (Regis des permis d'alcool), [1996] 2 SCR 919

Facts:
The numbered company (plaintiff) had it's liquor permits revoked by the Regis des permis d'alcool (defendant). The company challenged the provisions of the Quebec liquor statute since it dealt with the operation and the structure of the Regie

Issue:
Does the structure of the Regis create an institutional reasonable apprehension of bias?

Rule:
Lippe: Impartiality and Independence are both required. Even if a judge has no pre-conceived biases, if the system is structured in a way that creates a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.

Analysis:
The multiplicity of functions of the Regie is cause for real concern. For institutional bias, if a person who is well informed and viewing the matter realistically and practically would have a reasonable apprehension of bias in a substantial number of cases, then the bias is confirmed.

Statutory provisions that counter prejudicial effects are to be particularly considered. This test is great for administrative tribunals with a quasi-judicial function.

- However, this cannot overlook serious deficiencies in quasi-judicial processes since impartiality is needed for public confidence.
- Overlapping functions is not an issue and indeed commonplace. Employees of the Regie were involved at every stage of the process leading up to cancellation of a liquor permit, from investigation to adjudication.
    - Lawyers employed face a hurdle as they are not separated at different stages of the process
    - In essence, a lawyer who made submissions to the directors might then advise them in respect of the same matter. It would not be an issue for them to be in other roles of the final decision.
        - But, prosecuting counsel must not, in any circumstances, be in a position to participate in the adjudication.
        - To do so creates a reasonable apprehension of bias, as in this case

Conclusion:
Reasonable apprehension of bias found

Hold, Order:
Appeal dismissed; a separation of the director involved in various stages is needed.

Ratio:
Where there are issues in the structure of an administrative body in terms of bias, overlap is not always a ground for concern, unless the roles of employees are excessively close in the process

While *Brosseau* argued of institutional bias against the particular decision maker, this case was more the entire set up of the organization itself that suggests a lack of impartiality on an institutional level.

- The case is mostly about the Quebec Charter, but it does have important common law analysis. Firstly, the test used in *Lippe* is confirmed: For institutional bias, if a person who is well informed and viewing the matter realistically and practically would have a reasonable apprehension of bias in a substantial number of cases, then the bias is confirmed.
- The issue was not with the directors, but with the support staff, who could present arguments and then turn around and help influence decisions and draft them.
    - There were no efforts internally to separate the internal functions of counsel
    - If the statute allowed this, there would be no (legal) issue.
        - But the statute only allowed the Regis to set up an internal process, which is not the same as statutory authorization.
        - As such, it cannot be a shield against the rule against bias
            - When an administrative tribunal has a statutory setup, that is allowed by parliamentary supremacy, under statutory authorization
            - But when an administrative tribunal makes its own setup, Parliament didn't decide this, only that they could set themselves up, so it is not a parliamentary decision, and cannot be statutory authorization.
- If you get notice from internal counsel, they argue and then draft the decision, you will likely have some apprehension that the decision would be influenced by a party that was party to the proceedings. These people where too many hats to not ask questions of bias
    - This means there isn't a specific role that may have bias, but the entire institution. This is much larger because the institution basically has to completely rework its structure

Health Professions Act, RSA 2000, c H-7
Section 70

(1) If the hearing tribunal is advised by counsel acting on behalf of the tribunal at a hearing, that counsel may not lead or present evidence at the hearing on behalf of the college nor be the counsel of the complaints director

Veterinary Profession Act, RSA 2000, c V-2

Section 70

(1) If the Hearing Tribunal is advised by counsel acting on behalf of the Hearing Tribunal at a hearing, that counsel may not lead or present evidence at the hearing on behalf of the Association or be the counsel for the Complaints Director.

Statutes can draw a sharp line to avoid the apprehension of bias. In both of these cases, the lawyer cannot prosecute the member and then give advice to the decision maker.

Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52

Facts:

The Ocean Port Hotel ("OPH") was a hotel in Squamish. The Liquor Appeal Board found that OPH giving alcohol to minors, allowing patrons to take liquor from the establishment and have fights, all contravening the *Liquor Control and Licensing Act*.

Issue:

Are members of the Liquor Appeal Board sufficiently independent to render decisions on violations of the Act?

Rule:

Section 30 of the *Liquor Control and Licensing Act*

(1) The Liquor Appeal Board is continued consisting of a chair and other members the Lieutenant Governor in Council may appoint.

(2) The chair and the members of the appeal board

(a) serve at the pleasure of the Lieutenant Governor in Council, and

Analysis:

The statute must be construed on the whole as to what degree of independence the legislature intended for it to have; it is presumed that if the statute is silent, they are meant to comply with the principles of fundamental justice. Statutes can even oust the requirement of impartiality and independence, so legislatures determine the extent of the tribunal's relationship with the legislature. 30(2) allows the members of the board to be appointed at leisure. This cannot be said to violate "independence" (although long term, permanent appointments would be ideal), since it is what the legislature intended.

- This is the standard of independence achieved in the Act.
- Administrative tribunals are meant to span the divide between executive and judiciary
- The Charter requirements for independence do not apply to administrative tribunals though there are cases where it could.

The Court of Appeal found that the way the Board could be removed at will would frighten the members to never contradict the government, for fear of being fired. Because of this, they found the structure contradicted Independence requirements.

- However, independence in the Charter does not apply to tribunals. It was the legislature's attempt to remove them at will. Absent any constitutional infringements (of where there are none), this must stand
    - The intention for the Board to serve at the Legislature's leisure was intentional; common law requirements for independence cannot overcome the statute

Conclusion:
No violation
Hold, Order:
Appeal allowed

Ratio:
Charter independence does not apply to administrative tribunals. So, any language that severs administrative tribunal independence from the executive displaces common law independence requirements absent a constitutional challenge

The court confirms that, like all principles of natural justice, reasonable apprehension of bias and independence at common law can be ousted by statute. Even if the tribunal is too connected with the executive branch to not be independent enough at common law, if the statute demonstrates that was the legislatures intention, that is allowed

- Most tribunals were actually made to implement policy and keep close connections with the executive branch. If it were otherwise, there would be a mess of reworking administrative structures.

This is all to say that both independence and impartiality will vary with context, and mostly with statutes. They can vary based on the institution or the individual, but both can have impartiality concerns.

- There is no general rule that administrative tribunals need to be independent like Courts.

Institutional Consultations

The difficulty of administrative decisions following a judicial model/procedure is that these tribunals hear many more cases a year, constraining their time much more than Courts.

- While some administrative bodies make decisions like they do in judicial contexts, other decisions are a much more institutional, calling them "institutional decisions".
    - The sheer volume of decisions requires a large staff and dispersal of authority
    - The issues range in complexity so not all individuals can have the same expertise to make an appropriate decision.
- This collaborative model certainly has many benefits of efficiency and breadth of knowledge, but there will also be questions of bureaucracy: faceless decision making, lack of personal responsibility etc. It also has targets for procedural fairness.
    - Institutional decision making is not a separate doctrine, but procedural fairness elements are very applicable. Reducing the delegation of legal powers and duties, not being a judge in your own case, disclosure, impartiality and independence are all expected, subject to other considerations like statute

What are institutional consultations?

- Consultation by administrative decision makers who heard the case with other decision makers
- One "panel" consulting with the whole body of decision makers. These are formal meetings
- They tend to be more policy oriented, and less a discussion about the facts

Why do them?

- Discuss matters of law or policy that go beyond the facts of the case
- Promotion of internal consistency

Why are they concerning?

- Allows people who did not hear the case to influence the outcome (audi alteream partem)

- Might cause decision maker to consider new arguments or evidence (audi alteream partem)
- Adjudicative independence is compromised from undue influence or irrelevant considerations (nemo judex)

Usually, issues with these consultations only come to light when there is an internal tattle tale, so it does make you wonder how much goes on without us knowing. An issue is that tribunals are not hierarchical, so stare decisis cannot apply to "lower tribunals". If the tribunal is hierarchical, decisions are influential on those beneath, but if the decision makers are at the same level, they are not bound to anyone. If you have judicial review or statutory appeal, they are binding, but not between decision makers at the board. So if one decision maker comes to conclusion X, and a lateral decision maker comes to conclusion Y, who is the right precedent to follow?

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

Facts:
International Woodworkers of America ("IWA", plaintiff) applied to the Ontario Labour Relations Board ("OLRB") arguing that Consolidated Bathurst Packaging ("CBP", defendant) did not bargain in good faith. This involved the issue of whether the employer has a duty to disclose its business during negotiations of a collective agreement (in this case, the decision to close a plant).

- The Board previously used a rule of disclosure, only when it had made a concrete decision to close a board before/during the bargaining.
- Both IWA and CBP argued this rule should be changed

When deciding whether or not to change the rule, the Board called a "full board hearing" with other members who were not hearing that case to discuss the matter.

- The Board upheld the rule but favoured IWA's application. CBP appealed.

CBP argued that if evidence was given at a hearing was discussed with other members or considered, the decision was invalid.

Board Decision (1983), 5 CLRBR (NS) 79 (OLRB):
The Act confers broad discretion to the Board to interpret the Act. Decision making often turns on policy. Board decisions form law as old as the legislation and is settled and stable, satisfying stability and uniformity.

- The Board reserves the right to change its policies and Act amendments create additional requirements for ongoing policy analysis.
- The meeting was a part of internal administrative arrangements of the Board, which is set as it is for regulatory effectiveness. It is to the panel hearing the case to make the ultimate decision and Board meetings are limited to policy implications of a draft decision.
- Board meetings emphasize broad policy implications of individual decisions.

Majority (Wilson, La Forest, L'Heureux Dube, Gonthier, McLachlin)
Issue:
Is the process of the OLRB to host a "Full Board meeting" to discuss a draft decision a violation of natural justice by either (a) he who decides must hear or (b) the right to know the case to be met?

Rule:
Section 102 of the *Ontario Labour Relations Act*

(9) The chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in

Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

Analysis:

Chairman of the meetings stated that the purpose of the meetings was to discuss policy issues needed for an atmosphere where all members can make up their mind and preserve the responsibility of the outcome of the decision.

Does the importance of the policy issue and the efficiency needs to maintain quality and coherence of Board decisions allow for a full board meeting are allowed by natural justice?

- The *Act* gave the Board discretion to make final decisions. This requires necessary steps to make conclusive decisions in a final manner. They also get discretion as to "good faith" requirements.
- Full board hearings are highly practical (important policy consideration)
- The meetings take advantage of valued experience of members
- Board meetings also avoid individual decisions being made differently for similar cases. Coherence is thus fostered.

It cannot be said that someone who did not hear the case is unable to discuss with others who did, out of fear they would "influence" the decision. Conversations with colleagues do not constitute infringements of people who heard the hearing's ability to make a decision, though outsiders should not be allowed to participate in the decision and influence the decision. Whatever the decision is, it will be that of the decision maker for which he assumes full responsibility. The decision maker can be swayed by colleagues if it promotes coherence with Board decisions.

- The full board meetings are not imposed, they are requested. It was meant to foster discussion, but the decision is left entirely to the hearing panel.
- The Board meeting would not be perceived by an informed person viewing the matter realistically and practically, and having thought the matter through, as having breached the right to an independent tribunal and thus did not infringe natural justice.

There are certainly problems with the meeting for the *audi alteram partem* rule; the discussion of members without them voting certainly helps, but this would still generally violate natural justice as it allows parties to make representations on factual issues when they did not hear the evidence.

- But policy decisions must be approached in a different manner because they have an impact which goes beyond the dispute
- Because of the farther-reaching consequences, the Board is, to a certain extent, independent from the immediate interests of the parties

The rule that parties need to make representations and be informed stands, but when the decision is policy based, it is not applied.

- No violation of the *audi alteram partem* rule.

Conclusion:

No violation of natural justice

Hold, Order:

Appeal dismissed

Ratio:

The rule that parties need to make representations and be informed stands, but when the decision is policy based, it is not applied.

Dissent (Sopinka):

There is no evidence that the Board meeting was different from its usual practice.

- First step is what role the full board procedure played in the decision-making process?
  - The number of people in the meeting, and their high status indicate that they could have been highly influential

    - It is likely it affected the outcome
- Second step is to consider whether the full board meeting constituted a breach of natural justice?
    - S102(13) requires the Board to give both parties chance to present their submissions. The Board can make their own procedures, but they are subject to approval of Cabinet.
        - Not every practice needs approval, but the Board meeting could be one.
    - Argued that the full meeting is a violation on two grounds:
        1. There were members of the Board meeting were not in the hearing
        2. Decisions were made on matters not disclosed in the meeting and no submissions could have been made
    - Policy is not law. Tribunals are not bound to listen to only law presented by parties, they can do their own research and if it differs from the hearing, it can apply the law as found.
    - The full meeting deprived the appellant of the opportunity to provide evidence and was a denial of natural justice.

The Supreme Court was asked if the full board meetings required the parties to be present and reply to the meting decision. To SCC said no.

- Internal consultations are not prohibited, so long as the requirement to be there is not imposed on them. This means, if a chair imposes a requirement of a full board consultation, that would not be consistent with natural justice.
    - The Meeting also cannot deal with facts of the case, just the policy and legal issues
    - Only the Panel gets to make the final decision. Even if every other person at the Meeting says Yes, but the Panel says No, the No stands since they are the only ones that heard the hearing. Only the Panel can decide.
        - This ensures that the full board Meeting does not amount to participation in the final issue, so they are not influencing, just freedom to decide.
    - On factual matters, parties must have the opportunity to correct any statement prejudicial to their stance. But not in fact, so the rules are more lenient and full board Meetings are allowed without violating natural justice.

This does beg the question, that so long as the decision makers get the ability to make their own decisions, are institutional consultations always allowed? Is that practical? Are people likely to vote against an entire meeting room?

- If the Meeting is requested by the decision maker vs if they are imposed by the institution becomes a big consideration

Tremblay v Quebec (Commission des affaires sociales), [1992] 1 SCR 952

Facts:
Noemie Tremblay (plaintiff) was receiving social aid. She claimed reimbursement for certain bandages and dressings, but the Minister denied her claim. She appealed to the Commission as allowed in *Social Aid Act*.

- The Commission consisted of Mr. Pothier and Ms. Landry. After the hearing, Pothier sent his draft decision (in favour of Tremblay) to Landry who signed it but sent it to legal counsel (as was the procedure in the Commission). The legal counsel was on vacation, so the president of the Commission, Mr. Poirier read it instead. Mr. Poirier disagreed with the finding.
- Pothier asked for a consensus table at the next Commission meeting.
    - The majority opposed the Pothier/Landry decision. Landry changed her mind and wrote an unfavourable review for Tremblay.

- Since Pothier and Landry disagreed, the decision needed to go to the President, Judge Poirier, as required by the *Act*.
    - Since Poirier already gave his opinion, he provided the same one and the appeal was dismissed.

Procedural History:
Quebec Court of Appeal found there was a violation of natural justice

Issue:
Does the Commission procedure to ensure adjudicative coherence give rise to a reasonable apprehension of bias?

Rule:
Section 10 of the *Act respecting the Commission des affaires sociales:*

(1) A matter shall be decided by the majority of the members and assessors having heard it.

(a) When opinions are equally divided on a question, it shall be decided by the president or the vice-president he designates.

Analysis:
Deliberative Secrecy
Where there is no appeal, only judicial review, the court has to review the whole process. The nature of control exercised over administrative tribunals in their discretion cannot rely on deliberative secrecy like judicial tribunals can.

Reasonable Apprehension of Bias
The system for verifying decisions came from the decision makers themselves. The Commission had so many cases to decide, it became common to ask colleagues for advice. This was in hopes for consistency for client stability. There were no appeals, so the Commission had to ensure there were no errors.

- Though the consensus tables were not required, they were basically necessary when counsel determines the decision is contrary to previous decisions
- The system was more constrained than influenced by these meetings, regardless of any hard rule on it.

There are factors that hint at bias – a plenary meeting can be requested by the quorum making the decision as well as the president of the Commission.

- The president being able to refer for plenary discussion can constrain decision makers – they would not feel free to refuse when the president disagrees.
- The statute made clear that the decision maker must decide the matter, so they must retain the right to consultation – imposing it on them is an act of compulsion and denies their choice. Only the panel can decide, and only they can decide to corroborate. Compulsory consultation creates the appearance of lack of independence.
- The case being a new precedent would require a new hearing before consensus emerges. This would be long, but it appears that is what the legislature wanted.
- It is important that the ones who hear a case should be the ones to decide it.
- The President can hold undue influence on the decision makers and infringes the litigants right to an independent tribunal.
    - The institutionalized decision-making process in this case is contrary to *Consolidated Bathurst*
    - This gives rise to a reasonable apprehension of bias.

Conclusion:
Violation of natural justice.

Hold, Order:
Appeal dismissed

Ratio:
Plenary sessions, on their own do not violate natural justice. But, if they are imposed on decision makers, such that they are not free to truly decide, it will.

Institutional competence, while it can be beneficial, can be ruled a violation of natural justice if it is imposed, rather than requested by the decision makers who heard the case. The full board Meetings should thus be held in such a way that leaves the decision maker free to decide in their own opinions.

- Voting, keeping attendance of the Meeting and minutes create a reasonable apprehension of bias. This is because minutes show a certain level of formality, perhaps you know who votes for/against. This could increase the likelihood of outside factors weighing in, and create a reasonable apprehension of bias
- So, the President requiring consultation is a problem since it goes beyond influence and into constraint.
    - The President also should not have been the tie breaker given his previous involvement
        - This doesn't contribute to the atmosphere that the decision makers are free and allowed to make the decision they want without constraint.

Ellis-Don Ltd v Ontario (Labour Relations Board), 2001 SCC 4

Facts:
Ellis-Don (plaintiff, appellant) entered into collective agreement to contract only with companies who were members of the Toronto Building and Construction Trades Council union in 1962. In 1971, the Electrical Contractors Association of Toronto applied to the OLRB for certification on the bargaining agents.

- Ellis-Don did not show up on the list of possible partners.
- Local 894 filed a grievance with the Board that Ellis-Don had subcontracted work from a non-union entity, violating the 1962 contract.

The Board heard the grievance. The draft decision of the Board dismissed the grievance, claiming that they abandoned their bargaining rights. But on a meeting, they reversed this decision and allowed the grievance.

- Ellis-Don applied for judicial review, saying the difference was factual, not legal and claimed a violation of natural justice.
- Before judicial review, Ellis-Don received an order to compel the Board to give its procedure at coming to its conclusion.

Procedural History:
The order on the Board was reversed on appeal at the Ontario Divisional Court

- The Ontario Court of Appeal dismissed the appeal and affirmed the lower court.

Issue:
Did the full board Meeting change the panels position and violate natural justice?

Rule:
Section 114 of the *Labour Relations Act*

(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling

Analysis:

The final decision said nothing about what happened in the meeting. There is no direct evidence of improper tampering with the decision of the panel. Ellis-Don tried to argue the threshold for judicial review was an apprehension of breach of natural justice, and they did not need to show an actual breach. They thought this was established by the Board's displacement of the regularity of the administrative proceedings.

- This is a tension between deliberative secrecy and fairness.
- After the motion was dismissed, Ellis-Don could not examine the Board process.
- The Court cannot reverse the presumption of regularity simply because the decision changed. To do so would deprive administrative independence and jeopardize of institutionalized consultation proceedings to ensure consistency and predictability.

Conclusion:
No violation

Hold, Order:
Appeal dismissed

Ratio:
Apprehension of a breach of natural justice is not sufficient; must prove actual breach

A change between a draft and a final decision will not create the illusion of tampering or other unfairness. What if the board just changed its mind without even calling a meeting?

- The only information to go off of was the full board meeting occurred, and the decision changed thereafter. The final decision was more in line with the Board's precedents
  - A favourable finding to an unfavourable one does not ground a breach of natural justice
  - This means mere speculation of such a breach is not sufficient. They need proof
- This was also a judicial review, not an application for reconsideration. This means that the only thing the court got was the record. So, the decision maker could not explain why the consultation was called and how it happened. There was limited information about the nature of the consultation.

The court gives a three-part test when institutional consultation would not create a reasonable apprehension of bias or lack of independence:

1. Consultation cannot be imposed by a superior level of authority within the administrative hierarchy. It may be requested only by the adjudicator themselves
2. Consultation had to be limited to questions of policy and law. Discussions of facts would give a reasonable apprehension of bias since the other members did not hear the evidence
3. Decision makers had to remain free to take whatever decision they deemed right in their conscience and understanding. They cannot be compelled to adopt views expressed by other members of the tribunal

In *Shuttleworth v Ontario*, it was established that if there was one individual that determines if you stay on the tribunal or not, that would create a reasonable apprehension of bias since that person is less likely to disagree with them and make an independent decision.

CHAPTER 4: SUBSTANTIVE REVIEW

Substantive review moves away from analyzing the process by which an administrative decision is made, and towards a review of the substance of the material itself: *substantive review*. This means that even if the process was fair, there was no reasonable apprehension of bias, but the decision was bad, it can be appealed. For this entire section *Vavilov* is the starting point (the SCC literally says, this is the case that you start with). It does not deal with anything procedural at all, but any substantive review question will always deal with *Vavilov* first.

The biggest thing about substantive review is the standard to which the substance of the decision is reviewed on. Because, recall, that the point of administrative law is to create a specialised tribunal with expert opinions to decide specific claims. The way courts review those decisions must reflect that.

- Courts can review on a "reasonableness" standard, which generally respects the boards expertise and will let their decision stand so long as it was in a range of reasonable decisions
- Courts can also review on a "correctness" standard. In these cases, the court will give no deference to the boards decision. The board decision must be correct, and there is only one right answer. The court will substitute its thinking if the board's decision was incorrect.
- NB: these standards are not only in the administrative context, they are in all reviewing courts (ie, appeals from any lower court or tribunal). Because the standards covered all judicial review and appeal, there was great confusion on how to properly apply it.

<u>A Brief History of Substantive Review:</u>

1. Pre *CUPE v New Brunswick*
    a. Focus was on if the judge could make the decision that was in the administrative decision maker's jurisdiction
    b. If so, Courts could intervene to "correct" errors
    c. There was a wide range of court powers, higher level of intervention
    d. Little deference to the administrative decision-maker
2. *CUPE v New Brunswick*
    a. Called a Pragmatic and Functional Approach
    b. Based on a contextual analysis, based on 4 factors: (a) privative clause/statutory appeal, (b) expertise of the tribunal, (c) purpose of the legislation and the impugned provision, (d) the nature of the issue (law or fact)
        i. Had to be applied every time there was a judicial review to come to one of the three standards
        ii. This was a lot of work for everyone, and clients didn't like it since it racked up bills. Questions on if it was all necessary
    c. Created three standards:
        i. Correctness; no deference to administrative tribunal
        ii. Reasonableness simpliciter: a range of reasonable options
        iii. Patent Unreasonableness: only change the decision is patently wrong
3. *Dunsmuir*
    a. Attempted to simplify CUPE logic: collapse patent unreasonableness and reasonableness simpliciter into one standard: reasonableness, and correctness
    b. Not necessary to undertake a new review where precedent exists
    c. "Pragmatic and functional" approach replaced with "standard of review analysis"
    d. Still had to weight the four factors
    e. This method was universally critiqued for not respecting legislative goals to establish tribunals of limited expertise analysing factual issues, and those decisions could be reviewed on correctness
    f. The confusion in the legal and judiciary communities was so high that the Court invited a trilogy of cases that dealt with the standard of review: *Vavilov, Bell Canada, National Football League* to present their cases to reconsider the nature of judicial review for an administrative action
        i. This was to revisit the standard of review framework and address criticisms
4. *Vavilov*

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

Facts:
Vavilov was born in Toronto, to parents who were sent to Canada by the Soviet Union in the Cold War. As Russian spies, they assumed false Canadian identities and established fictitious personal histories.

- The family moved to the US where they were found to be spies, arrested and deported back to Russia. There, they admitted to being spies acting on behalf of Russia

The Canadian Registrar of Citizenship cancelled Vavilov's citizenship for these reasons, denying the normal birthright citizenship under the *Citizenship Act*.

Issue:
What is the applicable standard of review?

Rule:
Section 26

(3) Where the Minister has determined that the holder of a certificate of naturalization, certificate of citizenship, miniature certificate of citizenship or other certificate that contains the holder's photograph, or certificate of renunciation, issued or granted under the Act or prior legislation or any regulations made thereunder is not entitled to the certificate, the Registrar shall cancel the certificate.

Analysis:
These companion cases allow the Supreme Court to address two key aspects of the administrative law jurisprudence

1. New course for standard of review when court reviews merits of administrative decisions
2. Additional guidance when conducting reasonableness review

These operate in harmony with the general *Dunsmuir* framework to maintain the rule of law in judicial review contexts while also respecting legislative intent.

<u>Need for Clarification and Simplification of the Law of Judicial Review</u>
Dunsmuir did not achieve the simplicity and predictability it thought it would. Thus, a new framework for determining standard of review where courts review merits of an administrative decision has been made.

- First, there is a presumption that reasonableness is the applicable standard in *all* cases. The only time to deviate from this is when there is clear indication by the legislation to do so, or the rule of law clearly requires it.
- Second, courts are to conduct reasonableness analysis in considering the outcome in light of its underlying rationale to ensure the decision is transparent, intelligible and justified.
    - The focus is on decisions actually made by the administrative decision maker, not on the conclusion the court would have made.

The old 'reasonableness' interpretation meant that those subject to administrative decision makers are entitled to a decision between 'good enough' and 'not quite wrong'.
Reasonableness review is to be that courts only intervene when it is truly necessary to do so.

<u>Determining the Applicable Standard of Review</u>
Again, the presumption that reasonableness is the applicable standard when courts review administrative decisions. This can only be rebutted in two situations:

1. Clear indication from the legislature that it intends a different standard to apply. The prescription by the legislature must be a clear statement of a different applicable standard of review.
    a. Also the case where the legislature provides a statutory appeal mechanism from administrative body to a court (signalling the intent of the legislature's intent that appellate standards exist in court review

2. When the rule of law requires that the standard of correctness will apply. This is typical of certain types of questions:
    a. Constitutional questions
    b. General questions of law of central important to the legal system
    c. Questions of jurisdictional questions between multiple administrative bodies

These categories suffice when assessing what standard to use. This eliminates the "contextual inquiry" made in *Dunsmuir*.

<u>Presumption that Reasonableness is the Applicable Standard</u>

When reviewing the merits of an administrative decision (judicial review of an administrative decision other than a review for breach of natural justice and/or breach of procedural fairness), presuming the standard is reasonableness is most simple.

- Parliament and legislatures have the competence to make administrative bodies and endow them with statutory power. When it does so, the presumption is that the legislature intended to have a standard of reasonableness, unless stated otherwise.
- The fact that the legislature choses to delegate power to these specialized bodies is sufficient analysis of administrative bodies competence, and thus we can infuse that the standard will be reasonable is the default situation. This negates the 'contextual analysis'. It isn't contrary to the rule of law as it allows courts to give clear effect to legislative intent and deviate from the presumption when it is clear that the legislature intended a different standard to apply.

<u>Derogation from the Presumption of Reasonableness Review</u>

Legislature can make explicit a different standard should apply in two ways.

1. Legislated Standard of Review
    a. Derogation from presumption is founded as it supplies another one
    b. Legislated standards of review are to be given effect. When the Legislature indicates that a standard of correctness should apply for certain questions, that must be applied.
    c. As long as it is within the confines of the rule of law, they are to be respected
2. Statutory Appeal Mechanisms
    a. Derogation from presumption is founded as it supplies another process
    b. Courts should respect legislature's attempt to apply a statutory appeal process as much as respect their application of a specific standard.
    c. Legislatures can limit judicial interference of administrative decisions, but they can also use courts as part of the enforcement machinery.
        i. Allowing this would entitle courts to scrutinize administrative decisions on an appellate basis, and rebuts the blanket presumption of reasonableness standard.
    d. Deference should not sterilize appeal mechanisms to alter the decision-making process that the legislature intended.
    e. When the statutory appeal includes questions of fact, the standard of review is palpable and overriding error, but should a legislature intend another standard, it is free to do so by prescribing the applicable standard in the statute.
        i. This gives legislatures the choice to defer to the presumption of reasonableness standard on one end, or enact a statutory right of appeal on the other.
    f. When the word "appeal" is present in legislation, it is accepted that the legislature intended an appellate standard of review.
        i. Many statutes include statutory appeal and judicial review provisions, indicating two roles of courts.
        ii. There is no rationale to ignoring explicit statutory appeal frameworks

iii. Statutory appeals in statute do not preclude other intervening forces like judicial review.
1. If the standard was reasonableness for statutory appeals and judicial review alike, a statutory appeal would be completely redundant.

Giving respect to legislative intent to displace the presumption is needed for two reasons
1. Conceptual: based on respect for legislature's institutional design
2. Simplicity: closes the door on the contextual analysis

The statutory appeal mechanism should inform the choice of standard analysis in 3 regards.
1. Statutory appeals can either be allowed in all cases (as of right) or with leave from the court
    a. While the leave requirement effects whether a case is heard, it does not affect the standard to which it is heard.
2. Not all statutes that contemplate court review provide a right of appeal; some simply recognize that they are subject to judicial review.
    a. Since these merely recognize (and sometimes modify) judicial review processes without it being a statutory appeal, these decisions are not subject to the appellate standard of review.
3. Statutory appeal rights are often circumscribed to the types of questions which the party may appeal, or the types of decisions that may be appealed, or to the party that may bring an appeal
    a. These limitations themselves do not preclude applications for judicial review.

<u>Correctness when required by the Rule of Law</u>

Apart from statutes, correctness can be required by the rule of law to rebut the presumption of reasonableness, for particular questions.

1. Constitutional Questions
    a. Section 91/92 analyses, section 35 rights and other constitutional matters need a final and determinate answer from the courts. These questions must be answered by a standard of correctness
    b. Administrative bodies and legislatures are bound by the constitution and cannot legislate out of it, or alter the limits given to administrative bodies.
        i. A legislature can give powers to administrative bodies, but it cannot delegate power it never constitutionally had.
    c. Constitutional answers must be within defined and consistent limits. Nothing less than correctness will do.
2. General Questions of Central Important to the Legal System
    a. If a question was of central importance to the legal system and the adjudicator did not have the expertise to answer it, correctness is needed.
    b. The rule of law has the final word as to whether a question is of central importance, but a review of the decision makers expertise is not needed.
        i. Expertise is inherent to the new starting presumption
    c. Certain questions need routine and uniform answers due to their impact on the administration of justice as a whole. In such answers, correctness is needed to adequately respond to the fundamental questions of broad applicability and that carry significant legal consequences.
        i. For example, questions of client-solicitor privilege is necessary for the proper functioning of the justice system, so requires correctness
    d. This Court's jurisprudence will provide guidance on what constitutes a general question of central importance. Such established questions include:
        i. When an administrative proceeding will be barred by *res judicata* and abuse of process (*Toronto*)

ii. Scope of state's duty of religious neutrality (*Saguenay*)
iii. Appropriateness of limits on solicitor-client privilege (*UofC*)

e. Wider public concern is not enough to fall into this category
i. Ability to grant compensation, estoppel as arbitral remedy, statutory interpretation of timelines, limitation periods, confidential contracts bringing a complaint under a particular regulatory regime are all not

3. Questions on Jurisdictional Boundaries between Tribunals
a. Correctness is needed when two tribunals grapple with their jurisdiction concerning the other.
b. These are very rare, but courts are needed to assess if an administrative body correctly interpreted their authority as incompatible with another
c. The rule of law cannot tolerate conflicting orders where there is a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions.
i. Public needs to know where to turn for these disputes
d. Finality and certainty is needed, and requires correctness

Reasonableness does not give administrative decision makers free rein to interpret their authority. The legislation will always be a constraint on their authority. Precise or narrow statutory language will limit the number of *reasonable* interpretations.

- These 5 times are the only reasons to deviate from the presumption right now, but there may be more categories that also require the deviation. But any new category needs to be consistent with the reasoning of this judgement.
  - Deviations by rule of law would only work if failing to use correctness would undermine the rule of law or inhibit the proper functioning of the judicial system.

Application to the Facts

Registrar's decision came to the Federal Court by judicial review, and the *Citizenship Act* does not allow statutory appeal and the issue was not so serious to prompt the rule of law. Reasonableness is required.

Conclusion:

Standard of reasonableness is required.

Hold, Order:

Appeal dismissed; passport granted

Ratio:

The applicable standard of review is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review.

While a very long and wordy case, *Vavilov* in essence gave us two very important rules.

- First, the presumption of reasonableness
  - Every case is presumed to be reasonableness unless one of the exceptions:
    - Statutory Exceptions
      1. Statute lays out it's own standard of review
      2. Statutory Appeal will apply appellate standards of review
    - Rule of Law Exceptions
      3. Constitutional questions will be correctness
      4. Questions central to the functioning of law will be correctness
      5. Jurisdictional conflict between two administrative bodies
    - The door is always open to more exceptions, but they should be extremely rare
      6. Where another is needed
- Second, guidance on how to conduct a reasonableness analysis.

The entire point of administrative tribunals are for the legislature to create an expert body that they delegate power to. Implicit in this creation is the confidence in the tribunals from the legislative branch. As such, it is presumed that the legislature intended deference should be given to their decisions, This is why reasonableness should be presumed in all cases, unless one of the exceptions apply. All of the exceptions indicate either an intention (statutory exceptions) or an inability (rule of law exceptions) of the legislature to the administrative bodies.

- Intention because they explicitly created standard of review provisions or a statutory appeal
- Inability because the legislature doesn't have the power to answer constitutional questions or those central to the administration of law – those are the courts jobs, so correctness needed

Exceptions to *Vavilov* Presumption: Legislative Intent

Specific Standard of Review in Statutory Provisions

Express mention in a statute for a different standard of review is the simplest way to rebut the reasonableness presumption. This SCC basically said to the Legislatures, if you want a different standard to apply, write it in the law. If not, we assume you intended it to be reasonableness.

- When the legislature puts their own standard of review in, the courts will respect what standard they chose.
- This would be the only place that you ever see "patent unreasonableness" since it was eliminated in *Dunsmuir*.
    - This standard was not loved since it basically says that a decision can be wrong, so long as it isn't really bad. It means a decision that is "openly, clearly, evidently unreasonable"
    - "patent unreasonableness" in statute means that the legislature intended to give the utmost deference to the tribunal

Administrative Tribunals Act, SBC 2004, c 45
Section 58 (2) In a judicial review proceeding relating to expert tribunals under subsection (1) (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable, (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

Provincial Administrative Penalties Act, RSA 2020, c P-30.8
Section 58 (3) On an application for judicial review under subsection (2), the standard of review is reasonableness.

However, it is also possible for the legislature to implicitly set out a standard of review as part of the institutional design elements of the statute. But this is rare.

- This means that whenever a statute is silent on any standard of review, we presume it is reasonableness, unless another one of the *Vavilov* exceptions apply.

Statutory Appeal Standards of Review

This was one of the more surprising conclusions of *Vavilov*. Basically it showed that if the world "appeal" is in a provision, it means a statutory appeal and it is about how the tribunal decisions are reviewed (not other internal remedies). "appeal" is now the magic word. Statutory standards of review are:

- Questions of law = correctness
    - Asking what the correct legal test is
    - "What is the standard of care?"
- Questions of fact = palpable and overriding error
    - Asking what actually took place in the case
    - "What were the defendants actions before the plaintiff's injury"
- Questions of mixed fact and law = palpable and overring error
    - Asking if the facts satisfy the proper legal tests
    - "Did the defendant satisfy their standard of care to the plaintiff through their conduct"

It is a legal principle that the person in the best position to determine what happened is the judge who heard the evidence and testimony. This means that the trial judge/administrative decision maker will be best to deduce from the parties what actually happened.

- As such, the courts will give the most deference to questions of fact and mixed fact/law
    - Hence the palpable and overriding error

An error is palpable if it is plainly seen and the evidence doesn't need to be reconsidered that it is an error, and it is overriding if it has affected the result

- Both of these must be established to overturn a trial judges finding on fact or mixed fact/law in a statutory appeal
- The error is so wrong it basically has to leap off the page at you
    - Things like findings without an evidentiary basis

Correctness is a standard that whatever reviewing judge thinks the answer is, if the decision makers came to any other conclusion, it will not stand.

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

Facts:

The Superbowl had always been broadcast in Canada with the "simultaneous substitution" regime which was laid out in the *Broadcasting Act*.

- Simultaneous substitution are when Canadian TV stations hold exclusive broadcasting rights to an American program, and require TV providers in Canada to replace the American station with a Canadian one. This will cause viewers to see CBC's broadcast with the same content as the US broadcast, but the commercials would be different.
    - This is permitted to allow Canadian broadcasters to get greater advertising income

The Canadian Radio-television and Telecommunications Commission ("CRTC") released a new Order to prohibit simultaneous substitution for the Super Bowl. The Canadian Radio-television and Telecommunications Commission ("CRTC") decided the Superbowl should be exempt from the regime under the "Final Decision" (allowing them to see the commercials since the CRTC defined these as "an integral element of the event").

- Under this regime, Canadians would not see high-profile Superbowl commercials that were aired in the US.
- The CRTC implemented this by "Final Order" under s9(1)(h) of the *Act* (which allows the CRTC to require that TV providers carry the terms the CRTC finds appropriate.

Bell and the NFL brought statutory appeal of the Order.

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Procedural History:

The Federal Court of Appeal found that the CRTC had the authority to issue the order under a reasonableness standard and dismissed Bell and NFL's appeals

Issue:
What standard should this Court apply in reviewing the CRTC's decision regarding the scope of its authority under s9(1)(h) to issue the Final Order?

Rule:
Section 31 of the *Broadcasting Act*

(1) An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.

Analysis:
Because Bell Canada challenged the Final Decision and Final Order through statutory appeal in s31(2), the appellate standards of review apply.

- Bell does not contend that the CRTC can't oversee policy objectives from the Act.
- Rather, the primary ground of appeal was that the CRTC lacked the authority to issue the specific order.
  - This goes directly to the limits on CRTC's statutory grant of power
  - This would fall squarely in the statutory appeal mechanism under s31(2).
  - This means the standard must be correctness.

Was the CRTC correct in determining that it had the authority, under s9(1)(h) to issue the Final Order? To do so, the analysis of the nature and effect of the Final Order is needed

1. Nature and Effect of the Final Order
   a. The Final Order permits providers to distribute the 'programming service' of a Canadian station, contingent that they do not request for simultaneous substitution.
   b. The result is that the condition (prohibiting simultaneous substitution) will only apply to service providers that currently distribute the programming services of a Canadian television station airing the Super Bowl.
      i. It does not mandate the distribution of any station
2. Scope of the CRTCs power under s9(1)(h).
   a. S9(1)(h) interpreted consistent with the text, context and purpose is limited to issuing orders that require television providers to carry specific channels with terms and conditions to mandatory carriage orders
   b. The grammar of the provision ("on such terms and conditions as the Commission deems appropriate,") indicates that the primary power of CRTC is to mandate TV providers to carry specific services as part of their offerings.
      i. Both English and French indicate the limits of the orders are on specific terms and conditions.
   c. 9(1)(h) was enacted to ensure carriage of Canadian services when market forces may not induce providers do so across Canada.
      i. The legislative history certainly indicates that the provision only confers the authority to issue mandatory carriage orders on specific terms and conditions – not to be applied broadly to regulate and impose any conditions necessary
3. Application to Facts
   a. The Final Order did not mandate the carriage of a particular service, but sought to add a condition to providers
   b. This is beyond the scope of delegated power under s9(1)(h)

Since the Final Order does not mandate the TV providers to distribute a channel that broadcasts the Super Bowl, but imposes a condition on those that do, it is beyond s9(1)(h).

Conclusion:

Standard of correctness as per appellate review; Order was incorrect.

Hold, Order:

Appeal allowed; Final Order quashed.

Ratio:

Appellate standards of review from word "Appeal"; questions of law are correctness.

This is a very straightforward analysis of the *Vavilov* exception of presumption of reasonableness. This was a statutory appeal, which required a standard of correctness for questions of law.

- Because the Final Order was not permitted in the Act, it was incorrect and quashed.
- If it wasn't an appellate standard of review, it is very likely this case could have been decided another way since it may have been considered reasonable under the Vavilov presumption

Dhalla v College of Physicians and Surgeons of Manitoba, 2022 MBCA 7

Facts:

Dhalla (appellant) was a physician at the Brandon Regional Health Centre. A patient was admitted and the appellant was responsible for him for over a week.

- He diagnosed the patient with gastric volvulus. He treated it but did not completely reduce the volvulus. He then planned to perform a surgical reduction of the volvulus, but due to complications, was unable. The appellant then treated the conditions.

The patient subsequently deteriorated and was put in the ICU

- The appellant performed surgery. Given the instability of the patient, the appellant did not close the wound and used a VAC to manage the incision, which later caused an infection and eventually SIRS and septic shock, requiring ongoing blood transfusions
- Dr. Mohamed did another procedure where he found the abdomen bleeding with the expectation that the appellant would conduct a follow up surgery.
    - The patient continued multi-organ failure and died a week later.

A hearing made of the panel of the Inquiry Committee of the College (respondent) found the appellant committed acts of professional misconduct by failing to ensure continuity of care for a patient by not providing assistance when he remained responsible for the patient. He also failed to document the care management in the medical record.

- According to s56.9(1) of the *Medical Act*, the panel removed his license for 2 months and another hearing determined he had to pay $85,000.00
- The appellant appealed the penalty decision as allowed by s59.10 of the Act.

Issue:

What is the appropriate standard of review according to s59.10 of the *Medical Act*?

Rule:

Section 59.10 of the *Medical Act*

(1) A member in respect of whom a finding or order is made by a panel under section 59.5, 59.6 or 59.7 may appeal the finding or order to The Court of Appeal

Analysis:

Section 59.10 makes clear that this is a statutory appeal, sufficient to combat the presumption of reasonableness as the standard of review. There are nonetheless some discretionary decisions to make, involving questions of law, fact, and fact/law.

- Appellate review of a discretionary decision requires deference to the decision maker, absent any error or palpable and overriding error of fact (*CIBC v Ahmed*); called the deferential standard.

- Decisions of penalty have been considered discretionary, involving questions of fact, law and fact/law. The decision requires a balancing exercise by the College to chose among various remedies. The civil deferential standard can thus apply in the post-*Vavilov* framework.

Palpable and overring standard would traditionally attract the deferential standard. *Vavilov* only applies to administrative standards of review, it was not an examination of the law governing civil standards of review.

- In Manitoba, the deferential standard is still used in the civil law context, even by an administrative tribunal of statutory appeal for findings of professional misconduct. It should continue to be used absent any direction of the SCC
  - The civil deferential standard of review to the discretionary decision of penalties is to be used.
  - Absent a misdirection in law or on the facts, the appellate court will not intervene unless the decision is so wrong it would amount to injustice.

Conclusion:
Deferential standard to be used

Hold, Order:
Appeal dismissed

Ratio:
Decisions of penalty can be considered discretionary to bring the deferential standard of review.

Penalties are a tricky element since they are dependent on fact, law and a mix. While this is obviously a case of statutory appeal and thus the appellate standard of review, penalty decisions are not "yes" or "no", there are infinite options. The right sanction can come from a range of possible ones. As such, it should be discretionary.

- Vavilov didn't shut appellate standard of review to just patent and overriding error and correctness, there were other appellate standards that existed before Vavilov.
  - The "Civil Deferential Standard" existed for sanction reviews in Manitoba before Vavilov, so it should also exist after.
  - Under this standard, if there is no misdirection with the application of the law or facts, the law will not intervene unless the sanction amounts to an "injustice"

Recall that Vavilov only enumerated the 5 exceptions to the Presumption of Reasonableness. However, they left the door open that more exceptions could be added. However, this should be done very sparingly and only for truly good reason where correctness is required. The SCC made it seem like, even if the list was not closed, no new category would be added for decades. Well, lo and behold…

Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association, 2022 SCC 30

Facts:
Canada signed a copyright deal in the 1990s to deal with copyright of emerging technology. The *Copyright Act* was amended in 2012 to include s2.4(1.). A Copyright Board was created to determine whether s 2.4(1.) made two periods of time that an author could be compensated for their work

- Was it when the material was made available on the internet, or when the intention to copyright arose? The Board concluded it was both (two royalties)
- Entertainment Software Association ("ESA") challenged this decision, but the Society of Composers, Authors and Music Publishers of Canada ("SCAMP") defended it

Procedural History:
The Federal Court of Appeal overturned the Board's decision

Issue:
What is the standard of review for the case of two bodies interpreting a section?

Rule:
Section 2.4 of the *Copyright Act*

(1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

Analysis:
The Copyright Board had to interpret s 2.4 to interpret which powers it was conferred under the Act. But, the same section would have to be interpreted by the courts to assess the section for copyright action from an infringement of the Act. Where does it go first? This is a case where two bodies have concurrent jurisdiction of first instance.

- Is this reasonableness along with the presumption? Or an exception?
- This is a new exception to the *Vavilov* framework. Correctness would be needed where there is concurrent first instance jurisdiction between the court and an administrative body.
  - This is akin to the legislative intent exceptions: legislature implied it through their intentions. Institutional design of the Board show that both the Court and the Board have first instance jurisdiction.
- This "Concurrence of First Jurisdiction" is the 6th exception to the Vavilov presumption of reasonableness and is on a standard of correctness.

Conclusion:
Standard of correctness – new Vavilov exception.

Hold, Order:
Appeal dismissed

Ratio:
"Concurrence of First Jurisdiction" if the 6th exception to *Vavilov* and is a correctness standard.

Only 3 years after *Vavilov*, the SCC added another exception to the presumption. This one, is for a situation where both an administrative body and the courts have the jurisdiction of first instance – a case could go to either the court or the tribunal first.

- How to know what to do? Well the SCC found that this had to be an exception to the presumption since it showed a legislative intent to have two bodies be able to hear it first within the provisions of the Act in question.

NEW (2022!) Exceptions to *Vavilov* presumption of Reasonableness:

1. All cases will be decided on reasonableness, unless the presumption can be rebutted
2. Presumption rebutted in these cases only:
   a. Legislative Intent
      i. Statutory Standard of Review
         1. Whatever standard is in the legislation
      ii. Appellate Standard of Review
         1. Appellate standards
            a. Law is correctness
            b. Fact and Mixed is palpable and overriding error
      iii. Concurrence of First Jurisdiction
         1. Correctness
   b. Rule of Law
      i. Constitutional Questions

1. Correctness

ii. Issues of Central Importance

1. Correctness

iii. Competing Administrative Jurisdictional Boundaries

1. Correctness

c. Others (likely to be rare (maybe))?

Exceptions to *Vavilov* Presumption: Rule of Law

These exceptions to the Presumption of Reasonableness relate to when the rule of law needs a "singular, determinate and final answer to the question before it". In such cases, the presumption is rebutted and the standard of correctness shall apply

- Cases like these have to be substantial, heavy hitting issues. They can't just touch a wide range of people to be considered one of the exceptions under the Rule of Law

Constitutional Questions

The Correctness standard must be applied when the administrative decision is related to the Federal – Provincial division of powers, *Charter* violations, and s35 Aboriginal or Treaty Rights questions.

- *Charter* breaches for administrative decisions remain under the *Dore-Loyola* analysis
  - This would be if the decision maker reasonably and proportionately balanced the relevant Charter protection with the statutory objectives.
  - This was premised on a connection with the home statute and the administrative decision makers expertise in the are.
- But the court in *Vavilov* said they weren't touching *Dore* – yet

General Questions of Law of Central Importance to the Legal System

Questions of central importance to the proper functioning of the legal system need uniform and consistent answers, and since they are of fundamental importance and broad applicability, they need a correctness standard. Since they have legal consequences for the justice system and governments, they are very important. But, they are used very sparingly. There are only 4 cases from the SCC jurisprudence that falls under this category (pre-Vavilov too)

1. *Toronto v CUPE Local 70*
   a. Re-litigation issues decided in a previous judicial proceedings where the accused was criminally convicted and then fired 'without cause'. Does *res judicata* preclude the second claim?
      i. This impacts all administrative decisions
2. *Mouvement laique Quebecois v Saguenay*
   a. Where concurrent and non-exclusive jurisdiction are involved for a given point of law. The MLQ argued against prayers before town council meetings as being contrary to religious freedom. It has broad importance on the states duty and the legal system
3. *Alberta (Office of Privacy Commissioner) v University of Calgary*
   a. Administrative interpretation of *FOIP* required producing documents that violated solicitor-client privilege. Solicitor client privilege is the backbone of law so central importance
4. *Chagnon v Syndicat de la fonction publique et parapublique du Quebec*
   a. Parliamentary privilege disputes with labour laws when the Quebec Legislature fired civil service employees who then grieved and arbitrator had to weigh the statute with parliamentary privilege.

Just because a dispute is of wider public concern does not mean it is enough to fall in this category.

Questions about Jurisdictional Boundaries between Administrative Bodies

The rule of law can't tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies.

- If one administrative body interprets its authority in a way that is incompatible with the jurisdiction of another decision maker, correctness needs to be applied by the reviewing court to ensure the dividing line is "predictable, final and certain"

Northern Regional Health Authority v Horrocks, 2021 SCC 42

Facts:

Ms. Horrocks (respondent) claims that the Northern Regional Health Authority ("NRHA"; appellant) failed to accommodate her disability sufficiently.

- She was suspended for attended work drunk in 2011. She disclosed her alcohol addiction and refused a "last chance agreement" (which required her abstaining from alcohol and seeking therapy). The NRHA then terminated her employment.

Her union filed a grievance, which resulted in her getting her job back on the same terms, but she violated them and she was again terminated from those breaches.

- She filed a complaint with the Manitoba Human Rights Commission, contested by the NRHA on not having the grounds to hear the case, since the *Labour Relations Act* and the collective agreement mandated labour arbitration.

Issue:

Does exclusive jurisdiction of Manitoba labour arbitrators extend to adjudicating claims of discrimination that may support a human rights complaint if in the scope of the collective agreement?

Rule:

Section 78 of the *Labour Relations Act*

(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties thereto, or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning, application, or alleged violation.

Analysis:

This case asks if labour arbitration is the primary, or the exclusive forum for enforcing human rights issues from a collective agreement.

- The argument by Horrocks that the arbitrator's jurisdiction is exclusive only to the courts, and not a competing administrative tribunal, it must be concurrent

Given the dispute between the two administrative bodies, to determine who had jurisdiction is reviewable on a correctness standard, based on the exceptions to *Vavilov*. Applying reasonableness to this undermines the objective of ensuring that one adjudicative body does not trespass the jurisdiction of the other. It is crucial to point out that correctness only be applied when the authority of one infringes on the authority of the other. If there is no real conflict, then correctness should not be applied. To determine who has the proper jurisdiction:

- Step 1: Assess the competing scheme to assess whether it grants the arbitrator exclusive jurisdiction to displace the human rights statutory scheme
  - The mandatory dispute resolution clause in a labour relations statute is an explicit indication of the legislative intent to oust the human rights legislation
  - Section 78 of the *Labour Relations Act* gave exclusive jurisdiction to the arbitrator, and the *Human Rights Act* did not displace it. If the dispute is factually related to the collective agreement, it is contained in the arbitrator.
- Step 2: Assess if the dispute falls in the scope of that jurisdiction
  - Scope of arbitrators authority will depend on the language of the statute
  - The nature of the issue comes from the collective agreement

        - If two tribunals have concurrent jurisdiction over a dispute, the decision maker must exercise judgement on whether to decide in that particular case

Correctness is needed for all steps in the analysis, including the application for the facts to the law. This entire analysis turns on the legislation.

- The other statutory scheme must be determined to see if it had an intention to displace the arbitrator's exclusive jurisdiction. Courts must respect the intention, even when it states that a tribunal with competing jurisdiction has jurisdiction over disputes that would otherwise fall solely to the labour arbitrator
- To do so, requires positive expression by the legislation. Ideally the legislature will state when they intend to have concurrent jurisdiction in the enabling statute
    - However, even absent that language the statutory scheme may disclose that intention
- The mandatory dispute resolution clause in a labour relations statute is an explicit indication of the legislative intent to oust the human rights legislation

Conclusion:
Exclusive jurisdiction to arbitrator

Hold, Order:
Appeal allowed

Ratio:
The whole of a jurisdictional analysis needs to be on a correctness standard; factual and legal questions should not be separated for the standards reviewed on.

Perhaps more important that the two-step analysis used here is to look at the dividing line between the two administrative schemes. Did the statutes intend to have concurrent jurisdiction, either express or implied? If there is not, does the issue in question fall to the jurisdiction of the one that has exclusive jurisdiction?

- This is all an analysis on what the legislature intended in their wording. Even absent explicit wording to indicate concurrent jurisdiction, it could be implied in the statutory scheme.
- In this case, the issue arose solely from the collective agreement, which meant it fell to the arbitrator and no concurrent jurisdiction existed.

OK Industries v District of Highlands, 2022 BCCA 12

Facts:
OK Industries bought 65 acres of land in Highlands for a rock quarry. After the purchase, the District refused to zone it for industrial purposes. OK applied to the Minister to operate a rock quarry while the District opposed this. OK then received the permit

- The District told OK that it had to comply with their bylaws even with the permit, meaning that OK needed rezoning, a development permit and an amendment to bylaws to allow its activities.
- OK started work on the land before doing this, so the District offered him a stop work order

OK sought judicial review of the Order, since they were authorized with the permit.

Procedural History:
British Columbia Supreme Court found the province had exclusive jurisdiction on the matter

Issue:
Does the Province have exclusive jurisdiction to regulate to render District bylaws inapplicable?

Rule:
Section 10 of the *Community Charter*

(1) A provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment.
(2) For the purposes of subsection (1), unless otherwise provided, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment.

Analysis:
The legislative provisions authorizing the approval for the quarry is clearly overlapping with the district bylaws preventing the activities. Does the Supreme Court's decision to favour the Provincial laws require a standard of correctness under the *Vavilov* exceptions.

- It appears in this case that it is not two administrative bodies having a jurisdictional dispute, it is one administrative body and one legislative body
- The two provisions are overlapping, and they dual compliance is also not possible.
- While this is certainly a question with significant legal consequences on the matter, it does not comfortably fit into one of the *Vavilov* exceptions

It was open for courts to add other circumstances that should be added to the exceptions to prompt correctness. It could certainly be argued that it relates to a question of rule law that requires consistency and a determinative answer.

- However, it is not yet sufficient to justify adding it to the exceptions.

In this case, the bylaw does not apply to the quarry where the permit had been issued under the legislation. This means the conflict, on the facts, does not exist and the quarry can go

Conclusion:
Not exclusive jurisdiction

Hold, Order:
Appeal allowed

Ratio:
The jurisdictional exception to *Vavilov* is only between administrative bodies, not an administrative body and a legislative body.

This case came dangerously close to another exception to *Vavilov*, but the court refused to do so since they would have come to the same conclusion in correctness or reasonableness.

- So, it can still be said that (for the time being), a jurisdictional dispute between an administrative body and a legislative body will not create a correctness standard of review, but fit comfortably within the presumption of reasonableness

Moffat v Edmonton (City) Police Service, 2021 ABCA 183

Facts:
Moffat was an officer with the Edmonton Police Service ("EPS"). She was eventually discharged for insubordination and misconduct. In the investigation, she provided untruthful answers to questions and led to additional charges of deceit.

- The Presiding Officer conducted a hearing under the *Police Act* and uncovered many of the allegations were proven and imposed dismissal

Moffat appealed the deceit convictions and the sanction to the Law Enforcement Review Board ("LERB").

Procedural History:
The LERB used reasonableness to dismiss the application

Issue:
What is the standard of review of the Courts judicial review of the LERB decision, and the LERB internal administrative review of the Officer's decisions?

Rule:

Section 48 of the *Police Act*

(1) Where a chief of police or another police officer in respect of whom a complaint is made feels aggrieved by the findings or any action taken against the chief [of police] or police officer under section 47(4), the chief [of police] or police officer may, within 30 days from the day the chief [of police] or police officer was advised under section 47(5) of the findings and any action taken, appeal the matter to the Board by filing … a written notice of appeal setting out the grounds on which the appeal is based.

Analysis:

The wording of "appeal" within s48 of the *Police Act* would certainly indicate that this is an exception to the *Vavilov* presumption of reasonableness. However, since this was the review of the LERB, this was an internal review, not a judicial review.

- *Vavilov* only deal with the law on judicial review, not internal standard of review.
- This means that the "appeal" does *not* rebut the *Vavilov* presumptions in this case.
  - Instead, the standard of review must be found using context and the statute to determine what standard will be applied.
  - There are significantly different ideals and principles at play between internal and judicial review of administrative actions, and the standards cannot simply be translated
- Standard of review analyses related to judicial review grapple with tension between legislative choice to delegate power and constitutional requirements for courts to answer questions in a supervisory capacity. This is not one of those cases
- Given the case at hand, reasonableness was appropriate.

Conclusion:

Reasonableness

Hold, Order:

Appeal dismissed

Ratio:

Appellate standards of review only apply to judicial review, not internal administrative review

This means that even if the word "appeal" is in the legislation, it is not automatically the appellate standard of review. It must be a judicial review (or a statutory appeal to a court), not an internal review

- The standard of review will depend on the legislation and context. So, the *Moffat* standard of review will not be used in all cases like this, it is context dependent on the legislative framework and the context of the case
  - Appeal tribunal should focus on if the decision was based on errors of law/principle or is not reasonably sustainable but remain flexible
- So, the decision maker in an internal administrative review can't just say "appellate review" and move on, they need to consider various factors

There are various factors considered in *Yee v CPA Alberta* to help the contextual analysis:

1. Findings of fact based on credibility of witnesses should be given deference
2. Inferences by disciplinary tribunals should be respected unless articulable reason to oppose
3. With questions of law by a discipline tribunal, the appeal tribunal is positioned to understand this and promote uniformity in interpretation to ensure proper professional standards apply
4. Matters about the expertise of the profession, like standards of conduct, the appeal tribunal is well positioned to apply its expertise on misconduct where they perceive unreasonableness, error of principle, potential justice or another sound reason to intervene
5. Appeal tribunal is well positions to review the entire decision of reasonableness
6. Appeal tribunal can intervene in cases of procedural unfairness of RAB

Reasonableness Review

Reasonableness is central as it develops and strengthens the justification of administrative decision making and gives guidance to setting out constraints in evaluating if a decision is reasonable.

- This was one of the other important findings of *Vavilov*, other than the presumption and exceptions. It gave a good review of how a reasonableness analysis should be done.

Correctness review is when the court gives no deference to the tribunal, so the Court is entitled to replace its own analysis. If the court disagrees with the outcome, it will give it's opinion for both factual and legal determinations.

- It is not the same as a *de novo* hearing since that means redoing everything (recalling evidence and the process restarts anew). In a judicial review under correctness, the court is still limited to reviewing the records (unless the case falls to a category where more evidence is needed)
- Remember that the starting point is *always* reasonableness, but they can be rebutted with the exceptions
    - Reasonableness for *all* issues, legal and factual

As *Vavilov*, a reasonable decision is one that is based on "an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker."

- The centrality of reasons to "develop and strengthen a culture of justification in administrative decision-making"
- There are legal and factual constraints that limit what conclusions are reasonable
- The starting point of the courts review is that they should exhibit judicial restraint and respect for the role of administrative decision makers.
    - The onus is on the applicants that the decision is not reasonable
    - Reviewing judges should not ask themselves how they would have resolved the issue.
    - Reasonableness review considers "all relevant circumstances"

Unreasonable decisions should be put aside. To be unreasonable, a decision should have flaws or shortcomings that are so serious and sufficiently clear or significant to the decisions merits (rather than peripheral or superficial) that it does not meat the needed degree of justification, intelligibility, transparency.

Reasons explain the "how and why" a decision was made and is the primary mechanism to show that a decision was reasonable - it demonstrates to parties that their arguments were considered (or even more importantly if they were rejected)

- Reasons that are articulated are a shield against arbitrariness and a public justification in light of constitutional, statutory and common law contexts.
- Drafting reasons also ensures the analysis is carefully laid out
    - Practically speaking, it also facilitates the judicial review process if there are clear and articulate reasons. Without an internally coherent reasoning, it is likely unreasonable
- Both the decision-making process and the outcome have to be considered
    - Court should consider only whether the decision maker's decision was unreasonable while considering the rationale for the decision and the outcome to which it led
    - A decision that is reasonable will not stand if the rationale to get there was not
        - This is why *Vavilov* is so much more robust – the whole process needs to be reasonable, not just the outcome
        - This is a lot more helpful for counsel to attack the decision
- The whole context is considered from all relevant circumstances.
- The biggest thing with reasons – the decision needs to be *justified*, not just *justifiable.*

Reasonableness is a single standard, meaning it applies to all administrative tribunals (judicial, administrative or adjudicative). It is a single standard but accounts for context.

- Range of administrative decision makers and decisions is large
- One standard of review unmodulated by elements of context, but context will constrain what a reasonable decision should be in a particular case
    - Contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt
        - Ie, context limits what is reasonable for a particular case
    - Each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context

Courts are able to look at the record, since some of the reasons will be there. A decision maker can demonstrate expertise through the record, which is how it differs from a de novo analysis.

- But reasons are not assessed against a standard of perfection and review cannot be divorced from institutional context or the history of the proceedings
- Concepts and language may be fact specific and impact the form and content of the record
- Courts can consider (a) evidence before the decision maker, (b) submissions, (c) publicly available policies and procedures and (d) past decisions

In a review, courts should not:

- Ask what decision they would have made in the place of the administrative decision maker
- Attempt to ascertain the range of possible conclusions that would have been open to the decision maker (since that is them establishing their yardstick and seeing if it falls in it)
- Conduct a de novo analysis
- Seek to determine the "correct" solution to the problem

There are tools to be alive to when looking at administrative decisions of tribunals and what a court is likely to do in a reasonableness review.

- Does the decision as a whole, bare the hallmarks of reasonableness?
- The burden is on the party seeking to challenge the decision.
    - It is not a line-by-line analysis, there will always be a flaw somewhere, especially for a long decision
        - Similar to the logic of palpable and overriding error

Vavilov considered two large flaws that lead to unreasonableness:

1. Flaws to the Internal Rationality – Absence of Reasons or Logic
    a. Reasoning must be rational and logical but not a "line by line treasure hunt for error"
    b. Must show that a line of analysis within the given reasons that could presumably lead the tribunal from the evidence before it to the conclusion at which it arrived
    c. Unreasonable if it "fails to reveal a rational chain of analysis" or based on an "irrational chain of analysis"
        i. Or, if the conclusion cannot follow from the analysis undertaken
        ii. Or, if the reasons read in conjunction with the record do not make it possible to understand the reasoning on a critical point
    d. Unreasonable if the reasons exhibit a "clear logical fallacy" like circular reasoning, false dilemmas, unfounded generalizations or absurd premises.
    e. Reasoning must "add up"

2. Flaws in Justifying a Decision in light of the relevant factual and legal constraints

a. The court in *Vavilov* describes this category as being unreasonable if the decision is "untenable in light of the relevant factual and legal constraints"
b. It is to be justified in relation to the "constellation of relevant law and facts; legal and factual context are "constraints" on the exercise of delegated powers. All of these should be brought up in a fact pattern, and identify which ones are applicable.
    i. Governing statutory scheme
        (i) Most important given it imposes all initial constraints
        (ii) Decisions, discretion, must comply with limits of the legislation (rule of law; *Roncarelli*)
        (iii) Must comply with statute, including definitions, scope and purpose
        (iv) Not reasonable to take powers not granted to the decision maker
        (v) Scope of powers delegated are tricky; some questions may have only one reasonable answer

    ii. Other relevant statutory or common law provisions
        (i) Must be consistent with common law on exercise of statutory powers
        (ii) Must be consistent with generally recognized interpretations of common principles
        (iii) Precedents will act as constraints so a departure from precedents need a strong justification to be reasonable
        (iv) Common law principles must be adapted to administrative context
            a. May be unreasonable if not
        (v) International law may act as a constraint

    iii. Principles of statutory interpretation
        (i) Court cannot "second guess" the interpretation, not a de novo analysis
        (ii) Must be resolved by an analysis that has regard to the text, context and purpose of the legislation
        (iii) Decision must show that the decision maker was "alive to essential elements" of interpretation – in line with Driedger's principle
            a. Though, sometimes, there is simply only one reasonable answer so a deviation would be both unreasonable and incorrect
            b. The way the decision maker gets to the answer is entitled some deference, but you kind of have to arrive at the right place
        (iv) May not have to be a full analysis in each case

    iv. Evidence and "judicial" notice
        (i) Factual not legal - avoid re-weighing of evidence, but decision must be justified in light of the facts
        (ii) Unreasonable if "fundamentally misapprehended/ failed to account for the evidence" since that would outside possible factual constraints
        (iii) If decision is not made on the evidence actually before the decision maker

    v. Submissions of the parties
        (i) Must meaningfully account for the central issues and concerns raised by the parties. Key is "responsive reasoning"
        (ii) May be unreasonable if the decisions show a failure to meaningfully grapple with key issues or central arguments raised by other parties
        (iii) Concessions by a party may explain the absence of reasoning

a. The way the parties frame the issues is also a constraint the parties make on how the decision maker can decide

vi. Past practice and precedent
   (i) General expectation of consistency with decision making (rule of law) such that past decisions are a constraint
   (ii) Access to previous decisions, standard, policy, training, checklists and templates, plenary meetings may be beneficial provided the decision making is not fettered
   (iii) Departures from practice or precedent must be justified in the reasons
   (iv) Persistent internal disagreement may result in difficulty in justification of decisions that "preserve the discord"
      a. Internal consultations – tribunals may engage in the process

vii. Impact on the individuals affected
   (i) Not only for procedural fairness (*Baker*), but also has implications for how a court conducts reasonableness review
   (ii) Where the decision of an individuals rights and interests is severe, the reasons provided must reflect those stakes
   (iii) A failure by a decision maker to "grapple" with severe impacts of the decision may make it unreasonable
   (iv) Reasons must demonstrate that they have considered the consequences of a decision but they are justified in light of the facts/law

What happens when no reasons are provided?

- Where no reasons are required, this entire section is moot, since a reasonableness review is all for the reasons
  - Focus is still on a reasoning process; must look at the record as a whole which could provide the rationale
  - Record may show rationale, or lack of rationale (improper motive or impermissible reasoning)
  - Where no assistance in the record, court must examine "constraints" and determine whether the outcome was reasonable
    - Basically have to do the analysis yourself
  - Same standard, just a different "shape"
- Where required and provided, they need to provide a transparent and intelligible justification to be reasonable. If not intelligible, they breach the first factor
- Where requires and not provided, decision will be set aside as a breach of procedural fairness

Needless to say, this is a lot that the Court can work with when reviewing an administrative tribunals decision. This gives them a lot of opportunity to interfere on administrative decisions. At a certain point, how far is it really from correctness?

CHAPTER 5: CONSTITUTIONAL ISSUES, REMEDIES, STANDING

Jurisdiction to Decide Constitutional Questions

It is consistent with all administrative principles that all decisions should consider the Constitution and interpret in a way consistent with the Constitution; is it also a presumption that legislatures are presumed not to authorize unconstitutional conduct.

- This means tribunals have to engage in Charter questions as part of their general responsibilities for interpreting it's enabling statute
- If the party argues that the legislation or provision is invalid by division of powers or violates an Aboriginal or Charter right, can the administrative tribunal appropriately decide a challenge on the validity of its enabling statute?

Administrative powers when it comes to constitutional questions usually fall to one of three questions:

(1) Do administrative agencies have the jurisdiction to decide *Charter* or other constitutional challenges to the validity of their enabling statute?
(2) Where an agency has constitutional jurisdiction, can they grant constitutional remedies?
(3) What standard of review applies when an agency answers a constitutional question or grants a constitutional remedy?

The constitutional provisions in these cases will be s 24 (the ability to grant remedies the court sees appropriate) and s 52 (any law that is in violation of the Constitution is void and of no effect)

- Who can apply ss 24 and 52, and in what capacity?

Constitution Act, 1982

Section 24

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

Section 52

(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The first case to address this was the *Cooper* case in 1986. In that case, the Human Rights Committee had to find the constitutionality of its own enabling statute

- It was a s15 action, but s15(c) of the Human Rights Act (HRA) found mandatory retirement is allowed if consistent with industry standards. Did the commission have the ability to read if s15(c) was inconsistent with the Charter?
    - Majority: No
        - If they can consider questions of law, it should address constitutional issues, but the Commission did not have the statutory power to deal with constitutional issues
        - The Tribunal lacked expertise when it came to constitutional validity. It would inevitably be judicially reviewed, so the tribunals decision is illusory since it will end up in court anyway
        - Practical considerations: why do they not have constitutional decision making powers if they can answer questions of law

Nova Scotia (Workers' Compensation Board) v Martin, 2003 SCC 54

Facts:
Martin suffered from chronic pain from a work-related injury. He brought a claim with the WCB but was rejected, so he appealed it to the Workers' Compensation Appeal Tribunal.

- His claim was the exclusion of chronic pain sufferers from WCB benefits was a s 15 violation
- WCB argued that the WCAT did not have the jurisdiction to answer constitutional questions

Procedural History:
Nova Scotia Court of Appeal found that WCAT didn't have jurisdiction for constitutional questions

Issue:
Do administrative tribunals have the jurisdiction to consider constitutional questions?

Rule:
Section 10B of the *Workers Compensation Act*
Notwithstanding this Act, Chapter 508 of the Revised Statutes, 1989, or any of its predecessors, the *Interpretation Act* or any other enactment,
(a) except for the purpose of Section 28, a personal injury by accident that occurred on or after March 23, 1990, and before February 1, 1996, is deemed never to have included chronic pain

Analysis:
Unconstitutionality does not arise from an administrative, or even a judicial, declaration that it is unconstitutional – it is such as soon as it is passed. If an administrative tribunal makes its finding of constitutionality, it will be reviewed for correctness in the court anyway.
- It makes no sense to have an administrative tribunal be able to answer questions of law but not constitutional questions. Bifurcating the trial to have tribunals answer a question of law and the court answer constitutional questions is inefficient
- There is a public benefit to allow tribunals to make this determination. If not, the tribunal would be asked to apply legislation that may be invalid under the *Charter*

Instead of assuming the tribunal cannot do answer these questions, look at the tribunal's jurisdiction under their statute. If they can answer questions of law, they are presumed competent to answer constitutional questions as well.
- This authority can be given impliedly or explicitly
  - Impliedly will come from looking at the statute as whole, the tribunal's mandate, asking if answering a question of law is necessary and if the tribunal is adjudicative in nature

The *WCA* allows questions of law to be appealed to the Courts, which implies that the tribunal is able to answer questions of law in the first place.
- They had the implied authority to answer questions of law and thus have the authority to answer constitutional questions

Conclusion:
WCAT has the power to answer constitutional questions

Hold, Order:
Appeal allowed

Ratio:
If a tribunal has the jurisdiction to answer questions of law, express or implied, it is presumed they have the authority to answer constitutional questions.

This court overturned the ratio of *Cooper*. They do not say that tribunals have the jurisdiction to answer constitutional questions, but they could if they were granted authority (either express or implied) to answer questions of law. If they can do this, it's presumed that they can answer constitutional questions.
- This can be rebutted if the tribunal's enabling statute clearly demonstrate that the legislature intended to exclude the Charter from the tribunal's jurisdiction.
- The most common "implied" authority of questions of law are when there is a provision that states that questions of law can be appealed to a certain place, since to appeal these questions means the tribunal had to answer it in the first place

There is a human appeal to this finding. The *Charter* belongs to the people, and all law and law-makers that touch the people must conform it, tribunals charged with deciding legal issues being no exception.

- More people have Charter arguments decided by tribunals than the courts.
- If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals

The Constitutional remedy by a court is generally to strike down any law that is unconstitutional

- Tribunals can't really do this, and simply be authorized not to apply the invalid law to the case before it.
    - Can't declare a remedy to the law being void that would then apply to every person if you are a tribunal since you only have jurisdiction in that area of expertise.
    - So, a tribunal would just not use the provision in their analysis

In response to *Martin*, legislatures amended legislation to set out which administrative tribunals have the ability to decide which questions related to the constitution

Administrative Procedures and Jurisdiction Act, RSA 2000, c A-3
Section 10 In this Part, (a) "decision maker" means an individual appointed or a body established by or under an Act of Alberta to decide matters in accordance with the authority given under that Act, but does not include (i) The Provincial Court of Alberta or a judge of that Court, (ii) a justice of the peace conferred with the authority to determine a question of constitutional law under the Provincial Court Act, (iii) the Court of King's Bench of Alberta or a judge or applications judge of that Court, or (iv) the Court of Appeal of Alberta or a judge of that Court; (b) "question of constitutional law" means (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights,* to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or (ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights.* Question 11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.

- S10(b) refers to an administrative tribunal
- S10(d) covers a broad category of constitutional issues
- S11 says that even if another statute allows it, a tribunal cannot decide constitutional questions unless a regulation is made under s16
    - SCC opened up what tribunals can do, and Alberta shut it down
- S12: if a party wants to raise constitutional questions before a designated decision maker, notice must be given to the parties, Attorney General (Canada) and Minister of Justice (Alberta)

- S13: even tribunals who can answer questions of law may refer the issue to courts if that is a more appropriate forum to decide the issue
- S16 allows the Lieutenant Governor in Council to designate decisions by regulation
    - *Designation of Constitutional Decision Makers Regulation*
        - Labour Relations Board and labour arbitrators (as defined), Law Society entity (as defined), Alberta Utilities Commission, Alberta Energy Regulator (all questions of constitutional law)
        - Human rights tribunal, Workers' Compensation Board and Appeals Commission (only federalism)
        - Law Enforcement Review Board (Charter only)
        - Alberta Securities Commission (Charter and federalism)

While Alberta basically undid all the work *Martin* did, BC created a sort of menu, where in each of the enabling statutes, section 43 of 44 applies.

- So, first look at the home legislation to determine whether or not they have the jurisdiction to answer questions of law, and then look to the BC *Administrative Tribunals Act*.
    - S43 allows all questions of law (including constitutional) to be answered by the court, and referred to the court
    - S44 does not allow constitutional questions to go to the tribunal
- So the enabling statute can say either 's43 applies' or 's44 applies' (pick what it wants)

R v Conway, 2010 SCC 22

Facts:
Conway (accused) was charged with sexual assault with a weapon but was found not criminally responsible for mental disorder and detained in a mental facility

- He sought an absolute discharged, but the Ontario Review Board found he was a threat to public safety and could not be discharged under s672.54
    - He appealed this decision

Procedural History:
The Ontario Court of Appeal found an absolute discharge was not available and agreed the Board did no have the jurisdiction to answer constitutional questions?

Issue:
Does the Ontario Review Board under s24(1) of the *Charter* have remedial jurisdiction?

Rule:
Section 24 of the *Canadian Charter of Rights and Freedoms*

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

(2) Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Analysis:
To first answer this question, it must be asked if the Board is considered a court of competent jurisdiction. It seems odd to limit a tribunal being of competent jurisdiction only for issues of remedies. It should be asked if this particular tribunal has the jurisdiction to grant Charter remedies generally.

- If the tribunal has jurisdiction to answer questions of law, and it was not excluded by statute, it can grant Charter remedies in relation to Charter issues arising in the course of the statutory mandate (ie, it is a court of competent jurisdiction).
- It must then ask if it can give the specific remedy given the statutory mandate
    - This depends on legislative intent

When a remedy is sought under s24(1) by a tribunal, the proper inquiry is

1. Does the tribunal have the power to grant *Charter* remedies generally? *Martin*
    a. Does the tribunal have jurisdiction (explicit or implied) to decide questions of law?
    b. Is it clear that the legislature intended to exclude the Charter from their jurisdiction?
        i. If no, the tribunal is of competent jurisdiction and can consider Charter, and it's remedies
2. Does the tribunal have the power to grant the particular remedy sought, given the legislation?
    a. Did the legislature intend that remedy to fit the statutory framework of the tribunal?

Mr. Conway sought an absolute discharge.

1. Is Ontario Review Board of competent jurisdiction?
    a. Unquestionable it has power to answer questions of law as it has ongoing supervisory jurisdiction over treatment, assessment, detention and discharge of accused's for those NCR.
    b. No indication in part XX.1 of the *Criminal Code* (Board's statutory scheme) that Parliament intended to withdraw Charter jurisdiction from the Board's mandate. It can thus decide constitutional questions.
2. Is the absolute discharge in the Ontario Review Board's mandate?
    a. Board has to reconcile public safety of dangerous offenders while assessing the NCR's state.
    b. The Board, under s672.54 of the Code to 1) absolutely discharge, 2) conditionally discharge or 3) detention order. And consider 4 criteria:
        i. Need to protect the public
        ii. Patient's mental condition
        iii. Reintegration of patient
        iv. Patient's other needs.
    c. It can conclude that, if the patient is not a threat, an absolute discharge be issued. If they do not, as is the case, an absolute discharge is inappropriate.

Conclusion:

ORB has jurisdiction to grant *Charter* remedies

Hold, Order:

Appeal dismissed

Ratio:

Conway test:

1. *Martin* test; can the tribunal answer constitutional questions?
2. Is the specific remedy sought available in the tribunals jurisdiction (enabling statute)?

Abella creates a new test, but it kind of just builds off the *Martin* test.

- Step 1: Does the tribunal have the ability to answer constitutional questions?
    - Does the tribunal have explicit or implied authority to answer questions of law?
    - Did the legislature intend to exclude this ability?
        - If they have the ability, they have the power to grant Charter remedies
- Step 2: Is the specific remedy sought the kind that the legislature contemplated for the tribunal?
    - Does the intent of the legislation indicate that the tribunal has the authority to grant the particular remedy?

In this case, the ORB had to be 2 lawyers, 1 psychiatrist and 1 psychologist, which had sufficient expertise to deduce if the patient is a threat to society or not. Parliament did not intend for the Board to be able to release an inmate given the risk he posed to society

- It isn't helpful to ask if a board is competent jurisdiction for a remedy only
- Instead, ask if they can do Charter questions generally. If they can, and it is not excluded from statute, they can answer Charter questions.
    - Tribunal must then decide if they can, given their jurisdiction, issue the remedy in question. This depends on legislative intent
        - Makes sense since they are made from legislatures, so they should go back to the legislation to see if they can issue that remedy
            - Just because it is a Charter does not mean tribunals get free reign to make up whatever courts can do
            - But it also makes no sense to bifurcate decisions into findings of law at tribunals and then remedies at courts.

In sum, if the applicant is challenging the constitutionality of a statute, it is the *Martin* framework

- If the applicant is challenging for a remedy, it is the *Conway* framework

<u>Administrative Law and Constitutional Rights</u>

It is clear from the SCC that administrative tribunals can answer constitutional questions and fashion constitutional remedies if their enabling statute allows that. But now we deal with the issue on what happens when the constitutionality of an administrative decision is being challenged.

- The initial thinking on this matter was that the Oakes test was used.
- But then came Dore…

Doré v Barreau du Quebec, 2012 SCC 12

Facts:

Dore was a lawyer, representing a client in a criminal proceeding at the Superior Court of Quebec. The judge made derogatory comments at Dore, saying "an insolent lawyer is rarely of use to his client" and that he used "bombastic rhetoric"

- Dore wrote a letter to the judge criticizing his rhetoric.
- Dore also applied to the Judicial Council, who found the Dore's behaviour was at all times respectful and the judge's comments were unacceptable.

The judge sent Dore's letter to the Syndic du Barreau to initiate a professional complaint about him, alleging he violated Article 2.03 of the *Code of ethics of advocates*

- The Council found that the letter was not justified based on the judge's comments and Dore was suspended for 21 days

He appealed the decision to the *Tribunal des professions* and argued the decision of the administrative body was unconstitutional.

- The Tribunal found the decision was minimally restricting and upheld the decision

Procedural History:

On judicial review to the Superior Court of Quebec, the decision was upheld

- Quebec Court of Appeal also dismissed the appeal

Issue:

Did the decision of the *Syndic* violate his freedom of expression under the *Charter*?

Rule:

Section 2 of the *Charter of Rights and Freedoms*
Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Analysis:
Usually, a discretionary decision by an administrative decision maker is reviewed on reasonableness. But, what in the context of *Charter* issues? There are two options.

1. Adopt the *Oakes* framework
2. Adopt a richer conception of administrative law where discretion is exercised in light of constitutional guarantees.
    a. This is the more flexible approach while still guaranteeing *Charter* rights.

Charter analysis on laws are general. But, administrative decision analyses are specific and should thus award deference to the decision makers.

- There is no doubt that the standard of review for an administrative decision maker is correctness when it evaluates the constitutionality of the law, though reasonableness would be used in a normal disciplinary panel. It is the constitutional aspect that elevates it
    - But correctness should not be used to determine if the decision maker took sufficient account of *Charter* values in making a discretionary decision.
- The choice in this case is whether every time a *Charter* analysis is involved on judicial review, reasonableness turns to correctness, or that both tribunals and courts can interpret the *Charter*, but the administrative decision-maker has the specialized expertise and discretionary power in the area where the *Charter* values are being balanced.
- Correctness option is tricky, since Article 2.03 of the *Code* will always involve the lawyers controlling their speech in some way. Deference is still justified from the decision maker's expertise.
    - Even in cases of *Charter* values being implicated, the administrative decision maker is in the best position to consider the impact of the *Charter* principles to the facts. This means the standard must be that of reasonableness

How does an admin decision maker apply *Charter* values when exercising statutory discretion? The charter values in question need to be balanced with the discretion

- If, in exercising its discretion, the decision maker properly balanced the Charter provisions with statutory objectives, the decision will be reasonable.

<u>Application</u>
While professional conduct is paramount in the legal profession, the severity of the conduct needs to be interpreted in rights of expression when dealing with the appropriate boundaries of civility.

- Disciplinary bodies must demonstrate they have given due regard to the importance of the expressive rights at issue (both with lawyers right to expression and the public's interest in expression at large)
- The balancing is fact dependant

The Committee's decision to reprimand the lawyer was a proportionate balance between its public mandate to ensure lawyers' behave with objectivity, moderation and dignity, with the lawyer's expressive rights. It is thus a reasonable one.

Conclusion:
No Charter violation

Hold, Order:
Appeal dismissed

Ratio:

Dore test: Has the decision maker disproportionately limited a *Charter* right in light of the statutory objectives? If so, the decision is unreasonable

The underlying issue of this case was determining what framework should be used when considering *Charter* values in administrative bodies.

- Does the Charter issue substitute the discretion with an Oakes analysis?
    - Using an Oakes analysis and thus of correctness does negate the expertise element that administrative tribunals may well be best positioned to use, even in constitutional questions.
    - As such, to reconcile both the constitutional approaches and administrative principles, a different framework should be used. A richer framework with discretion in light of Charter guarantees

Correctness is still the standard for determining constitutionality of the legislation itself, but the constitutionality of the decision will be reviewable on reasonableness.

- Vavilov explicitly refused to touch the Dore framework in their decision.
- Proportionality will be satisfied if it falls in the range of reasonable decisions

Dore test: If, in exercising its discretion, the decision maker properly balanced the *Charter* provisions being limited with statutory objectives, the decision will be reasonable.

- At one hand, you have to ensure the same constitutional protections are going to apply to the administrative decision maker since they are deciding on rights and privileges.
- At the other end, if every decision that involves Charter rights implicated a full analysis, it would be unworkable. So, the constitutional test we currently use (Oakes) is not a proper fit with administrative realities.
    - Especially in professional regulatory contexts, every time you are sanctioned for something you say, there is going to be a 2b challenge
- The compromise: use the system we have to analyse the reasonableness of a decision but with imposing constitutional insights into the analysis.
    - Some people really hate this because they would like more rigorous analysis of Charter involvement
- The new approach is to balance the pressing and substantial statutory objective (since administrative bodies are all beholden to their statute) with the Charter right.
    - If the decision maker does not do this, it is unreasonable
    - Deference is reflected in the "minimal impairment" nature where the decision maker is given some leeway
        - A natural part of an administrative body saying "we are balancing the Charter value and the statutory objective" is that they need to determine the scope of the Charter right or value.
            - Does this need to just be reasonable? After *Vavilov*, it isn't totally clear

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

Facts:
Trinity Western University ("TWU") sought to open a law school that requires its students and faculty to adhere to a religiously based code prohibiting sexual intimacy that violates the sacredness of marriage between a man and a woman.

- The Law Society of British Columbia ("LSBC") refused to recognize this law school and this was brought against the Courts as violating s2(a).

Procedural History:
The British Columbia Superior Court ruled in favour of TWU
- The BC Court of Appeal affirmed this decision.

Issue:
Was the LSBC decision to refuse a TWU Law school a violation of s2(a)?

Rule:
Section 2 of *Canadian Charter of Rights and Freedoms*
Everyone has the following fundamental freedoms (a) freedom of conscience and religion
- This has 2 aspects: 1) freedom to hold religious beliefs and 2) freedom to manifest those beliefs.

In order to claim his freedom of religion was violated, he must prove:
(1) Sincere belief in a practice or belief that has a nexus with religion, and
(2) Impugned state action interferes with this belief in a non-trivial way

Analysis:
1. There is no doubt that Christians believe that studying in a religious university can help them grow spiritually. TWU seeks to do just this. These beliefs are in good faith, neither fictitious nor capricious, and that it is not an artifice
2. The LSBC has interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious practices. Accordingly, their religious rights were interfered in a nontrivial way.

Conclusion:
S2(a) rights infringed.

Issue:
Was the limitation of religious freedoms justified using the LSBC's mandate?

Rule:
Dore: If the administrative decision maker properly balanced the pressing and substantial objectives of the statute in limiting the *Charter* right, the decision will be reasonable

Analysis:
LSBC could have only accepted or rejected. Accepting the TWU Law school would not have advanced the relevant statutory objectives. The decision does not prevent evangelicals from adhering to Christianity; it is only restrictive on those who want to study law at TWU.
1. The limitation is a minor significance; it only prevents prospective students from studying law in their *optimal* religious learning environment.
2. The interference is limited because prospective TWU law students made clear they would prefer to study law in combination with the Christian values. Denying someone a right they would merely prefer certainly falls short of a major breach.

The statutory mandate of the LSBC is to "promote and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the competence of the legal profession".
- LGBTQ students will be effectively barred from TWU. This barrier may discourage otherwise qualified candidates from gaining entry into the legal profession. It thus also gives more opportunity to those who are able to accept the Covenant.
- The public confidence of the administration of justice could be undermined if the LSBC approves a law school that effectively bars LGBTQ students.

Accordingly, minor limits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society.
- As such. The refusal cannot be said to be a serious limitation on the religious rights of the TWU community; no Christian is denied the right to practice his or her religion.

Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue on the facts of this case, and given the absence

of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance.

Conclusion:

Limitation justified

Hold, Order:

Appeal allowed

Ratio:

While considering the proportionate statutory-Charter balance, must also consider if less restrictive alternatives are available and not used

A more minor finding of this case is that decisions were not required in this context because decisions made by the democratic process do not need reasons. Nonetheless, the analysis can be gleaned from the speeches on the record.

This was a case that demonstrated what the statutory-Charter balancing analysis would look like. In the process, the court realizes that the balancing alone was not sufficient to truly balance Charter rights. An administrative decision could violate the Charter, and it would be held reasonable rather than charter violations being under correctness otherwise.

- So, they impose a new addition: a Charter infringement will only be allowed if the balancing is adequate, and there were no other less restrictive alternatives available.
    - Only when this happens will the Charter protection be affected as little as reasonably possible, which is required for the decision to be reasonable.
    - In this case, the only options were to approve the law school or deny the law school
        - The only way to minimally intrude less on the Charter right would be to approve the law school, which would not intrude at all.
            - As such, the decision struck the right balance, and there was no other way to make the decision and infringe the Charter value less
    - This does not mean that the decision maker must choose an option that limits the Charter protection least, the question is whether the decision falls in a reasonable range of outcomes.
        - If the option that limits the Charter protection the least does not advance the statutory objectives, then this test is useless.
        - So, it is reasonably choosing the option between those that advance the statutory objectives that least impairs the Charter values
            - Naturally, it is a highly contextual inquiry
- McLachlin in concurring says that the scope of the Charter right must be given a consistent interpretation and is thus a standard of correctness
    - If the scope of the right analysis is wrong, it will be unreasonable
    - But, isn't reasonableness a single standard?

There was a lot of talk about "Charter values" in the *TWU* decision, but McLachlin points out that only "Charter rights" are protected. So, what exactly are Charter values? Well, the frustrating this is that no one really knows.

In *AB v Northwest Territories*, this issue was front and center. In that case, it was a challenge against s23 *Charter* rights which was a right to allow education in both official languages. Under this right, if an individual was taught in English in Quebec or French in the rest of Canada (ie, the minority official

language in that province), they have a right for their children to also learn in that language (these parents are called rightsholders).

- Effectively this creates an obligation for the province to offer education in both languages, even if the right is to a very narrow group of people
- The Northwest Territories Minister of Education received 6 applications from parents to put them in French education, but they were not "rightsholders" of the Charter.
    - The government of the Northwest Territories passed a bill for the Minister to allow French education to non rightsholders (but it wouldn't be constitutional)
- The Minister then denied to do so based on criteria that they found allowed the refusal.
    - The unhappy, non rightsholder parents sought judicial review of the decision, but did not claim s 23 since they were not rightsholders.
- Curiously, the NWT Superior Court agreed that the Minister's decision did not proportionately balance the section 23 protections and the governments interests
    - In making the decision, the justice admitted that rights were not violated, since they were not rightsholders. But, the Charter values (to have education in both languages) was violated, and that was not a proportionate balance
- The Northwest Territories Court of Appeal allowed the appeal to restore the Minister's decision.
    - They found that the NWSC decision was on the mistaken assumption that a Charter violation was involved.
    - There was no ambiguity on the scope of the right – it was clear the applicants didn't qualify for them. There was no statutory right to allow the education either.
        - Since the administrative decision did not engage a Charter right, it was not a Dore analysis but a Vavilov. It did not rebut the presumption since, again, it was not a real Charter right in question and was thus reasonableness.
    - NWCA: only Charter rights engage the Dore, not values
        - But in *Dore, TWU,* they stated the Dore analysis was also for Charter values.
            - This is exactly what McLachlin was saying in *TWU*, Charter values are not written down, no one really knows what they are, where they begin or where they end, so where are we protecting them with the force of constitutional law?
        - But, McLachlin was in concurring, so that is not the state of the law. Since *Dore, TWU* were SCC cases, they are binding over *AB,* and as of now, Charter values are also under the Dore analysis, but there is certainly an argument the other way now (especially with McLachlin's concurring).
            - Until this case goes to the SCC next year, that is the best we know
            - If it is a non-Charter issue, go with Vavilov, as the NWCA did here
        - Just a mention of Charter values is enough to make it a Charter issue now. This can get very messy very quick
            - The Minister had a wide range of options, they had a directive where they had large deference, so a lot of them could be reasonable and wider. Charter values can't be used to undo discretionary decisions
                - Or can they?

<u>Remedies</u>

Assuming there are cogent procedural or substantive grounds for challenging an administrative decision, how should these be remedied?

1. Request a reconsideration of the case?
2. Lobby for legislative amendment or executive intervention?
3. Refer the matter to the ombudsman?

4. Statutory right of appeal to appellate tribunal or court?
5. Application for judicial review?

There are a number of factors to consider when advising a client as to a remedy (expense, jurisdiction, costs rare, decision being remitted, political factors). Superior court judges have access to common law remedies which used to be known as "prerogative relief" or "prerogative writs". This means you usually would go to the ABKB and state what you are looking for, but don't necessarily need to state you're looking for the others.

1. *Certiorari*: remedy used to quash/nullify/set aside an administrative decision
2. Prohibition: remedy used to order a tribunal not to proceed with a matter
3. *Mandamus*: remedy used to compel an administrative official to perform a public duty
4. *Habeas corpus*: a remedy used to compel an administrative official to justify a person's detention or imprisonment

Federal Courts and Provincial Courts have an allocation of jurisdiction between them. The provincial superior courts (Alberta Court of King's Bench) are s 96 courts and have inherent jurisdiction. Rules 3.15-3.24 govern this.

- This means that the ABKB is the presumptive court, unless that power has been taken away.
    - Matters can go through the ABCA if the statute says so, but if not it goes to ABKB
- The *Federal Courts Act* (ss 2, 16-18, 28) ground the FC and FCA as statutory courts, rather than courts of inherent jurisdiction
    - Section 18 says FC has a general power to hear judicial review, but there are certain statutory provisions where it would go straight to FCA

Federal Courts Act, RSA 1985, c F-7
Section 16 (1) Except as otherwise provided in this Act or any other Act of Parliament, every appeal and every application for leave to appeal to the Federal Court of Appeal, and every application for judicial review or reference to that court, shall be heard in that court before not fewer than three judges sitting together and always before an uneven number of judges. Otherwise, the business of the Federal Court of Appeal shall be dealt with by such judge or judges as the Chief Justice of that court may arrange. Section 17 (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown. (2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which (a) the land, goods or money of any person is in the possession of the Crown; (b) the claim arises out of a contract entered into by or on behalf of the Crown; (c) there is a claim against the Crown for injurious affection; or (d) the claim is for damages under the Crown Liability and Proceedings Act. (3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters: (a) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada; and

(b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

(5) The Federal Court has concurrent original jurisdiction
(a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and
(b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

Section 18
(1) Subject to section 28, the Federal Court has exclusive original jurisdiction
(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of habeas corpus ad subjiciendum, writ of certiorari, writ of prohibition or writ of mandamus in relation to any member of the Canadian Forces serving outside Canada.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

In *Canada (AG) v Telezone Inc,* Telezone applied for a license, which was denied so they sued.

- ONSC:
  - The Crown argued that the ONSC did not have the jurisdiction to hear the complain, since a federal decision was involved, meaning Telezone should have gone to the FC
    - This would benefit the Crown since Telezone used remedies not in the FCA
  - Telezone was only seeking private law remedies, which s 17 of the FCA says the FCA is only for matters with the Crown.
    - ONSC thus said that the FCA was inappropriate
- ONCA:
  - The Attorney General of Ontario appealed, but ONCA dismissed the claim
- SCC:
  - *Federal Courts Act* does not prevent private law actions against the Crown from going to the provincial courts.

        - This is about access to justice. Because Telezone didn't want judicial review, they just wanted damages in tort, Ontario court was fine.
    - The claimant is not trying to overturn the decision itself (not a judicial review), just pursuing damages as a result from the decision. No reason it should go to the FC to challenge the decision itself, and then challenge for damages if that is all they wanted in the first place (save money and the judiciary's time)
        - Someone should be able to challenge it without going for judicial review first

<u>Staying of Proceedings</u>

An applicant will often try to stay the proceedings when the individual is subject to a decision that is contrary to their interests and it takes effect immediately.

- Most common in professional discipline cases with immediate punishment.
- You would use a stay to keep working while the case goes through the courts.
- Either rule 3.23 or s 18.2 can be used to justify this request

Alberta Rules of Court, Alta Reg 124/2010
Rule 3.23 (1) The Court may stay the operation of a decision or act sought to be set aside under an originating application for judicial review pending final determination of the originating application. (2) Despite subrule (1), no order to stay is to be made if, in the Court's opinion, the stay would be detrimental either to the public interest or to public safety.

- Rule 3.23 states that simply applying for judicial review will not stay the decision, you would need a separate application for a stay.
    - Some legislation bring the stay automatically (FOIP applications for judicial review stay the decision because the information can only be revealed once, and you can't put the toothpaste back in the tube with something like privacy concerns

Federal Courts Act, RSA 1985, c F-7
Section 18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

In *Manitoba (Attorney General) v Metropolitan Stores*, the court asked when it was appropriate to stay the decision of the administrative decision maker.

- MBQB:
    - Stated that staying would be contrary to operations of the store
- MBCA:
    - Allowed the stay
- SCC:
    - Made a 3-part test in order to establish when a stay should be granted
        - Preliminary Assessment
            - Is there a serious issue to be tried (issue may not be defined by then)
            - Is there a prima facie case to stay (specifics are not needed)
        - Irreparable harm

        - If the applicant for the stay was seeking the stay would suffer irreparable harm (ones that cannot be contemplated with damages) if the stay was not granted
    - Balance of convenience
        - Where most of the analysis is
        - Look at a wide range of issues to decide what is the best decision in the administration of justice
            - There is a presumption of constitutionality
        - Public interest needs to be considered when dealing with the constitutional validity in question. Look at the public interest because part of the body is regulating the profession in the interest of the public)

<u>Availability of Public Law Remedies</u>

Which types of institutions or decisions are subject to "public" law remedies, and which are subject to "private" law remedies

- Early common law position: public law remedies (prohibition and certiorari) available when any body of persons have legal authority to determine questions. This was interpreted as confining the reach of public law remedies to bodies that were genuinely statutory
- The result of this was that the government "outsourced" public functions in order to devolve costs and escape judicial review
- The courts now take a more pragmatic view of whether a body is carrying out "public" functions
- This is what the finding of the *Toronto Port Authority* case was. Use the factors in that case to determine if they were truly public:
    - The character of the matter for which review is sought
    - The nature of the decision maker and its responsibilities
    - The extent to which a decision is founded in and shaped by law as opposed to private discretion.
    - The body's relationship to other statutory schemes or other parts of government
    - The extent to which a decision maker is an agent of government or is directed, controlled or significantly influenced by a public entity
    - The suitability of public law remedies
    - The existence of compulsory power
    - An "exceptional" category of cases where the conduct has attained a serious public dimension
- Basically, it has to be a matter affecting rights or interests (*Highwood Congregation*) having a public character (see above factors)

<u>Remedial Discretion from *Vavilov*</u>

Vavilov left the door open for remedies, but what it explored was only available for cases decided on reasonableness (ie, not the exceptions). If it is reasonableness, the court isn't asking what the answer it, but if it is justified in the constraints of the decision. There is a zone of remedies the decision maker can decide in.

- With correctness, it is substituting it's own views and what the correct interpretation is. Once they do that, there is no reason to send it back – so the court will just make the decision and the remedy
- But with reasonableness, there remains the possibility that the decision maker was operating in the zone of reasonableness and came to that conclusion
    - Judicial economy means that cases won't be heard for years, so if the judicial review finds that the decision was unreasonable and sends it back, it could literally be a decade long affair.

        - So, some judges will factor that in and give a more conclusive decision if they ought to know where the conclusion is.
        - If you can convince the judge that a particular outcome is inevitable, the judge may not go back to the tribunal for another decision
    - Often, however, the court will find it beneficial to the decision maker to have the benefit of the courts reasons and remit the decision back them

Recall the *Law Society of Saskatchewan v Abrametz*. Where there is a significant delay, are other remedies available for the administrative tribunal to accept.

- In this case, it was a statutory appeal, so the appellate standards of review apply as a *Vavilov* exception
- It was a question of abuse of process, which is a question of law: correctness standard
    - Delay is found where it impairs a party's ability to answer the complaint, or significant prejudice as a result of the inordinate delay
- A stay of proceedings (process halted completely) is not the presumptive remedy unless it is absolutely necessary because there is a public interest in the statutory mandate going to completion. When this threshold is not met, tribunals can award other kinds of awards as a remedy for significant delay, including reduction of sanction and a variation in any cost award
    - The tribunals remedy powers are determined by the statute, so if the statute does not allow costs, you won't get costs by pointing to this case.

<u>Standing</u>

When does a person have the ability to challenge state action? When it is a tribunal situation, it is obvious who bears the results of the decision and they are undoubtedly the ones with the ability to appeal/review the decision. But what happens when it is more on the policy end of things? When an administrative decision effects many, potentially thousands, of people. Are all of them allowed to bring action? Sounds like it would bog down the system quickly.

- There is a benefit to allowing individuals to challenge state action.
- So we want to ensure they have a means to doing so to ensure all state actors are acting in accordance with the law.

Finlay v Canada, [1986] 71 NR 338 (SCC)

Facts:

Finlay (plaintiff) relied on social assistance from Manitoba provincial aid. The province made deductions which caused him to lose some of the amount he received.

- The social assistance program in Canada was set up where the federal government supplied the provinces with money and the provinces would give the money to citizens in need of social assistance.
    - Part of the program was that the provinces needed to distribute the money a certain way in order to keep receiving federal funding.
- He filed an action arguing that Manitoba wasn't living up to their obligations needed to receive the federal funding since the aid to Finlay was below the threshold to provide for the necessities of life.

Procedural History:

Federal Court struck the claim since Finlay did not having proper standing

- Federal Court of Appeal allowed the appeal, finding Finlay had the requisite standing

Issue:

Does Finlay have sufficient public law standing to bring this claim?

Analysis:

The idea of public law standing can apply to administrative cases. The rationale for this is to allow a mechanism to challenge allegedly unconstitutional laws even if they are not directly or personally affected (principle of legality). This can be done with administrative action as well to ensure executive action comply with laws

- In this case, Finlay does not have sufficient "direct, personal interest" in the alleged insufficient provincial response.
  - This is also not constitutional; he is only alleging non compliance with the federal scheme, not that the provincial legislation is unconstitutional merely poor in execution
  - The prejudice caused to the respondent from the implementation of the funding is too indirect.
- But this does not preclude him from bringing a claim. Individuals should be able to challenge non compliant laws through public standing

The test for public standing:

1. Is it justiciable?
2. Does the applicant have "sufficient interest"? (not just a busybody)
3. No other manner to have the issue adjudicated?

Based on these three, it is clear that Finlay has public interest standing.

1. Issue of provincial noncompliance with federal scheme is justiciable
2. Finlay is disproportionately hurt from the decision as he is now below the poverty line
3. This is the way it is proceeding

Conclusion:

Proper standing – new trial ordered

Hold, Order:

Appeal dismissed

Ratio:

Test for public standing: 1) justiciable, 2) sufficient interest, 3) no other manner to adjudicate

In this case, because the federal government's program was not being properly used by Manitoba, the Attorney General of Canada would have been the more appropriate party to bring the action. But since it was Finlay, he needed to prove he had standing. The court ends up making the test for who has public standing from this case

In the end, the trial went back up the SCC and Finlay lost, but he was still able to bring the action. The worry with allowing public standing was allowing a mass of people bring action, when they are just busybodies. Only those the most directly affected should be the ones bringing action. That is why the criteria were so stringent in the three part test for public standing:

1. Justiciability
2. Sufficient interest
3. No other manner to have the issue adjudicated

However, in subsequent cases, it was found even this test was too stringent.

British Columbia (Attorney General) v Council of Canadians with Disabilities, 2022 SCC 27

Facts:

The Council of Canadians with Disabilities ("Council") is a non-profit which advocates for people with disabilities. It filed, with two individual claims, a challenge in the BC *Mental Health Act* under the Charter.

- The Act allowed someone who was admitted to a mental health institute to undergo certain procedures that were contrary to their safety
- The Council is a litigation groups that advocates for people with disabilities who are going to court. In this case, the two individuals went through the mental health system and claimed they had their Charter rights violated

The two individuals later dropped out of the litigation, so the Council amended the pleadings to say they have a public interest standing.

- The Attorney General of BC claimed they did not have public interest standing.

Procedural History:
British Columbia Supreme Court denied the Council standing

- British Columbia Court of Appeal allowed the appeal and sent back to BCSC

Issue:
Does the Council have adequate standing to bring the action?

Rule:
Finlay test for public standing: a) justiciable, b) sufficient interest, c) no other manner to adjudicate

Analysis:
The decision to grant a public interest standing is discretionary. This is a task that lands firmly on the judge of first instance. In doing so, the judge of first instance needs to assess and weigh various factors:

1. Is the issue a serious, justiciable issue?
2. Does the party have a genuine interest in the matter?
3. Is the proposed suit a reasonable and effective means of litigation the issue?

Each of these need to be weighed flexibly and generously to align with purposes:

- Allocating scarce judicial resources
- Ensuring courts have contending points of view
- Ensuring courts do their proper role in a democratic society

The factors need to be weighed equally and consistent with the constitutional role and property for the court to decide. It would be beneficial, but not mandatory to have an individual defendant who was subject to the action being challenged.

- In this case, the Council would have public interest standing.

Conclusion:
Council has standing.

Hold, Order:
Appeal dismissed – send back to BCSC

Ratio:
Step 3 of the *Finlay* test: Is the proposed suit a reasonable and effective means of litigation the issue?

The choice to amend the third step of the *Finlay* test was appropriate to allow some flexibility and more liberal interpretation to allow proper claimants to come forward. They also elaborate on each of the three requirements:

1. Serious Justiciable Issue
    a. Consistent with the constitutional role and property for the court to hear and decide
    b. Needs an actual legal dispute
    c. Needs to be far from frivolous
        i. If you have one of these, that's enough and you can move on
2. Genuine Interest

a. Does the claimant have a real stake in the proceedings and the things raised?
b. Consider plaintiffs reputation, involvement and interest
c. What evidence was important here:
    i. Reputation of the Council and the Councils evidence was their own history adjudicating similar matters

3. Reasonable means of Litigation
    a. Is there another way this could be decided? Is there an argument that this isn't the best way to put judicial resources to use?
    b. This is a wide ranging contextual analysis
    c. Gives us a list of things to consider
        i. Stage of Proceedings
            1. If preliminary, there may not be a factual basis for this yet
        ii. Pleadings
            1. How concrete are the facts?
        iii. Nature of the Public Interest?
            1. Comprised of individuals who could be impacted, then it is reasonable to assume they could bring evidence
        iv. Undertakings
            1. If undertaking certain evidence at trial, it could indicate there is sufficient evidence for adjudication
        v. Actual Evidence
            1. There was an affidavit in this case
    d. Consider the plaintiffs capacity to litigate, whether the case is of public interest, whether alternative means exist, impact of proceedings on others.

It is often beneficial, but not necessary for the individual defendant who was subject to the action included in it as they have a more direct claim.

- In this case, they could still be called as witnesses.

Also important, is that "legality" and "access to justice" do not merit particular weight

- Legality:
    - State action must conform to the law and there must be practical and effective ways to challenge the legality of state action
- Access to Justice
    - Knowing ones rights and how the legal system works, being able to secure legal assistance and access legal remedies
    - Breaking down barriers that often prevent litigants from ensuring their legal rights are respected