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INTRODUCTION

What is Administrative Law?

Legal Rules and principles that…

- Limit the exercise of state power, both in terms of the procedure that must be employed to make legally valid decisions and the substance of those decision
- Govern the authority of courts to enforce compliance with those limits
    - These limits are both procedural in terms of what procedures have to take place in order t make legally valid decisions; and
    - The rules governing the substances of those decisions and the judicial review of these decisions

Part of the family of public law

- Most similar to constitutional law in that it concerns the legal structuring and regulation of sovereign authority, both in state's relations with individuals and in the allocation of authority among various institutions.
- Pervasive because of the extensive and often integral role of government in modern society.

Features of the Administrative State

- Use of statutes to establish institutions and create basic framework of rules for the governances of those institutions
- Notes significance of reliance on delegated legislation and guidelines/policies/practices to establish detailed operational guidance for administration of statutory schemes
- Breadth of governmental purposes served by statutory schemes
    - Employment regulations
    - Industrial and commercial regulations
- Roles of statutes and other forms of legal guidance
- Range of government functions/institutional choices/approaches to policy questions
- Evolution of institutional arrangements over time and among jurisdictions
- Evolving ideas of the role of the rule of law in the administrative state
- Evolution of provision of services from private to public to public/private partnerships
    - Ex. Hospitals being ran by churches to being run by governments

****Specific Features of the Administrative State in Canada:**

- Statutes are used to create the framework of adminsrttaive institutions and to provide rules in key areas
    - Reflect the central role statutes play in providing the legal framework for a broad range of governmental activity.
- Statutory schemes service a broad range of governmental purposes
    - Same as above.
- Detailed operational guidance for the administration of statutory schemes is typically provided by a combination of delegated legislation, guidelines, policies, and practices
    - Notwithstanding the importance of statutes, detailed operational guidance for most adminsrttaive activity is provided through a range of other instruments.
- Services are typically provided by a combination of public bodies and private bodies supported by government grants or contracts.

- Canadian governments typically employ a mix of public and private provision of governmental services

Institutions of the Administrative State

1. Legislatures
    - Nearly all public programs must originate with a stature enacted y the provincial or federal legislature in order to create new legal rights/duties.
    - Not only does legislature debate and approve legislation that establishes program, they have a role in its subsequent administration
2. Cabinets
    - Cabinet adopts strategic policies, sets budgets, and passes regulations and orders in council
    - May play a decisive role in determining the shape and scope of public programs.
        - ****A statute may only provide a right of appeal to the Cabinet from decisions of administrative agencies.**
3. Municipalities
    - Exercise powers that are delegated by the provincial legislature.
4. Crown Corporations
    - Some public services are provided this way and enjoy substantial independence in their day-to-day operations.
5. Independent administrative agencies
    - **Points in common:**
        - Arms length relationship with political arm of government
            - This means at the very least the adminsrttaive body cannot direct what decisions they must reach in the matter before them
            - In turns, the minister is not politically accountable to the legislature for the agency's decisions
            - Statutes may influence agency decisions
        - Formalized hearing processes
            - Those who are liable to be affected by a decision are given an opportunity to participate in the decision-making process by providing evidence and making submissions
            - Procedural openness
        - Individualized decision-making
            - Operate on decisions where the program as applied to an individual.
        - Specialization
            - Have specialized subject matter jurisdiction, though breadth of that jurisdiction will vary from agency to agency
    - Points of difference:
        - Scope of policy-making mandate
            - Decisions made by agencies are found on a continuum.
        - Volume of work
        - Nature of specialization/degree of legalization
            - Whether or not they are represented by lawyers, etc.

        - Process differentiation

  These differences are especially notable between regulatory agencies and adjudicative agencies, but even within these categories the procedures employed by different agencies will vary significantly. It is true some employ procedures that are essentially simplified version of court procedure, but there are also significant departures from court procedures.

  - Agencies vs Departments vs Courts
    - Government departments are typically headed by a Cabinet Minister so the political arm of government has ultimate control and responsibility for decisions made within those departments
    - Key difference is ministries are responsible for decisions made by their departments. Agencies are not under this responsibility.
    - Courts are independent from government and have constitutional protection of this which is not made available to Administrative Agencies
  - Courts and Administrative Agencies

    Public law litigation is remedy of last resort for various reasons
    - High cost
    - Unlikely success
    - Even if one gets a favourable decision, the possibility remains that having corrected the legal error, the administration may not change the substance of the decision that generated the complaint

      Original Jurisdiction of Courts
    - If the legislature has not established a mechanism for challenging the decision, it may go directly to court.

      Two different types of procedural vehicles for judicial oversight of adminsrttaive decision-making:
      - Statutory Appeal
        - **Administrative decisions may only be appealed to the courts if a right of appeal is granted by statute.**
      - General Judicial Review
        - Grounds of review
          - Procedural impropriety
          - Illegality
          - Unreasonableness
          - Unconstitutionality
    - Why Agencies should resolve disputes that arise from the implementation of a public program:
      - Nature of the decisions made by agencies are for more governmental than judicial
      - May be desirable that decisions are made by persons other than judges
      - Many of the disputers which are concerned involve relatively small sums and, as important as these claims are to individuals,

            - to process them through the superior courts would be a misallocation of public resources
            - A more informal process than that associated with courts may enable more expeditious decisions and reduce the need for legal representation.
    - Administrative Institutions and the Government
        - Administrative Institutions are a reflection of what governments decide to do and how they decide to do it.
            - Both of these things evolve over time in different places.
            - Sometimes we will see parallel movements towards changes across other institutes, but at other times they will have differences.
        - Some advantages over a govt department
            - Insulated from the pressures of day-to-day partisan policies
            - Easier for agencies to maintain an open process and develop longer-term consistent policies

Administrative Tools that Modern Administrate have at their disposal:

- Exercise of Authority
    - Individual decision-making
        - This is the area of administration focused on by most lawyer
    - Rulemaking
- Collecting and Spending money
- Direct provision of services
- Acting as an employer or manager
- Gathering and distributing information

Political and Administrative Redress of Individual Grievances

- Legislative oversight
    - Oversight of delegated legislation
    - Oversight of bureaucratic action involving individuals
- **Administrative remedies**

  When persons who are affected by an adminsrttaive decision disagree with the outcome of the decision, there only avenue of recourse is not just to challenge the decision to the courts.

  There are also opportunities to:
    - Internal administrative appeals
    - Appeals to external administrative bodies
    - Ombudsman review
        - Review and changes and recommendations to government decisions

The Rule of Law and the Administrative State

Dicey and the Rule of Law

Key elements:

- Nobody should be made to suffer except for a breach of the law
- Government and citizens are EQUALLY subject to the law

- The law of government should be administered in the ordinary courts and not in the specialized system of administrative courts
    - *Controversial and subject to limits

The Functionalist Critique of Dicey's Rule of Law

Points of disagreement with Dicey:
- Belief that judges and courts process may not be best suited to administer a range of programs and regulator schemes
- Belief that judicial attachment to common law norms inferred with effective administration of statutory schemes designed to address shortcoming in the common law
- **Belief that government should be overseen by the ordinary courts using the ordinary law of the land

Points which they agree with Dicey:
- Government and citizens are equally subject to the law
- Subject to constitutional limits, legislatures are free to enact legislation that reflects their own policy choices.

Functionalist Approach that was not mentioned by Dicey:
- Judicial Deference: Recognition that effective administration may require decision-makers to have differential skills and backgrounds than judges

Rule of Law, Democratic Values, and Fundamental Rights

- Contemporary acceptance of some elements of the Functionalist Critique, **especially related to judicial deference to expert adminsrttaive interpretations of legislation**
- Tendency for judges to be more willing than in the past to take an expansive view of schemes designed to provide social benefits
- Belief that judges play a critical role in the enhancement of constitutional norms reflected in the *Charter*

Administrative Institutions and Indigenous Governments

- Reflects evolving distinction between two types of Indigenous governance organizations
    - Indigenous Governments that are exercising statutory delegated authority by federal or provincial law (Band Councils or child welfare organizations)
    - Bodies exercising authority as a result of Indigenous or treaty rights (in a sense those authorities that pre-exist confederation)
- Administrative agencies are having a bigger role when it comes to the duty to consult

The Role of Judicial Review

Baker v Canada (Minister of Citizenship and Immigration), SCC 1999

Facts:
- Baker came to Canada as a visitor in 1981.
- Her visitor status expired and she worked illegally as a live-in domestic to support herself and her four Canadian-born children.
- She had a difficult time after the birth of her fourth child. She was diagnosed with post-partum depression and schizophrenia

    - Two of her children we placed with their father, and the other two were temporarily in foster care.
- In 1992 she was ordered deported.
- In 1993, she applied for humanitarian and compassionate relief (h&c relief) from the deportation order.
- In 1994, her application was refused and she was issued a removal notice.

Relevant Legislation and Procedural History:

- Section 82.1(1) of the *Immigration Act* required Baker to obtain leave of the Federal Court of Canada to bring a judicial review application
    - J. Simpson granted leave to the application but dismissed it.
- Section 83(1) restricts appeals to "questions of serious general importance".
    - Baker did not have an unqualified right to appeal the decision made by J. Simpson. However, she did certify a question which allowed B to bring the appeal.
    - The question dealt with the implications of the international convention of the rights of the child in h & c review where the applicant has Canadian children.

      Q: What is the implication o the convention?
        - The convention treats the bes interest f the child as being a primary consideration in any decision affecting the child
        - The convention while being internationally on Canada had not been incorporated into Canadian domestic law.

      A: The convention was not binding on immigration officials as it had not been incorporated in Canadian domestic law. Only hold internal significance.
- SCC granted appeal to look at the entire case.

Issue:

1. Is there any dispute that Baker was subject to a lawful deportation order issued in 1992?

   A: No, by the time her judicial review application go to federal court, there was never any dispute about this.
2. What was the legal basis for her claim of h & c relief? Was she properly denied it?

   A:
    - Section 114(2) enables the governor and council to make regulations allowing the Minister of Citizenship and Immigration to exempt individuals from the requirements of regulations or to facilitate their admission in Canada.
    - Section 1.2 authorized the Minister to facilitate the admission on h & c ground.
    - Minister then delegates authority to Officers due to the amount of applications received each year.
3. What was the role of Officer Lorenz, Caden, and the Minister in this case?

   A: This was Caden's case and he received a recommendation from Lorenz who reviewed the file and recommended it be denied. The notes from Lorenz become very significant because there is no written reasons for Caden's decision.

Analysis of Procedural Review:

1. **Procedural Fairness: Was Baker entitled to procedural fairness?**
    - Parties agree that common law procedural fairness obligations apply to h & c
        - It is a decision that is administrative and affects the "rights, privileges and interests of an individual"
        - Based on precedence

- FCA in *Shah* concluded that the procedural fairness obligation in h&c was minimal, but SCC here disagrees.
  - Procedural fairness requires meaningful opportunity to present evidence relevant to the case and have it fully and fairly considered
  - This does not necessarily mean she was entitled to the full panel of natural justice hearing requirements though.
- Duty of fairness is flexible and variable and depends on the contest of the statute and rights affected.
- The existence of a duty of fairness, however, does not determine what requirements will be applicable in any given set of circumstances.
- **Baker Factors that determine procedural fairness threshold: (non-exhaustive list)**
  - Nature of the decision being made and the process following in making it.
    - The more the process provided for function of tribunal, nature of decision-making body, and the required determination of decision resemble judicial decision-making the more likely that procedural protection closer to trial model will be required.
    - *Knight*: the more a process is like a judicial trial, the more protections provided to procedural fairness.
  - Nature of statutory scheme and the "terms of the statute pursuant to which the body operates"
    - Look to the words and other indiciations in a statute.
    - An exception to the general rule: comes to what you think agency review is really about.
    - Greater procedural protection when no appeal procedure provided for in statute.
    - Greater procedural protection when decision is determinative of the issue and further requests cannot be submitted.
  - Importance of decision to the individual affected
    - Most important in this case because it not only effects the individual herself, but her family.
    - More important decision is to the lives of those affected and the greater the impact, the more stringent the procedural protections will be mandated
  - Legitimate expectations of the person challenging the decision
    - Does not create substantive rights, but if claimant has a legitimate expectation that a certain procedure will be followed, the procedure will be required by duty of procedural fairness
    - Similarly, if the claimant has legitimate expectation that certain results will be reached in their case, procedural fairness may dictate more extensive procedural rights
    - Based on principle that circumstances affecting procedural fairness take into account the promise or regular practice of administrative decision-makers and that it will generally be unfair for them to act in contravention of representations as to

procedure or to backtrack on substantive promises without according significant procedural rights

- Decision-makers procedural choices
  - Takes into account and respects agency choices especially where the statute leaves decision-maker the ability to choose its own procedure or when agency expertise in determining appropriate procedures in circumstances.

2. **Oral Hearing- Was Baker entitled to an oral hearing?**
   - Even though the procedural requirements in h & c determinations are not minimal, and oral or in-person hearing is not necessary
   - Unless a trial-type proceeding is contemplated by statute, courts are reluctant to impose them
   - Imposing oral hearings in h & c decisions may have unintended consequences of making hearings more adversarial
3. **Reason- Was Baker entitled for written reasons of the decision on her application?**
   - Prior to *Baker,* Canadian courts did not recognize a general obligation on the part of administrative decision-makers to give written reasons for the decisions.
   - Lorenz's notes constituted the reasons for the decisions
   - It was fairly obvious by the way the notes were written that they should not have been read by Baker, but this was all the Court had, so they were produced as reasons.
   - Justification in decision-making is importin
   - Right to reasons is not unqualified, but in general post-*Baker* reasons will be required in most adjudicative settings
   - Part of a general trend toward requiring the administrative decision-making be transparent, intelligible, and justified.
4. **Bias- Was there a reasonable apprehension of bias from the decision-maker?**
   - **Test (*National Energy Board*):** What would an informed person, viewing the matter realistically and practically, and having though the matter through, conclude?
     - Would they think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.
   - Impartiality is a core element of procedural fairness, whether in judicial or administrative decision-making
   - Even though Lorenz was not the decision-maker, we have no idea what Caden was thinking, so we only have Lorenz's recommendation to go off.
     - SCC concludes that all immigration officers who play a significant role in the decision-making process have to be impartial.
   - If there was reasonable apprehension of bias from anyone who seems to have had a role in the decision, there would be reason enough to overturn the decision.
   - Whether the decision-maker would be perceived as bias by a reasonable person, does not mean they actually had to have been bias, only that there was a reasonable apprehension of bias.
   - Since Lorenz drew a link between Baker's mental illness and the strain on Canada's welfare system, this was considered bias.

- There is a reasonable apprehension of bias ad the application needs to be reconsidered by a different officer.

Analysis of Substantive Review for Reasonableness

- The court overturned the decision on the basis of it being substantively unreasonable.

1. **Standard of Review**
    - Canadian law governing substantive review of administrative decisions has evolved substantially since the *Baker* decision, and the law was substantially revised in *Vavilov*.
    - The decision to grant h & c relief is a discretionary decision and not dictated by rules found in the act.
    - The SCC concluded that it is entitled to intervene if the decision is "unreasonable"
    - Because the decision failed to give sufficient weight to a variety of factors, including the overall policy of immigration legislation favouring family reunification, Canada's support for giving considerable weight to the bets interest of children endorsed by the International Convention on the Rights of the Child, and the importance of the interest of children reflected in the Ministerial Guidelines, it was evident that the discretionary decision in Baker's could not withstand somewhat probing scrutiny demanded by the reasonableness standard of review.
2. **Reasonable Exercise of Discretion**
    - Consider the impact of the objectives of the *Immigration Act,* the ministerial guidelines, and the *International Convention on the Rights of the Child* which was adopted by Canada but not incorporated into Canadian domestic law.

Holding: Case should be remanded for the reconsideration of another Immigration officer.

Elements of the rules of procedural fairness when concerning application for humanitarian and compassionate relief:

1. The right to written reasons for the decisions
2. The right to an impartial decision-maker
3. The right to have the application considered in its entire and in a fair manner

The application considered in light of Ministerial guidelines or having weight given to the best interests of children are **not elements of procedural fairness *but are substantive rights* under this particular statutory scheme.**

Baker and Previous Case Law:

Followed previous case law when…

- Concluding that there is no need to provide a person claiming h & c relief an in-person learning.
- The test for reasonable apprehension of bias.

Departed from previous case law when…

- The degree of procedural fairness requiring in hearing claims for h&c relief
- The existence of a common law obligation to provide written reasons for decisions in respect of h & c claims.

Our review of *Baker* reveals several things:

1. Judicial review applications and the ways they are decided can have significant implications for the administration of administrative schemes.
2. The same administrative scheme often can be described and characterized in different ways
3. The way an administrative scheme is characterized can have a significant influence on the approach courts take to procedural and substantive review of decisions made pursuant to that scheme
4. Administrative law is not static but continues to develop
5. Courts exercising judicial review authority are ruling on the lawfulness of administrative decisions rather than on the wisdom of those decisions, but it is sometimes difficult to disentangle the two.

Restrictions on Access to Judicial Review

- The *Immigration Act* contains relatively unusual schemes restricting access to judicial review.
- Decisions taken under the *Act* can only be judicially reviewed if the Federal Court of Appeal grants leave
- Denial of leave by the Federal Court is not appealable
- Appeals of Federal Court decisions may only be made to the Federal Court of Appeal if the Federal Court certifies a question of general importance
- Some view appeals as a way of delaying deportation, so this is why there is a restriction of judicial review applications. However, but not allowing any appeals at all, there is a chance that an error or mistake of law may occur and there needs to be some type of review process.
- If there is no one external to the Administrative body to judge if the body is complying with the law, there is potential for judicial action. So, parliament does not want to create a fight with judiciary over a complete cut off of them.
- Another thing that could be done is saying "only seek judicial review if the agency says you can" so you have to convince the agency rather than the Court.
- Barriers to the Judicial system are discouraged, but without any there is the fear that Court systems will be overrun and misused.

ADMINISTRATIVE PROCEDURE

Sources of Procedural Fairness Obligations

Potential Sources of Procedural Norms (in order of hierarchy of dominance**)

1. *Canadian Charter of Rights and Freedoms*
    - *Section 7!!!
    - Principles of fundamental justice have a procedural dimension which is a source we must consider
    - Really important in Criminal matters
2. *Quasi*-constitutional statutes
    - *Canadian Bill of Rights*
        - *Section 2
        - Key points:

            - Only applies to federal decision-makers, and section 2 does provide for a fair hearing in accordance with principles of fundamental justice for determinants of rights and obligations.
            - Most of time do not need to do this because you will already get procedural protection through common law or section 7.
    - *Alberta Bill of Rights*
    - *Quebec Charter of Rights and Freedoms*
3. General procedural statutes
    - Serve as an additional source of procedural requirement.
    - Once the threshold is triggered for these, they prescribe procedural standard for the relevant decision-makers.
    - Alberta *Administrative Procedures Act*
    - Ontario *Statutory Powers Procedure Act*
    - Quebec *Administrative Justice Act*
4. Enabling statutes and regulations
    - To ascertain whether it is required by law to afford certain procedures to an affected party, a public authority must first look to the terms of its enabling statute.

   Subordinate Legislation
    - Instead of prescribing specific procedures in an enabling statute, the legislature may choose to statutorily delegate to an executive actor the power to enact regulations or rules that establish procedural requirements.
    - To prevent the risk that those who are making the rules are not following the intentions of those who delegated the power, many jurisdictions have enacted laws providing for legislative scrutiny of subordinate legislation.
    - Another accountability mechanism is public consultation:
        - Bodies are required to give public notice often which allows the public to make comment.
5. Common law rules of natural justice and procedural fairness
    - If a specific procedure is not required from any of the above or only required to a limited extent, procedural fairness may still require procedural protections.
    - Most fundamentally it is required for a "judge" to hear from the other side through and impartial and independent hearining.
6. Administrative body rules, guidelines, and practices.
    - Soft law instruments, which play a dominant role in public authority decision-making.

***Notes on Hierarchy of Sources**

- Constitution prevails over statutes in case of inconsistency
- Statutes prevail over common law statutes in case of inconsistency
- Statutes and common law prevail over administrative guidelines, policies, and practice statutes in cases of inconsistency
- Place in the hierarchy of sources is not the sae thing as practical importance of sources in any given situation

Constitutional and Quasi-Constitutional Sources of Procedures:

These sources become relevant in three main instances:

1. *Singh*: When a statute may expressly deny certain procedural safeguards, leaving no room for supplementation by the common law. In such a case, only these sources can override the statute to mandate more elaborate procedural safeguards.
   - The recognition of a protected *Charter* interests serves to boost procedural protection beyond those recognized at common law.
2. When they may establish procedural claims in circumstances where none existed at common law
3. Such provisions may mandate a high-level or procedural protection than the common law for the relevant context of decision-making.

Dominance of Common Law Procedural Rules

- Most enabling legislation is silent on procedure and common law fills in gaps
- The common law model of procedural fairness significantly informs the approach courts take to interpreting generally worded constitutional and quasi-constitutional requirements of fair procedures.
  - IT DOES NOT VOERRIDE INCONSISTENT STATUTORY PROVISIONS.
- Common law is flexible and general principles can be adapted to meet specific needs
  - Administrative law rules are not black and white, but instead, context is KING!
  - General procedural statutes tend to only apply to administrative tribunals because they tend to operate on a more consistent basis, but once you move to more bureaucratic decisions it becomes more flexible
    - This flexibility is advantageous
- Common law requirements can be informed by administrative practice
- Common law standard provide the model of fair procedure in constitutional and quasi-constitutional settings
- Common law standards provide the model of fair procedure in general procedural statutes

Implications of the Dominance of Common Law Rules

- Contrast with administrative procedure in US where common law does not fill procedural gaps
- In Canada, less pressure to expand constitutional guarantees of fair procedure
- In Canada, less pressure to create general procedural statutes (Contrast with US federal and statute *Administrative Procedure Act*)
- Where general procedural statutes exist, less pressure to make them comprehensive and tendency to focus on administrative powers rather than rules

Common Law Rules Governing Fair Procedure

- "Rules of Natural Justice"
  - Pre-1978: rules of fair procedure applying **only** to quasi-judicial bodies
    - In administrative decisions there was no assumption that common law would fill in the gap.

Quasi-Judicial vs Administrative Decisions

Quasi-Judicial Definition: bodies engaged in court like proceedings which mirror a court-like model

        - Signs of a quasi-judicial decision (Not all above signs need to be present):
            - Statutory requirement of a hearing
            - Adversarial process is involved (when a Board adjudicates the rights of the parties before it based on rules set out in the statute)
            - Decision-maker is a board or tribunal
            - Decision involves application of rules to determine rights/obligations
        - Signs of an administrative decision:
            - Statutory context is inconsistent with a formal hearing requirement
            - Decision-maker is a Minister or a public servant
            - Does not involve a contest between two more adversarial parties (such as in cases of applications by individual persons)
            - Decision relies on exercise of discretion rather than adjudication of rights
        - If it is not quasi-judicial, it is administrative.
    - Post-1978: In *Nicholson,* SCC said that rules of natural justice was a signpost that points to the mere elaborate end on a spectrum of fair procedure that applies to many types of administrative decision-making

Nicholson v Haldimand-Norfolk Regional Police Commissioners

Facts:

- *Police Act* provided that a hearing is required for officers being dismissed after serving for 18 months, but was silent on the process for those dismissed serving less time.
- Nicholson was discharged after 15 months without the opportunity to give any submissions.

Issue: What level of procedural fairness is required here?

Analysis:

- Although he cannot claim the protections afforded under the Act, he also cannot be denied any protections.
- The realization that the classification of statutory functions as judicial, *quasi*-judicial, or administrative is often very difficult, and to endow some procedural protection while denying others would work as an injustice.

Holding: N should have been told why his services were no longer required, and given the opportunity to respond, whether it was orally or in writing.

- This case impacted the common law rules of governing administrative procedure as the Court expanded procedural requirements beyond the setting of quasi-judicial decisions and established a continuum of procedural requirements that extended into administrative as well as quasi-judicial decision-making.

- "Procedural Fairness"
    - A generic term used to describe common law rules of fair administrative procedure
        - Do not have to look at rules of natural justice here because this covers the entire waterfront.
    - A signpost that points to the less elaborate end of the spectrum of fair procedure

- When determining which of the above two definitions, look at the context in which it is used.

Key Common Law Concepts (Natural Justice, Procedural Fairness, Implied Legislative Intent, and the *Baker* synthesis)

Natural Justice

- The requirements of 'natural justice' are based on court-like models of trial-type procedures
-
- Two fundamental element of this form of procedure:
    - Right to a hearing ("audi alterm partem")
    - Right to an impartial decision-maker ("nemo judex in causa sua")

Procedural Fairness

- The requirement of "procedural fairness" in the narrow sense are a less elaborate version of the same model
  - Historical Overview:
    - English common law decisions from the 19th central imposed procedural obligations on some statutory decision-makers
    - From early 20th century until 1978, common-law rules of natural justice applied only to quasi-judicial tribunals
    - In this era, common law imposed no procedural obligations on decision-makers classified other than as quasi-judicial
    - *Nicholson* replaced the "all or nothing" approach with continuum of procedural standards
    - *Nicholson* diminished significance of distinction between quasi-judicial and administrative decision-making functions
    - Location on continuum determines extent to which decision-makers procedures may deviate from court-based model
    - Classification as *quasi*-judicial vs administrative now may assist in deterring a decision-maker's location on the continuum and maybe relevant for some other purposes
  - Post-*Nicholson* Fairness:
    - Strong presumption that decision-maker classified as quasi-judicial fall at high end of continuum and most closely track court-based procedural standard
    - Moving along continuum involves increasing departure from court-based procedural model
    - Decision-makers classified as performing administrative decision-making function presumed to fall lower on continuum than *quasi*-judicial decision-makers
    - Courts may nose impose procedural requirements even if decision-maker performing administrative rathe than *quasi*-judicial functions
    - Twp questions always arise when courts are dealing with common law rules of procedural fairness:
      - Does a duty of procedural fairness arise in relation to particular decision in particular context?
      - If so, what is the duty's content in the context?

Implied Legislative Intent- Where do common law rules come from?

- Legislature is presumed in law to have intended that decision-makers be subject to a duty of procedural fairness absent express statutory induction to the contrary
- Courts may impose procedures not mandated by statute
- As long as decision-maker does not violate constitutional, statutory, or common-law procedural rules, it has the discretion to control its own procedures
- Query whether implied legislative intent or some other theoretical principle how underlies fairness doctrine

The *Baker* Synthesis

- In the *Baker* decision, the SCC identified a series of contextual factors relevant to determining both the existence of a duty of procedural fairness and its content. (it did not reverse the *Nicholson* decision)
- The *Baker* synthesis reflects the evolution of the common law approach to procedural fairness in the post-*Nicholson* era as it identified a series of factors that are relevant to determining both the availability of common law procedural protections AND their scope.
- The factors are:
    - The nature of the decision being made
    - The nature of the statutory scheme
    - The importance of the decision to the person affected
    - The legitimate expectation of the person
    - The procedural choices of the decision-maker

Thresholds of Common Law Fairness Obligations

When does fairness apply?

Knight v Indian Head School Division

Facts:

- Director of schoolboard was dismissed when he refused to sign a renewal of his contract that was a shorter time period than the previous one.

Issue:

1. Was the Director entitled to procedural fairness? YES
2. Was the threshold of procedural fairness owed met? YES

Analysis:

The fairness doctrine is presumed to apply based on the following:

- Nature of decision (adjudication vs rulemaking or investigative)
    - Decisions of a "legislative and general nature" or decisions as a "preliminary" nature vs decisions f an "adminsrttaive and specific nature" or decisions of a more final nature
    - The second options are provided higher standards of procedural fairness.
- Relationship between decision-making boy and person affected by the decision; and
    - Decision-makers should be cognizant of all relevant cirucmsatnces surrodning the employment and its termination (*Nicholson*).
- Effect of decision on that person's rights.

There is a presumption that fairness doctrine applies, but this can be rebutted by express statutory language or agreement (but neither were present in this case).

Holding: Director was entitled to procedural fairness before being terminated. However, the negotiations between the Director and the Board relating to his contract renewal satisfied the fairness obligation in relation to dismissal.

- *Knight* noted that it is not simply legislative functions that fail to attract a duty to act fairly, but also decisions of a general nature.

The *Dunsmuir* Exception

- Court holds that a public official who holds office "at pleasure" is not entitled to procedural fairness in addition to any rights contained in statute or in the official's employment contract
- Court accepts statement of principles set out in *Knight* but holds that the majority in *Knight* did not give sufficient weight to the effect of the employment contract
- Confined to situations in which government has a contractual relationship with a party seeking to impose fairness obligations
- This will normally be an employment contract, thought it can also be a commercial contract for goods or services
- Courts are reluctant to expand the *Dunsmuir* exception beyond situations where there is a clear contractual relationship between a public body and the person seeking to impose a fairness obligation

The *Baker* Synthesis (evolution for *Knight*)

- *Baker* factors relevant to both the threshold question AND the content of procedural fairness:
    1. The nature of the decision being made (same as *Knight* factor 1)
    2. The nature of the statutory scheme (a more elegant wayof describing *Knight* factor 2)
    3. The importance of the decision to the person affected (same as *Knight* factor 3)
    4. The legitimate expectations of the person affected (modifies the reasoning in *Knight*); and
    5. The procedural choices of the decision-maker (more relevant to fairness content rather than threshold)
- Often it is unnecessary to address each of these factors to know whether or not fairness applies, but they are helpful in marginal cases
- Sometimes procedural fairness threshold questions are easy and you do not have to address it because the common text is it applies and the issue is whether a particular element of it has been compromised

Situations in which fairness may be inapplicable

Decisions of a Legislative and General Nature

- Generally, fairness does not apply when administrative decision-makers are making "rules" rather than "adjudicating"
- Note that administrative decision-makers often create their own procedures for consultation in rulemaking
- Rulemaking can be distinguished from adjudicative decisions by considering <u>both their practical effect and the procedural context</u> in which they were made
- Courts will look beyond the form of decision-making to determine whether practical effect of decision is an individual determination

- Examples of decisions attracting fairness:
  - Cabinet decisions revoking citizenship or pardons (*Oberlander;Desjardins*)
  - By-law affecting single property development (*Homex Realty*)
  - School closure in accordance with a policy that requires consultation (*Bezaire*)

Legislative Restructuring (*Authorson; Mikisew*)

- Introduction of legislation to restructure an organization or alter a program will not attract fairness obligation, even if it has a significant impact on individuals
- General reluctance of courts to interfere with the legislative process

Auhtorson v Canada (AG)

Facts:

- Class action against the Department of Veterans who failed to invest or pay interest of disabled veterans pensions and other statutory benefits.
- After they realized this, the government made an Act which provided no claim could be made to collect interest of moneys held by the department.
- The Veterans sued for breach of fiduciary duty and argued the statutory bar on the right to sue was inoperative because it breached s 1(a) and 2(e) of the Bill of Rights.

Issue: Is this a breach of the Bill of Rights? NO.

Analysis:

Section 2(e) of the Bill of Rights

- Does NOT impose parliament duty to provide a hearing BEFORE the enactment of a legislation, its protections are operative only in the application of law to individual circumstances in a processing before a court, tribunal, or similar body.

Holding: Bill of Rights does not grant procedural rights in the process of legislative enactment. They do confer certain rights to notice and an opportunity to make submissions in the adjudication of individual rights and obligations, but no such rights are at issue in this appeal.

Cabinet and Cabinet Appeals

**If a question every says that a Cabinet is the decision-maker use the following case to justify it!!!

Inuit Tapirisat

Facts:

- Government(CRTC) has ability to regulate utility rates of Telecommunication networks.
- Bell asked for a rate increase, but the Inuit intervened and said the Government should only accept the rate increase if Bell agreed to provide better service for remoter Northern communities.
- This was declined, and the Innuit is now appealing to the Cabinet.
- The CRTC and Bell both made submissions to the Cabinet, and the Inuit were given no materials except the submission made by Bell.
- Cabinet minister made the decision to dismiss the Appeal.
- Inuit made a motion to the Federal Court for a declaration that a hearing should have been given and that the principles of fundamental justice were not met.

Issue: Is procedural fairness required in Cabinet Appeal? **NO**
Analysis:

- No fairness required in Cabinet appeal of CRTC ratemaking decision
- Many parties affected by decisions which was political in nature
- Note that parties and intervenors DID have rights to fair procedure before CRTC

Holding: Cabinet Appeals should be classified as policy-making decisions that do not attract the duty of procedural fairness.

- Note: subsequently Cabinet did decide to create some procedural safeguards when addressing appeals from CRTC decisions, but there are self-imposed requirements rather than ones imposed by the courts using common law procedural fairness
- Note: Cabinet decisions that are "administrative and specific" CAN attract a fairness obligation, though they will normally be satisfied via written submissions

Regulation, By-laws, and Rulemaking (*Canadian Doctors for Refugee Care*)

- When cabinet or an administrative agency is enacting a regulation or rule of general application, the decision is treated as a legislative act that does not attract a duty of fairness
- Governments can create their own "notice and comment" procedures for rulemaking but they have no common law obligations to do so
- Same principle applied to municipal councils:
  - Where a municipal council is addressing a specific property, even if it does so by way of a by-law, that does attract procedural fairness requirements (*Homex Realty*)

Policy Making (*Regulated Importers, Vanderkloet*)

- Decisions of general application do not ordinarily attract fairness obligations

Examples:
School Board Decisions:

- *Vanderkloet*: A board acting in good faith within its statutory authority has complete power over relocation of students and is not affecting the legal rights of any person. Principles of procedural fairness are not applicable to the board. Decision concerning reallocation of students does NOT attract fairness doctrine- consultation guidelines inapplicable.
- *Bezair*: decision to close schools DOES attract fairness doctrine due to procedural guidelines for consultation as school closures have a bigger impact on individuals.

Differences:
The fairness doctrine did not apply in *Vanderkloet* because it dealt with policy matters concerning the assignment of students to schools and the school board had no policy requiring consultation in respect of such decisions, whereas fairness did apply in *Bezaire* because it dealt with school closures and the board had a policy requiring consultation before doing so.
Import:
Canadian Association of Regulated Importers
Facts:

- Canadian Association challenged a ministerial decision that had changed the quota distribution system for the importation of hatching eggs and chicks.
- This change significantly affected historical importers, who are claiming they had not been consulted.

Issue: Does the Ministerial have the duty of procedural fairness? What level is required?
Analysis:

- Generally, principles of natural justice are not applicable to the setting of a quota policy, although they may be individual decisions respecting grants of quotas.
- Some individuals may be hurt by the quota, but others will gain from it.
- The setting of a quota is essentially legislative/policy matter, with which courts do not normally interfere.
- It might have been considerate for the Minister to give notice and opportunity to be heard, but it was not required to do so.
- No legislative provision here that says duty to consult is required.

Holding: overturning FCTD, FCA finds that Ministerial decision imposing quota does NOT attract fairness doctrine.

- This is a policy-making decision that does not attract procedural fairness obligations.
- Only exception would be if there was a legitimate expectation of consultation that was either promised or was a "clear, unambiguous, and unqualified" past practice as required by *Mavi* and *Agraria*.

Individualized Discretionary Decision-Making

- Although SCC in *Knight* refers to the impact on a person's rights it is now generally accepted that fairness can apply if a decision affects a person's "rights, privileges, or interests" (*Cardinal*; *Baker*)
- Historically, Courts have held that some kinds of benefits are sufficiently discretionary that they did not qualify as interest deserving of fairness
  - Example is of the *Canadian Arab Federation*: NO fairness requirement in a decision to extend contribution agreement, even though reputation was an issue
- There is a growing tendency to treat highly discretionary decisions as ones that affect "interests" that are more likely to be treated as ones that affect interests and deserving of fairness protection
  - Example is *Everrette*: fairness IS required in discretionary decision not to renew fishing license where basis of non-renewal was allegations of serious violations of conversation rules.
- Not all interests are sufficient
  - Non-extension of funding agreement (*Canadian Arab Federation*)

Decisions that do not have a sufficient impact on an affected person's rights

- *Cardinal* spoke of the duty of procedural fairness applying whenever rights, privileges, or interests were at stake.
- Examples of fairness applying:
  - Removal of access to low-income housing attracted fairness doctrine but fairness was satisfied in this case (*Webb*)

    Re Webb

    Facts:

    - Housing corporation recommended termination of Webb's lease due to problems caused by her children.
    - This was approved by Board of Directors.

    Issue: Did they owe Webbe a duty of fairess at common law? If so, what was the threshold?

    Analysis:

        - If no notice is given toa person who, as a result of an investigation by a public corporation in carrying out a public obligation, is in danger of losing an important benefit, and no opportunity is affordered to answer the case against him, such a procedure is fair.
        - As long as person adversely affected is advised of the case against them and is permitted to give an answer, that is sufficient.
        - Notice were sent out to Webb, giving her warning to change the behaviour or else face eviction.

    Holding: Webbe was treated fairly. She was owed fairness and got that. They have her opportunity to remedy or respond to complaints against her and she chose not to answer.

        - Although the distinction between applications for discretionary benefits and removal of existing discretionary benefits may affect the content of the procedural benefits available, it does not affect it's ability for procedural fairness to apply.

    - Application for humanitarian and compassionate relief from deportation (*Baker*)
    - Application for security clearance needed for job attracted fairness but fairness did not require the opportunity to supplement information submitted by applicant on application form (*Kahin*)
        - *Webb* and *Kahin* illustrate extent to which fairness claims can be defeated at the content stage eve if fairness applies
        - Reminder that *Baker* and *Kahin* and *Webb* demonstrate that fairness can apply to application for benefits as well as decisions discontinuing benefits.

Inspections and Recommendations (decisions of a "preliminary nature" or non-dispositive decisions (non-disposiitve means not final))

Up until the 1970's neither of these functions were judicial and therefore, no hearings were required. *Nicholson* changed this, and it was first used in the recommendation case of *Abel*.

"A decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have such an effect…" (*Knight*)

- The above quote is a GENERAL principle, and there are SIGNIFICANT EXCEPTIONS
- Procedural fairness protections are OFTEN available in respect of non-dispositive decisions such as investigations and recommendations in multi-stage proceedings, depending on the nature of the proceeding and the impact on the person affected, but the content of these procedural protections at this stage is likely more limited than in respect of final decisions.

Why exclude preliminary decisions from the requirements of fairness?

- Effective investigation may be inconsistent with open information exchange where you don't want to create a situation where someone is trying to deceive an investigator is acquiring advantages because of an open-exchange of information.
    - It may be helpful or even necessary to hold some information of an investigation back while it is occurring.
- Fairness at a recommendation stage may require duplication of effort. So, we do not want to create a process for processes sake. We want process that helps us get better decision in which people that are affected by the decision have a fair

opportunity to have input into the decision, but not an opportunity to work the system or abuse the processes.

What makes an exception to the general rule?

- Some "investigative" processes are run in a very formal way
  - *Krever* inquiry into blood
- Some "recommendations" have serious consequences and it is desirable to avoid errors. If we can avoid serious consequences at the recommendations stage without overbearing or duplicating the practice.

Abel

- "recommendation" to Lieutenant Governor in Council re: release of persons detained as "criminally insane" REQUIRES procedural fairness

Facts:

- Advisory board was created by an order in council under the *Mental Health Act* whose main function was to review patients confined in psychiatric institutions after being charge with criminal offences and being found not guilty "by reason of insanity"
- The board made reports about each patient and recommendations for their release.
- Lawyers for some patients would request disclosure, including the reports, but these requests were refused.

Issue: Do these recommendations require procedural fairness? YES

Analysis:

- Governor does not have to act on recommendations of report, but it is unlikely they will ever not follow them
- This is the only chance that the applicants have of avoiding a lifetime of incarceration, so this decision heavily affects their rights.

Holding: Not providing the reports goes against the procedural protection of fairness. This recommendation, although not dispositive, would have a significant impact on the likelihood of his release and procedural fairness is required.

Dairy Producer's Co-op

- Officer investigating of human rights complaint and reporting whether or not probable cause of a violation existed did NOT owe a duty of procedural fairness to the respondent or the complainant.
- When premature disclosure of information to a suspect may compromise the effectiveness of the investigation, fariness protections are NOT ALWAYS guaranteed.
- Decisions subsequent to this case though have come to different conclusions
  - Bodies engaged in an investigation that could lead to referral to a hearing must conduct a fair and impartial investigation.

Re Teachers' Federation Act and Munro

- Executive Committee's recommendation to Minister concerning sanction to be given to teacher being disciplined DOES attract procedural fairness

Masters v Ontario

- Recommendation to Premier re: dismissal of provincial agent general because of allegations of sexual harassment DOES attract fairness requirement.

How can these cases be reconciled?

1. Investigative situations where investigative secrecy is important typically do NOT attract fairness obligations
2. Some recommendations have the practical effect of final decisions so fairness is required (*Abel, Masters, Munro*)
3. Some multi-stage proceedings are deliberately designed to have more than one layer of formal hearings (*Krever Inquiry)*
4. Many multi-stage proceedings are deliberately designed with informal preliminary stages (*Dairy Producers' Co-Op*)
5. Informal nature of investigative stage not likely to go to CONTENT of fairness obligations rather than existence of fairness obligation (*Tharmourpour, Hughes*)
6. Courts will often differentiate the CONTENT of procedural fairness at different stages of multi-stage proceedings rather than EXCLUDE the application of fairness at preliminary stages (*Tharmourpour, Hughes*)

Emergencies

- Procedural Fairness does not apply before action is taken
- In emergency situations, it may be necessary to act before notifying and hearing from an affected person

  Examples:
  - Interim stoppage of mail that is suspected of being used for criminal purpose (*Randolph*)
  - Initial placement in administrative segregation in prison due to threat of violence (*Cardinal*)
- Often in these situations an "after-the-fact" hearing is required.

Legitimate Expectations

- The term "legitimate expectation" is used in case law in two ways:
  1. Legitimate expectations can help shape the content of procedural protection offered by the fairness doctrine (*Baker* factor 4)
  2. Legitimate expectations can give rise to PROCEDURAL obligations o the part of decision-makers in circumstances in which such obligations would not otherwise be imposed.
- In some jurisdictions (but NOT CANADA) legitimate expectation include substantive promises that will be enforced by courts.
- A legitimate expectation can be based on either a primes or a pattern of past practice (*Agaira*)
- There is no need to show determinantal reliance (*Mavi*)
  - *Mavi*- statement that the government will not collect money that is owed by sponsors if the default happened because they were abused or other relevant circumstances.

- If the expectation is based on an expected substantive result, all that the law will require is that far procedure is followed in making the decision (*Mavi*)
  - Example being the effected person having a right to be consulted (*Mavi*)
- To form the basis of a "legitimate expectation" the promise or practice must be "clear, unambiguous, and unqualified" (*Mavi; Agraira*)
- The promise or practice must be within the authority of the person making the promise or undertaking the practice, and must not be inconsistent with the decision-maker's statutory duty (*Mavi*)
  - If a public minister says a different minister will consult others before making the decision – the other minister is not bound to do that.
- Substantial compliance with a promise procedure may be sufficient (*North End Community Health Association*)

In Canadian law, legitimate expectations…

- May help to shape the procedures that the fairness doctrine requires administrators to use in making decisions
- Can be created by either a promise or past practice, and the expectation can be either that a particular procedure will be followed or that a substantive decision be taken,
- Can only be created if a past practice or promise is clear unambiguous, and unqualified.

Canadian Assistance Plan Reference

- Promise not to introduce legislation changing *Canada Assistance Plan* without provincial agreement is a SUBSTANTIVE promise that will NOT be enforced by court using "legitimate expectations" doctrine
- Even a procedural promise (ie. consultation before change) would not be enforced.
- Courts are very reluctant to interfere with primary legislative processes (*Mikisew Cree First Nation v Canada*)

Mount Sinai

- Refusal of Minister to grant new hospital operating licence was procedurally unfair
- Unlike UK and Australia law, Canadian law does NOT recognize "substantive legitimate expectations" doctrine
- Legitimate expectations doctrine is an aspect of procedural fairness not estoppel, and it is NOT necessary to show detrimental reliance on the promise of consultation.

Canada v Mavi

- Sponsors of permanent residents who made undertakings to reimburse government for costs of social assistance argue that attempts by government to collect were unfair
- SCC held government undertakings that debt could be cancelled if default results from abuse or "in other appropriate circumstances" gave legitimate expectation that sponsors would have an opportunity to address circumstances before debt was collected.
- SCC held claim for relief failed because ON govt procedures satisfied this obligation

Agraira v Canada (Public Safety and Emergency Preparedness)

- Applicant who was ruled inadmissible to Canada on national security grounds argued that immigration guidelines created a legitimate expectation that processes for determining eligibility would be followed

- SCC agreed that guidelines DO create a legitimate expectation that process would be followed
- Nevertheless, claim failed because guideline process was followed in making the determination of inadmissibility

Constitutional and Quasi-Constitutional Thresholds and General Procedural Statutes

Procedural Fairness Model:

- Model of fair procedure is the "trial-type hearing"
- This model has two-broad elements:
  1. The right to a hearing; and
  2. The right to an impartial decision-maker
- The trial-type hearing model s applied flexibly, depending on a variety of factors.
- The 5-part *Baker* analysis is used more in marginal cases; usually a siutaion where the question is one that doesn't really require one to go through all five factors because one will perhaps just dominate.

Types of Issues Raised by Trial-type Hearings:

1. Pre-Hearing Issues such as…
   - Notice
   - Discovery
   - Delay
2. Hearing issues such as…
   - Oral hearing
   - Open hearings
   - Right to counsel
   - Disclosure
   - Official Notice
   - Admissibility of Evidence
   - Cross-examination
3. Post-hearing issues…
   - Reasons

The Role of the Constitution in Mandating Fair Administrative Procedure

- The common law creates a broadly applicable regime of fair administrative procedure
- Person seeking procedural protections that go beyond those mandated by the common law may find it useful to have recourse to the Constitution (or quasi-constitutional statutes) in two situations:
  1. The statutory scheme in question is inconsistent with the procedural protection being sought (*Singh*); or
     - Statutes take precedent over the common law, so if there is a statute restriction on a statute procedure that otherwise might be commonly available under the common law, then it may be useful to consider whether the Constitution or quasi-constitutional statutes can override this.
  2. The common law does not require the type of procedural protection being sought (*Blanceo*)

- These situation are relatively rare, and most persons affected b administrative decisions receive adequate procedural protection through the common law/

Overview of the Applicability of the *Charter* and *Bill of Rights*

- The Charter and Bill of Rights are NOT universal in their application.
- The Charter applies generally to federal and provincial legislation and delegated legislation and to the decision of federal and provincial governmental organized.
  - Not all organizations that have a statutory basis are considered governmental organizations for purposes of *Charter* applicability. For example: hospitals, corporations, and universities.
- The Canadian Bill of Rights only applies to federal law and adminsrttaive action.

Section 7 of the Charter	Section 2(e) of the Canadian Bill of Rights
Protects rights to life, liberty, and security of person	Protects rights to a fair hearing in respect of rights and obligations
NOT property rights	CAN include rights to property, liberty, and personal security.
Applies to federal and provincial statutes, and administrative action	Only applies to federal statute and administrative action
Both procedural and substantive protection	Only procedural protection
In *Singh*, protects rights of Convention refugee to a fair hearing since it engages personal security.	In *Singh*, protects rights of Convention refugee to a fair hearing.

Section 7- *Canadian 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"

- "life, liberty and security of the person" is construed narrowly.
  - Does NOT include property rights or right to pursue a profession or employment (*Sieman*)
- Deprivations are permitted as long as they are "in accordance with the principles of fundamental justice"
  - Principles of fundamental justice have both procedural and substantive content
  - Procedural content is modelled on common law concept of procedural fairness.
  - Like procedural fairness, principles of fundamental justice are flexible and sensitive to context (*Suresh*)
- In principle, violations of s, 7 are subject to a reasonable limit that is demonstrably justified under s 1 using the *Oakes* test (*Charkaouri; Suresh*…even though it was rejected in both cases, it was considered)
- In practice, it is very difficult to justify s. 7 using s. 1, and sensitivity to context tends to be built in at the principles of fundamental justice stage rather than the section 1 stage (*Singh*)
- Because the procedural content of s 7 is essentially the same as procedural fairness, most of the time you will not need to engage the Charter to make an argument about fair procedure. Whether the Charter does or does not apply, you can still make an argument under common law. Where it is relevant is in instances where common law

fair procedure has been excluded, such as explicitly in statute (because statute trumps common law)

Section 2(e) of the *Canadian Bill of Rights*

"…no law of Canada shall be construed or applied so as to… (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations…"

- Unlike s 7 of the Charter, s 2 only conferred procedural rights… specifically the right to a fair hearing
- Hearing rights available in respect of "determination of… rights and obligations"
- Broader than section 7 "liberty and security of the person) as s 2(e) includes property rights, but does not encompass privileges
  - However, on the other hand s. 7 covers discretionary benefits, but s 2(e) does not.

Singh v Minister of Employment and Immigration

Facts:

- Refugee claimants who landed in Canada
- The minister, acting on the advice of the Refugee Status Advisory Committee, determined they were not refugees.

Issue: Does this statutory scheme infringe on section 7 or section 2(e)? YES.

Analysis:

6 Justices had a unanimous decision with split reasoning.

- All justices agree that The *Immigration Act* is deficient in failing to provide Convention refugee claimants with in-person hearings for determination of claims

3 Justices based on **Section 7 of the Charter**

- Security of the person under s 7 encompasses freedom from threat of punishment potentially suffered by refugee claimants
- Principles of fundamental justice are flexible and may not require an oral hearing in every case
- Where serious issues of credibility are involved, an oral hearing is required.
- Legislation is not consistent with s. 7 and needs to be rewritten,
- Minister has not shown that compliance costs are so prohibitive that they create a justification under s 1

3 Justices based on **Section 2(e) of the Bill of Rights**

- The *Immigration Act* confers "rights" on refugee claimants and therefore, s 2(e) is engaged.
- The content of the right to a fair hearing is similar to the above reasoning concerning the procedural content of the principles of fundamental justice
- An oral hearing is not required in every instance where s 2(e) applies, but where life or liberty may depend on findings of fact and credibility, an oral hearing is necessary.

Holding: No oral hearing required.

Charkaoui v Canada

- SCC uphold section 7 challenge to regime for removing convention refugees on national security grounds
- Procedures limit the access of both the person being removed on national security grounds and the reviewing judge to information sensitive to national security

- While national security may justify limits on providing access to national security information to person being removed, limiting reviewing judge's access to relevant information is not justified

Holding: Regime does not meet section 7 standards, and fails to be justified under s 1 as it does not meet the minimal impairment standard.

Suresh v Canada (Minister of Citizenship and Immigration)

- SCC finds regime for deportation on national security grounds of persons potentially facing torture do not meet s. 7 standards
- Court applies 5-factor *Baker* synthesis to determine level of procedural protection required by the principles of fundamental justice in section 7

Holding: Court does NOT find that an oral hearing is required but the limits on disclosure of relevant information and the limits on the ability of the person concerned to respond to relevant information offend s. 7 requirements. Section 1 justification has not been met.

Blencoe v BC (Human Rights Commission)

- SCC majority holds that respondent to human rights complainant was not entitled to claim the protection of s 7 in order to have the complaint quashed for undue delay
- Majority concludes that s 7 can be invoked in relation to adminsrttaive proceedings provided the proceedings involve a deprivation of either "liberty" or "security of the person
    - Liberty includes the right to make fundamental life choices free from state interference
        - Human rights complaint did not prevent Blanceo from fundamental life choices
        - Right to pursuit of employment is not a fundamental life choice
    - Security includes state interference with bodily integrity and serious state-imposed psychological stress
        - Being a respondent in a human rights complaint affected Blencoe's reputation and his position as a politician, but that did not amount to an undermining of his dignity or interfering with his psychological integrity

Other claims to section 7 protection in administrative settings:

- Section 7 does NOT protect purely economic interests or the pursit of an individual's preferred form of employment, such as the ability to operate VLTS (*Siemens*)
- SCC had not to date recognized that social assistance regimes engage interests protection by s 7 of the Charter (*Gosselin*)
- SCC has recognized that child apprehension proceeding engage "security" within s 7 (*G(J)*)

Why such a restrictive approach to section 7?

- Canadian courts are reluctant to use section 7 to attempt to assess social and economic regulation against a vague fundamental justice standard
- This is particularly true because "fundamental justice" in Canada has both substantive and procedural content
- Broad application of common law rules of procedural fairness and general willingness of legislatures to accept judicial approaches to fair procedure undercuts the need to

expand the scope of s 7 in order to ensure the existence of adequate procedural safeguards for persons affected by adminsrttaive decision-making

General Procedural Statutes

- Somewhat unusual in Canada

  The four that exist are:

  1. Alberta *Administrative Procedures and Jurisdiction*
     - Applies very narrowly; only to Procedural obligations currently apply to only four provincial tribunals designated by regulations
     - Creates procedural obligations that are fairly general
     - Mainly clarifies procedures that would be required by common law, although create a statutory obligation to provide written reasons for decisions that did not exist at common law prior to *Baker*
     - Tribunal jurisdiction aspect of *APJA* does NOT confer powers; instead it limits tribunal jurisdiction over certain issues
  2. Ontario *Statutory Powers Procedure Act*
     - Applies to provincial bodies exercising a "statutory power of decision"
     - Mainly creates procedural powers but some procedural obligations
     - Procedural obligations are generally expressed reasonably broadly; room for greater specificity through tribunal rules
     - Mainly clarifies procedural obligations that would be required by common law
     - Addresses only procedures; other issues addressed by *Adjudicative Tribunals Accountability, Governance, and Appointment Act*
  3. Quebec *Act Respecting Administrative Justice*
     - Applies to Administrative Tribunal of Quebec and to provincial administration making decisions in respect of a citizen
     - Creates both procedural obligations and powers
     - Procedural obligations for ATQ are reasonably specific, for other decision-makers obligations are expressed reasonably broadly
     - Follows general common law approach to procedural obligations but more specifically in respect of ATQ
  4. British Columbia *Administrative Tribunals Act*
     - Applies to provincial tribunals to the extent designated by tribunal's enabling legislation (most BC tribunals are designated)
     - Mainly creates procedural powers, but some procedural obligations
     - Procedural obligations are mainly clarifications of common law requirements
     - Addresses tribunal appointments, governance, jurisdiction, and judicial review

	AB	**ON**	**QB**	**BC**
Create procedural obligations AND powers?	No. Only obligations	Yes	Yes	Yes
Only apply to tribunals	Yes	No. Apply to governmental decision-makers	No. Same as ON.	Yes

specifically identified?		making certain types of decisions as well.		

The Content of Hearing Rights

Types of issues raised by trial-type hearings:

Pre-Hearing Issues

Issues concerning notice, discovery, and delay, are all procedural issues that will typically arise as a result of an adminsrttaive action or inaction that has taken place prior to the commencement of a hearing.

Notice

- The right to notice is the right to be notified n advance of the time, place, and subject matter of whatever hearing is going to take place
- Necessary for anyone entitled to a hearing simply because without it other procedural rights cannot be exercised effectively.
- Can be written or oral.
- This right allows for sufficient time to prepare
- Four main issues involving notice:
  1. Form of Notice
  - Absent other contextual factors (such as statutory rules concerning the form of notice or the possibility that the hearing involves a large group of individuals) may allow for flexibility to occur,
  - Typically courts will insist on written notice delivered to the affected individual if only concerning a specific individual.
  - Some types of decisions require flexibility, especially where the proceeding involves a large group of individuals (*Re Hardy and Minister of Education*)
    - In these situations, newspaper advertising will normally be sufficient, though use of government websites or twitter feeds may be sufficient nowadays as well.
      - In *Hardy*, it would be unreasonably to suggest that every resident in a school district must be personally apprised of the intention to close a school.
      - In the *Krever Commission*, 1000 Canadians were infected with HIV and 12,000 infected with Hepaitits C from Canadian blood. Commissioner waited until last day of hearing to give notices to all those suffering against claims of misconduct. This was found not to be unfair because it was impossible to give adequate notice without having heard all evidence first and parties were given a reasonably time period to respond
  2. Manner of Delivery
  - There is no general requirement that notice be served in the same manner as documents instituting court proceedings.

- Service by mail or email is usually adequate
- If it is possible to do so while still respecting the relevant statutory language, courts will often strain to prevent unreliability of mail delivery from affecting the ability to individuals exercising their hearing rights (*Re Winnipeg* and *Torchinsky*)
- Government agencies are entitled to rely on mailing addresses provided by the parties, and parties are responsible for notifying the agency of a change of address (*Wilks v Canada*)
    - *Wilks*:
        - W not only gave a mailing address but also a cellphone number and he moved prior to the immigration hearing and did not receive the notice until after the fact
        - His counsel argued that the immigration officials also had his phone number, so they should have called him
        - The Court said it was up to Wilks to notify the agency of his change of address, it is not up to the agency to use alternative means to follow up. (they can but are not expected to do so)

3. Timing of Notice

- Must be sufficient time for preparation but fairness is sensitive to context (*Krever Commission*)
    - *Re Krever Commission*:
        - Notices of potential findings of misconduct is used after most the witnesses had testified were adequate in light of ability of those notified to present additional evidence
        - "In light of the nature and purposes of this inquiry, it was impossible to give adequate detail in notices before all the evidence had been heard. In the context of this inquiry the timing of the notices was not unfair."
- Adequacy of timing may depend on the nature of the proceeding
- An agency must follow its own rules, but may cure deficiencies by offering adjournments
    - *Zeliony v Red River College*
    - Z was a student attending a hearing in to whether or not she should be suspended from her academic program.
    - Colleges hearing rules said they would give 2 days notice of who witnesses are going to be, but then they did not do so.
    - Lawyer for Z objected and the panels aid they could give an adjournment to prepare.
    - The date of adjournment did not work for Z, so she gave up her right to sufficient time, and went ahead with the witnesses on that day.
    - **If the administrative bodies offers an affected party who has not received timely notice an opportunity for an adjournment and it is refused, that may constitute a waive of the notice required, at least if there is no substantial prejudice to the affected party.**

4. Content of Notice

- Notice must include sufficient information to know what the hearing is about but it does not have to include a full statement of the case to be met or the potential consequences of the hearing.
- Where notice is given to the public regulatory proceedings, it is important for the information to be accurate and informative.
- Notice must not be misleading or inaccurate
    - Including some potential consequences, but not the most severe is misleading.
    - Adding allegations at a hearing can increase severity of consequences and is misleading
    - *Mayan*: **Notice needs to clarify what is at stake/potential consequences, and specifically clarify what is being said (business vs legal advice)**
        - A chuckwagon racer and he was alleged to have had some complaints against him.
        - Complaints were not specified and he was lead to believe it was a minor issue, so he did not attend the hearing.
        - M ended up getting a one-year suspension
        - Notice was found to be inadequate, mainly on the basis that the racer was insufficiently notified of the seriousness of the complaint. He would have prepared better if he knew.
        - Saying "face serious professional consequences" is not misleading.

      What are consequences of failure to attend a hearing?
        - If proper notice is given, a decision-maker can normally render a valid cession in the absence of a person who does not attend
        - A decision taken when a party I not in attendance may be overturned by a court if the notice given is defective
        - Consider the advantages and disadvantages of refusing to attend
        - If adequate notice is an issue, possible strategies are to ask for particulars or seek an adjournment.
    - *Central Ontario Coalition and Ontario Hydro*: **Notice cannot mislead or be inaccurate.**
        - An application with respect to a new hydro law, and the application just said somewhere in "southwestern Ontario"
        - However, one of the sites being considered was actually in Eastern ON.
        - Court said that you do not have to know exactly where, but cannot mislead people as they would not worry since the Eastern location was not even proposed.

Discovery

- The right of a party to a proceeding to obtain information that is in the hands of an adversary

Discovery	Disclosure

Right to access information relevant to a hearing that is in the hands of the opposing side or third party	Right to access information that the decision-maker may make use of in rendering a decision.

- When receiving stuff from a prosecutor it is discovery.
- Administrative bodies do not have an inherent authority to order a discovery (*CP Airlines*)
- The authority of a tribunal to order discovery is typically contained in (and limited by) their enabling legislation (*CP Airlines*)
  - *CP Airlines*:
    - Court rules that the CLRB's power to compel testimony by witnesses and compel production of documents at a hearing did not give it the authority to order the employer to provide pre-hearing discovery to the union.
- Nowadays it is common for general procedural statutes to empower tribunals to make rules concerning pre-hearing discovery
- Courts have sometimes taken an expansive view of older versions of these statutes to require government agencies to provide pre-hearing discovery of material that may be relevant to an adversary party (*Ontario v Ontario)*
  - *Ontario (Human Rights Commission) v Ontario (Board of Inquiry into the Northwestern General Hospital)*: Complaint of racism made by 10 nurses against the hospital. Board considered what degree of dcslsoure was required to meet duty of fairness in this case.
- Courts have generally been reluctant to extend the *Stinchcombe* principle into the administrative law arena
  - *Stinchcombe* principle: accused's right of access in criminal proceedings to any information in the Crown's possession that might be useful
- Generally it is sufficient if information that is relevant to the party's ability to make out their case is made available (*May v Ferndale* and *Skriskandarajah v US*)
- Even where some measure of discovery is available in principle, there may be reasons for limiting its scope. Includes:
  - Protection of privileged documents (*Pritchard v ON*)
  - Protection of privacy where the material sought was of doubtful relevance (*ON v Dofasco*)
  - Preventing unnecessary dissemination of commercially sensitive information (*Qjikqtaaluk Corp v Nunavut*)
- When discovery is provided, it may not entail the type of extra-hearing questioning of witnesses familiar from civil procedure, and may be restricted to discovery of relevant documents (*Clifford v Ontario*)
  - *Clifford v Ontario (AG)*: deciding who was entitled to Clifford's death benefits. Application for judicial review, organizing tribunal breached procedural fairness by failing to order full oral discovery of witness under oath before the hearing. The absence of particular documents that counsel speculates must exist, does not make the hearing process itself unfair.
    - Under *Clifford*, making witnesses available for pre-hearing questionings is not a common law obligation of discovery.

Delay

- Undue delay, either under common law or s 7 when applicable (*Blecnoe*→ SCC held s 7 was not applicable, so B was limited to recourse under common law), may be the basis for judicial relief
  - Section 7 standard for delay in criminal proceedings is more strict than the common law standard
    - *R v Jordan* in *Abrametz* → refers to effort on part of the parties to import the principles of delay in criminal cases in *Jordan* into the adminsrttaive law arena, and SCC says that is not appropriate because *Jordan* was a different setting than *Abrametz*
- At common law, two questions need to be consider in respect to delay:

1. Was the delay undue, and
   - The *Blencoe* majority:
     - At common law courts could intervene in administrative proceedings as a result od undue delay in 2 circumstances:
       - I) Undue delay prejudices a party's ability to be given a fair hearing; and
         - Must be substantial and caused by the delay
       - II) Undue delay amounts to an abuse of process
         - To constitute this, delay must be unacceptable to the point of being so oppressive as to taint the proceedings
     - Here, SCC concludes respondent's ability to mount a fair defence was NOT substantially prejudiced.
     - 24-month delay was long and B did suffer a hardship, case was handled like others before the Commission and there was only a 5-month period of complete inactivity on the case.
     - No abuse of process here.
   - The *Blencoe* minority:
     - Applied a 3-factor test to determine if delay was undue:
       - I) The length of the delay (in light of inherent time requirements)
       - II) The causes of the delay
       - III) The impact of the delay
     - These factors are traditionally used in s11(b) criminal delay cases prior to *Jordan* in 2016
     - Differ from majority because impact of delay is only a factor here where it is the key issue in the majority's decision.
2. If so, what is the appropriate remedy?
   - In some instances the appropriate remedy will be to quash a proceeding and not allow it to go ahead
   - In *Blencoe*, the minority found undue delay but refused to quash the proceeding because of the impact of the human rights complainants who were not responsible for the delay, and found the appropriate remedy was an expediated hearing and for the Commission to play Blencoe's legal costs.

- Where abuse of process is found, there will only be a stay of proceedings if going forward with the proceedings creates more harm to the public interest than if the proceedings were halted.
- Other possibilities:
  - Expedite hearing through Board application or mandamus (*Abrametz* suggestion)
  - Order and expedited hearing and award costs (*Blencoe* minority)
  - Order reduction in penalty (*Abrametz* suggestion)
- Choice of remedy will be influenced by nature of proceedings and impact on other parties

Law Society of SK v Ambrametz (goal to reconcile approaches used in *Blencoe*)

Facts:

- A professional discipline case in which the SKCA had found that the law society's delay constituted an abuse in process and therefore, ordered the penalty against him be quashed.
- The SCC overturned this.

Issue: Was the delay undue? **NO**

Analysis:

- No significant prejudice to A, so if he was to succeed it had to be on abuse of process branch
- *Blencoe* majority sets a high threshold for abuse of process where remedy sought is a stay, and minority uses a lower threshold for lesser remedies.
- Rejects effort to "Jordanize" common law principles or delay amounting to an abuse of process
- Court develops a 3-part test for determining whether delay is an abuse of process:
  - I) Is delay inordinate in light of overall context, based on
    - a. Nature and purpose of proceedings,
    - b. Length and causes od delay; and
    - c. Complexity of facts and issues in case?
  - II) Has the delay itself caused significant prejudice?
  - III) If the first two elements have been met, courts should make a final assessment of whether proceeding is manifestly unfair to a party or otherwise brings the administration of justice into disrepute.
- Where abuse of process is found there will only be a stay of proceedings if going forward with the proceedings creates more harm to the public interest than if the proceedings were halted.
- If a stay is not appropriate, other remedies can be used where an abuse of process is found.
- Majority concludes that delay, although long, was not inordinate . and there was no significant prejudice to A, and no abuse of process.
- Cote J dissented and would have dismissed the appeal on the basis that the disciplinary proceedings took 6 years, more than 2 years of which was unexplained and this is inherently undue delay

Hearing Issues

Oral Hearings

- To have a face-to-face encounter with a decision-maker
- Rules of procedural fairness do not create a presumption hat there will be oral hearings in all adminsrttaive proceedings, especially ones at the more informal end of the fairness spectrum.
- Prior to *Nicholson*, there was a presumption that hearings to which the rules of natural justice applied would be oral hearings or in-person hearings (in other words, a quasi-judicial hearing was one that limited a trial where parties would present in front of an adjudicator)
  - Traditional presumption that quasi-judicial hearings will be in person, but tribunals are increasingly give flexibility to sue paper hearings where appropriate
  - Courts will sometimes require oral hearings for assessment of credibility of witnesses (*Khan, Singh*)
  - Absent constitutional considerations, nature of proceedings may displace requirement for an oral hearing (*Masters*)
- Statutes may expressly require oral hearings or expressly preclude them
- With the development of the fairness doctrine the presumption of an oral hearing was displaced
- In *Komo Construction Inc c Commission des Relations de Travail du Quebec*, It is important to note that hearing form the other side does not always imply an oral hearing.
- Courts will sometimes require an oral hearing where the credibility of the facts is a key element in the case (preference for in person assessment of the credibility of witnesses)
  - *Khan*
    - A grade appeal at the University of Ottawa law school
    - Normally disciplinary hearing would be oral, but this was a grade appeal which was typically handled by written submissions
    - K maintained she had written 4 exam booklets, but only 3 had been graded
    - **This means the case rests on K's credibility, therefore, requiring an oral hearing.**
    - An oral hearing should be granted where credibility is at issue and the consequences to the interest at stake are grave.
- The nature of a hearing may displace the requirement for an oral hearing.
  - *Masters*
    - An investigation and the oral hearing including the testimony of witnesses saying M engaged in sexual harassment was not appropriate because it was not a formal adjudication, just an investigation and recommendation to the Premier.

Facts:

- M was accused of sexually harassing 7 women
- After hearing response from M, Premier decision M should no longer be Agent General and reassigned.
- M instead took a financial resignation.

Issue: Was M entitled to an oral hearing? **NO. He was aware of all material allegations and was provided an adequate opportunity to be heard.**
Analysis:

- Where the nature of a decision is discretionary, such as the use of prerogative power, less procedural fairness will be afforded.
- When a decision maker is fulfilling an investigative mandate rather than a determinative one, the affected party will be awarded less procedural protection.

Open Hearings

- At common law, decision-makers had a discretion whether or not to hold hearings that are open to the public
- Some legislation requires open hearing, subject to limited exceptions
- Courts have used *Charter* guarantees under s 2b of freedom of the press to create a rebuttable presumption that quasi-judicial hearings will be open to the public (*Pacific Press*)
    - This presumption can be rebutted (for security or privacy reasons) but will not be easily rebutted (*Ontario Police Force v Lalande)*
- At common law, there was no obligation on the part of the adminsrttaive tribunal to open their hearings to the public; this was left to the discretion of the tribunal (*Millward*)
    - This presumption can be alter by statute (ex. S 9 of Ontario's *SPPA* and s 41 of the BC *ATA*)

Right to Counsel

- At common law, the right to counsel is the right to be represented, NOT a right to publicly funded legal representation.
    - **The common law right to counsel does not include a right to have legal representation paid for by the government. Section 7 of the *Charter* can create a governmental obligation to pay for legal representation in appropriate cases, but section 7 does not apply to residential tenancy hearings.**
- Section 7 of the *Charter* can form basis for right to publicly funded legal representation
    - In these cases…
        - Section 7 must apply as there is a deprivation of life, liberty, or security of the person
        - The right is qualified by seriousness and complexity of the proceedings relative to the capacity of the person affected (*G(J) v New Brunswick*)
- Public funding for legal representation is available to individuals with low incomes through legal aid schemes, but many of these schemes do not cover adminsrttaive proceedings

New Brunswick v G(J)

- The Court held that s 7 of the Charter could, in some circumstances, create a right to PUBLICLY FUNDED legal representation
    - In the absence of legal aid support, an individual's right to publicly funded legal representation is confined to situations where s 7 applies. IN this case it was a child apprehension situation which engages liberty and security interests.

            - Note that not every case where section 7 is engaged creates a right to state-support legal representation.
    - Court sad that in determining if state-supported legal representation was required, there are 2/3 considerations (*G(J) v New Burnswick*):
        1. How serious and how complex are the proceedings?
            - If there is a situation where a child is being taken, particularly permanently, the proceeding are highly complex, which militates strongly in favour.
            - On the other hand, if the case involves a financial benefit, it would be the opposite.
        2. What is the capacity of the individual to represent themselves?
            - If a person has diminished mental capacity, or limited education, that is going to militate inf arbour.
            - If the person is well-educated or has lots of financials means, then it is their responsibility to manage the hearing.

Common Law vs Case Law Right to Counsel

Common Law

- Whether or not the administrative decision-maker can deny a party to proceedings(or a witness or somebody else involved) an opportunity to be represented by a lawyer at their own expense.
    - Depending on consequences for witnesses, court may even allow them to be represented by counsel (*Parrish*)
    - Possible reasons adminsrttaive bodies may deny a party an opportunity to be represented by a lawyer:
            - Should be encouraged to take responsibility for addressing problems themselves
            - Some parties may be more able to afford lawyers than others
            - Presence of lawyers adds unnecessarily to the time, expense, and complexity of proceedings.
    - Courts are generally unsympathetic to these arguments.
- Courts a re reluctant to accept the argument that parties may not be legally represented at their own expense
    - Particularly, courts are reluctant to accept justifications that parties should take responsibility for addressing problems they created by themselves (*Howard*)
- Right to counsel is not absolute and context may make acceptance of right to counsel impractical (*Dheghani*)
- Right to adjournment to obtain counsel of choice is not absolute (*Ramadani*)

Case Law

- *Re Men's Clothing Manufacturers Ass'n*
    - Court quashes arbitrator's decision refusing to allow employer to be represented by counsel in a labour arbitration.
            - Neither pf the parties were natural persons, which means they must both be represented by agents so it makes no sense to deny them from hiring lawyers to act as these agents.

    - Arbitrator thought it would be better to have parties represent themselves. Court said this was unfair.
        - Issues were complex, general manager did not feel competent enough to represent, and viability of business was at stake.
    - **As a general rule, any party entitled to be represented by agent in a proceeding cannot have its choice of agent limited unless explicitly done through statute.**
- *Re Parrish*
    - Ship captain who was a witness in a safety board investigation collision is entitled to be represented by counsel.
    - Normally witnesses are not represented by counsel, but there were implications to the captain in terms of what the safety board may find in regard to the collision and the captain's role.
- *Dhegani*
    - No right to counsel at port of entry interview stage of immigration process.
- *Ramadani*
    - Refusal to grant adjournment of immigration hearing because preferred counsel was unavailable was not an abuse of process
    - Even though parties can normally be represented by the lawyer of their choice, in appropriate cases decision-makers have the discretion to refuse an adjournment where the lawyer the party prefers Is unavailable.

Disclosure

- The right of a party to a proceeding to obtain the information that the decision-maker uses in making a decision
- When receiving stuff from an adjudicatory it is disclosure.
- There are circumstances in which an affected person's interest In full disclosure must be balanced against other interests, and sometimes those other interests will prevail.

General Principles

- Full disclosure of the information the administrative body uses in making its decision is generally necessary unless some competing interest prevails
- Generally, the administrative body is restricted to the use of factual information that was introduced at the hearing (*Kane v UBC)*
    - *Kane*
        - A decision of the Board of Governors to sanction an individual who was a faculty member for improper use of the University's computers.
        - There was a subsequential Board of Governor hearing where K was not present, and the President presented additional factual information to the Governors
            - SCC found this tainted the fairness of the decision because there was information the board was privy to that supported their decision that K did not know about
                - K had no opportunity to tell his side or contradict the accuracy of the information
        - Court case that one cannot add evidence to a decision-making process if the affected person did not know about it and thus did not have a chance to fight it

- Courts are reluctant to accept adminsrttaive convenience or the effective operation of the administrative system as a justification for refusal to disclose relevant information (*Napoli*)
  - *Napoli*
    - Involved worker's compensation decision where individuals who were looking for worker's comp wanted access to the full medical records from the doctors working for the WCB who did their assessment.
    - WCB tried to resist by arguing the doctors would be uncomfortable and may become less forthcoming in their assessments
    - Court said this was not a sufficient justification for not giving full access
- Courts are much more likely to accept harm to third parties as a justification for refusal to disclose information
  - When harm to third parties is accepted as a justification for limiting disclosure, courts typically try to find alternative ways of ensuring that information used by decision-makers is reliable.

Special Circumstances

Some reasons Courts will find as acceptable justification for imposing some limits on disclosure:

1. Executive Privilege (*Canada Evidence Act*, ss 37-39)
   - The government can reuse to produce information in a proceeding on the basis that it would be injurious to international relations or national security or that to produce the information would breach Cabinet confidentiality
   - Normally this is a "discovery" privilege not a "disclosure' one – the government cannot normally put the information before the tribunal to prove its case, but refuses to allow the adverse party to see the information
     - Some exceptions under the national security regime
2. National Security Regimes

   Immigration and Refugee Protection Act
     - Section 9 authorizes the detention and removal from Canada of permanent resident and other non-citizens on national security grounds
       - Do not have to be charged or convicted of an offence, and full criminal safeguards are not available to the individual
     - The Act authorizes to issuance of a Ministerial certificate that an individual is inadmissible on these grounds, and that certificate is referred to a judge of the Federal Court to determine if it is reasonable
       - The judge is provided with information that is relevant to the determination of the reasonableness of the certificate, and the named person is given information that allows them to be "reasonably informed" of the basis for the Minsters' case, but not anything that would be injurious to national security if disclosed.
- Key features of the regime:
  - There are adversarial procedures for testing the reliability of the Minsters' information before the judge, but they do not involve giving full information to the named person (partial summary is enough)

- Judge must ensure named person is kept reasonably informed, but may not provide the information that may compromise security.

Charkaoui I

- The SCC held that the regime then in place did not give the reviewing judge access to sufficient information to effectively play the review, and Parliament subsequently required full information to be provided to the reviewing judge.

Charkaoui II

- The SCC ruled that Charkaoui was entitled to the notes of the CSIS interviews with him, but failure to provide the notes did not result in a stay of the certificate.
- Destruction of the notes was a breach of the duty to retain and disclose information.

Harkat

- The SCC upheld the constitutional validity of the regime as amended after *Charkaoui I*, but took an expansive view of the individuals right to be reasonably informed.
- Clarified the degree of disclosure required to satisfy s 7 of the Charter.
  - Necessary outcome of situations where there is an irreconcilable tension is that the Minister must withdraw the information or evidence whose non-disclosure prevents the named person from being reasonably informed
  - Only information that raises a serious risk of injury to national security or danger to safety should be withheld.

3. Other Common Law Privileges
   - Examples:
     - Attorney-Client Privilege
       - Normally a discovery privilege, but can be a disclosure one where a party seeks access to a legal opinion used by a tribunal in making a decision (*Pritchard*)
     - Deliberative Secrecy
   - Courts have these privileges to allow free and frank discussion with legal advisors or other decisions-makers.

4. Confidential Informants
   - Courts sometimes allow decision-makers to protect the identity of sources of information, especially if there is a reasonable prospect that release of their identity will result in harm.
   - Courts will usually require that the person affected be given a summary of the relevant information, and they may require additional evidence of reliability of the information
   - Courts may require a demonstration that harms flowing from the release of information identifying informants are concreate rather than speculative

- *Khela*
  - Court upheld a decision quashing a decision to transfer K from a medium to maximum security institution after a stabbing incident occurred.
  - Information from confidential sources implicated K in the stabbing
    - Court did not require that K be given information about the identity of the informants for their safety

- Summary he was given of the information provided and reasons for concluding the information provided was reliable was inadequate
- K also should have been given information on the basis for his security classification
- Court must show that information from informant was reliable, and cannot just be the fact that "we found it"

5. Commercially Sensitive Information
   - Where commercially sensitive information is used in and adminsrttaive proceeding, there are often restrictions on the extent to which the information has to be disclosed to other parties
   - Where a party seeks a document that contains commercially sensitive information, a court may require production of a redacted version of the document that excludes the commercially sensitive information (*Qjikqtaaluk*)
   - In some types of proceedings it is common for regulatory agencies to receive commercial sensitive information
     - It is typical in those cases for regulatory agencies to be given the authority to:
       1. Protect sensitive commercial information from disclosure
       2. Provide restricted access to commercially sensitive information to counsel or experts
       3. Order that some commercially sensitive information be disclosed where it is in the public interest to do so

Official Notice

- Legislative vs Adjudicative Facts

  Legislative Facts
  - Background ideas about the way the world works
  - Facts that are sufficiently uncontroversial and do not need to be proved on the basis of evidence are legislative facts
    - Adjudicators take "official notice" of these facts
    - Taking official notice of matters of common knowledge is not particularly controversial, as long as the knowledge is NOT based on stereotypes or false assumption

  Adjudicative Facts
  - Facts peculiar to the case before the decision-maker
  - Decision-makers have to base their finding with respect to adjudicative facts on evidence that is deduced before them.
  - Tribunals cannot do their own adjudicative fact investigations without giving notice to parties and allowing them to comment (*Canadian Cable Television Association*)
  - Cannot use official notice to make findings with respect to adjudicative facts or fill in gaps of evidence with respect to these facts (*Akiq'nuk First Nation*)
    - *Akiq'nuk First Nation*
      - The use of administrative tribunal of historical material and ofen subject to official notice,

            - However, in this case, the historical material not only gave background to the dispute, it went to the heart of the dispute which concerned whether the Crown breached its fiduciary duty in its historical allocation of reserve lands to the band
            - If there is a gap in evidence, decision-maker cannot use their own research to fill it.
            - Doesn't mean research was unreliable, just that they never gave parties opportunity to show their own research.
- In principle, tribunals should be able to make use of their expertise with respect to legislative facts, but not with respect to adjudicative facts.
- Expert decision-makers typically have expert knowledge that extend beyond that of an ordinary person
    - **This knowledge can be used to evaluative evidence on issues in dispute but not as a substitute for efvidence (Huerto)**
        - *Huerto v College of Physicians and Surgeons*
            - H believes the committee did not confine its own opinions an expertise to assessing the evidence, but instead applied its personal knowledge to enhance the evidence
            - It would have been ine for the committee to use its' expertise to evaluate which set of expert testimony was preferable, but they cannot substitute their background for evidence that is actually before them.
            - If they have a problem with the expert evidence, they should be asking questions of the experts so there is material before them they can rely on.

Admissibility of Evidence

- Agencies are not governed by the rules of evidence used by courts unless a statutory provision required them
- As a general rule, adminsrttaive tribunals are not required to base their findings exclusively on evidence that would be admissible in a court of law (*Miller v Ministry of Housing*)
    - *Miller v Ministry of Housing*
        - Whether a piece of land had been used by a business for retail sale of garden sales.
        - Only four witnesses gave evidence it was used for this purpose
        - A contradictory letter was introduced and witnesses could comment on it.
        - The decision still relied on the letter even though witnesses disagreed with it.
        - Hearsay can be admitted as long as it is found to be reliable.
- ON the other hand, it can be procedurally unfair to ail to take account of the rationale that underlies evidentiary rules in deciding what evidence to use
    - Failure to admit crucial evidence can be unfair (*Laroque, Timpauer*)
- This does not mean that the rules of evidence are irrelevant in adminsrttaive proceedings. In some situations, failure to follow certain evidentiary rules may result in the denial of a fair hearing.

- A good illustration of this is the admission of hearsay evidence.
  - In it of itself, there is not a problem with administrative tribunals admitting hearsay evidence.
    - Hearsay is a statement that is made outside the context of the hearing room, the testimony is someone saying that someone said something, and being introduced to show it was said.
  - Important to recognize hearsay rules are there to ensure that parties are able to challenge the evidence that's before the tribunal
  - **While reliance on hearsay evidence can result in a decision being procedurally unfair, especially where the hearsay evidence is potentially unreliable (see *Bond v New Brunswick Management Board*), reliance on hearsay evidence does not automatically result in a denial of procedural fairness, especially where there are reasons to think that the hearsay evidence is reliable (see *Re County of Strathcona*).**
  - The problem with not following hearsay rules is if there is reason to doubt the credibility of the statement, and the party who wants to challenge the statement cannot cross examine the person who made the statement because they are not there, no context or truth necessarily supported by these types of statement.
    - However, hearsay statements are not automatically inadmissible in adminsrttaive proceedings.
- Problems concerning the admissibility of evidence are not restricted to the admission of hearsay, here are some other examples:
  - *Universite du Quebec a Trois-Riveres v Laroque*
    - Failure to admit crucial evidence in an arbitration hearing which was procedurally unfair.
  - *Timpauer v Air Canada*
    - Often disputes about whether evidence s admissible are bound up with ideas about what is relevant in respect to the issues in the case.
    - Here, a labour board decision was quashed because the Board refused to allow claimant to introduce expert evidence relevant to determining whether presence of tobacco smoke in the workplace presented an "imminent danger" to him
    - Board was of view imminent damager meant something immediate, not long-term.

Cross-Examination

- Adjudicators have the right to control the conduct of the proceedings.
  - Meaning that if a cross-examination becomes abusive, irrelevant, or competitive, at some point the panel can say STOP, and this is not a violation of procedural fairness.
- Decision-makers also have the right to say that a witness does not need to be produced and can choose to not have them be subject to cross-examination if the written testimony is enough.

- A right to cross-examine witnesses depends on the existence of an oral hearing, which may not be required in every case.
  - *Masters v Ontario*: not every case is going to require an oral hearing where witnesses are examined and if there is no oral hearing, there is no right to cross-examine.
- If witnesses do testify at a hearing, there is a general presumption that the parties are entitled to cross-examine them
  - *Re Toronto Newspaper Guild and Globe Printing*
      - Board refused to allow cross-examination which is a denial of natural justice.
  - *Innisfil v Vespra*
      - Defines what it means for cross-examination to be "reasonably required"
      - Administrative tribunals must not always apply same techniques as courts
      - Where rights of citizen are involved and statute affords hum right to a full hearing, one would expect cross-examination to occur
- Limits on the opportunity to cross-examine witnesses do not automatically result in a hearing that is procedurally unfair, can happen if the efficiency and convenience of the hearing, some witnesses are allowed to present written testimony and not be subject to cross-examination, so long as there are other means of testing the reliability of their evidence
  - *Strathcona v MacLab Enterprises Ltd*
      - Planning board directed that agricultural lands be rezoned to allow residential development. This decision was appealed and succeeded by a group who said the odours from industries would make housing unsuitable.
      - Group was never given opportunity to cross-examine all evidence, specifically a report by a German author who could not attend the hearing.
      - Board provided back up reports and certifications showing all credibility of the report, which was enough.
      - Cross examination is not always required.
  - *Djokavc v BC*: an alternative to cross-examination is by way of written question
      - Claiming compensation for back injury that allegedly occurred at physical rehab.
      - D was never given the opportunity to fully and farly present his case as per *Baker*.
      - In denying this opportunity, the Court took an unacceptable risk.
- Nevertheless, failure to issue a subpoena to a physiotherapist to allow cross-examination on his written statement concerning the treatment of a claimant for benefits resulted in denial of a fair hearing where the issues were central to the claim and the written statement was not responsive to his concerns

Post-Hearing Issues

Reasons

When are reasons required?

- As per *Baker*, in some instances, there is a common law obligation to give written reasons for decisions in the absence of a statutory direction to do so.
  - This obligation exists "where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circumstances"
  - Generally, it is required to facilitate judicial review of adjudicative (individualized) decisions (*Future Inns*; *Cuper*)
    - *Canadian Union of Public Employees v Montreal*: Court noted the need to ensure a person entitled to judicial review is not frustrated, Absence of a transcript could be a fatal error if it led to an inability to make out a case for judicial review.
  - Generally, NOT required for enforcement of policy decisions
    - *Canada v Mavi*: reasons not required when enforcing contractual right to collect benefit costs from immigration sponsor
    - *Service Corp. International (Canada) Ltd. v Burnaby*- reasons not necessary where municipality is making a decision
    - *Gigiotti:* A minister's decision to close a college is a policy decision and no reason are required to do this.

Content of Reasons

- General position is that if reasons are provided, inadequacy of reasons is not a separate ground of review on the basis that inadequate reasons are procedurally unfair
  - *Newfoundland and Labrador Nurses Union;* affirmed in *Vavilov*
- *London Limos v United City Taxi*
  - Objectors to issuance of taxi license were not denied procedural fairness despite no formal reasons for decision being provided
  - Court influenced by failure of objectors to request written reasons
  - Court finds the record of proceedings provides sufficient evidence of reasons for the decision
- *Wall v Independent Policy Review Director*
  - Dismissal of police complaint for being out of time overturned by the courts and returned to director for reconsideration
  - Divisional Court concludes that letter informing complainant that complaint is dismissed for being out of time does not satisfy reasons requirement
  - Court of Appeal concludes that letter provides some reasons but does not address ability to exercise discretion to waive time limits and is therefore inadequate
  - Both Divisional Court and Court of Appeal in *Wall* find that decisions to refuse to extend time limit is substantively unreasonable
  - Better approach is probably to focus on substantive review for reasonableness as discussed in *Vavilov* decision

Bias, Independence, and Institutional Considerations

In Canadian law, fair procedure has two elements:

1. A right to a fair hearing, and

2. A right to an impartial decision-maker.
   The Meaning of Impartiality
   - Impartial means open-minded; open to persuasion.
     - Does not mean that decision-makers are not allowed to have any kinds of pre-conceptions (this is inevitable)
   - Test for impartiality: do the circumstances give rise to a reasonable apprehension of bias?
   - Law requires an open-mind not an empty one, and tries to identify biases that are unacceptable. Examples:
     - It would be unacceptable for a decision-maker to make use of a pre-conception that certain individuals are less trustworthy witnesses because of personal characteristics such as race or gender.
     - On the other hand, it is not considered problematic for decisionmakers to have pre-dispositions of the values that lie at the core of our legal system such as equality, freedom, or democracy.
   - Relationship between Impartiality and Independence
     - Impartiality is the characteristic of being open-minded
     - Independence is understood as institutional guarantees that a decision-maker is not subject to external or improper types of influences that may make a decision-maker partial.

   Institutional Considerations
   - We may be willing to allow the legislature to create institutional arrangements that might otherwise raise concerns about lack of impartiality
   - Institutional considerations may affect our assessment of the degree to which concerns about lack of impartiality are reasonable
   - We may require institutional guarantees to bolster our confidence in the impartiality of decisionmakers

Bias

The General Test:

- The test for impartiality in Canadian law is whether there is a "reasonable apprehension of bias"
  - "The apprehension of bias must be a reasonable one, held by reasonable and right-minded people, applying themselves to the question and obtaining thereon the right information… The test is "what would an informed person, viewing the matter reasonably and practically – and having thought the matter through – conclude" (*Committee for Liberty and Justice v National Energy Board*)
- The test is universally accepted.
  - Note the test is totally irrelevant marginal cases since It is from dissent of the above case.
  - Note the general test is often of little assistance in resolving concreate disputes.
- Concerns of bias can arise in matters that happened before the hearing, during it, or after in the giving of reasons.
- Threats are inconsistent with duty of impartiality. Difference between colourable way of making a factual findings, versus going beyond and makign a threat of future action. This can occur in written reasons!!

Categories of Reasonable Apprehension of Bias

These categories are not mutually exclusive.

Antagonism During a Hearing

- Adjudicators must behave in a manner that maintains the appearance of their impartiality throughout a hearing
- It can be argued that antagonism by a decision-maker has denied the victim an opportunity to present the case.
- Adjudicators may ask questions or express tentative conclusions, but they mut be careful not to "descend into the fray" before all the facts are presented
  - *Canadian College of Business and Computers*
    - Not problematic in it of itself for admin tribunals to ask question versus trying to lead answers, asking irrelevant questions, or being an advocate for one of the parties.
    - Where a tribunal members asked irrelevant questions about whether an applicant for a license was a member of the Tigers (an armed organization of the Tamil separatist movement in Sri Lanke), suggesting perhaps some form of prejudice against the individual.
    - This gives rise to a reasonable apprehension of bias.
- Being mean to one party or overly playing favourites with the other can lead to disqualification.
- Distinguish tentative expression of views to guide submissions form pre-judgement before all the evidence/argument is presented.
- As we saw in *Baker*, antagonism may also be a problem in paper-based hearings (such as the notes used in the Officer's decision-making)
- Requirement of proper behaviour does not only fall on decision-makers, but also to lawyers who are employed to assist a tribunal at the hearing
  - *Brett v Ontario*: conduct of lawyer for the profession's discipline committee led to the quashing of the committee's decision.
    - During the hearing, counsel had told the lawyer presenting the case when to object to questions and when to put forward an argument favourable to the prosecution.
    - Principle concern in this case is that there is the creation of an impression that the decision-making function of the tribunal has been taken over by counsel.

Association with People Involved in the Case

- Prior associations giving rise to impartiality concerns may be with the parties or with others involved in the proceedings, including lawyers and witnesses
- These associations may be personal (party is relative or friend) or professional (a former colleague or client)
  - Regarding personal relationships, usually the issue is how close the relationship is; if a spouse or child, the adjudicator will be disqualified, but not if just a casual acquaintance.
    - *United Enterprises Ltd v Saskatchewan*

- Sometimes the concern is that the adjudicator behaves in a way that is overly familiar with a party or counsel, especially at a hearing.
- Excessive friendliness can give rise to reasonable apprehension of bias.
  - Here, counsel was invited to BBQ, and was often found chatting with the Board in between cases.
- Informality vs familiarity:
  - Reasonable apprehension of bias will not arise when proceeding are informal but can arise if the tribunal treats one party with a degree of familiarity that is not extended to the other.

- Regarding professional relationships, usually issues involve how close they were, how fair in the past it was, and what s reasonable to expect given the statutory scheme.
  - The Test for professional relationships is sensitive to context
    - *Marques v Dylex*
      - Ontario LRB adjudicator not disqualified because he had been a member of the firm acting for the union before his appointment to the Board
      - This challenged failed because….
        - Chairman had nothing to do with any aspect of the present proceedings as part of his association with the law firm and neither did the firm itself during the currency of his association with them
        - Over a year had elapsed since he had anything to do with the union, and over a year since he terminated his employment with the firm
        - Additionally, nature and function of board itself had to be regarded; members of the OLRB will have had expertise and experience in the law and labour relations, most if not all those appointed will have some prior associations with parties coming before the board.
    - *Terciera Melo v Labourer's International Union*
      - Ontario LRB decision overturned because Vice-Chair had represented one of the parties 7 years earlier on a very similar case- OVERTURNED ON APPEAL
        - Court said this past representation was a conflict of interest not a reasonable bias of an adjudicator.
        - Court of appeal in this case would justify that working with someone on unrelated matters more than three years ago is not sufficient to give rise to reasonable apprehension of bias.
    - *Chartered Accountants v Cole*

- Recusal appropriate where complaint filed by an associate in decision-maker's firm – appropriate not to recuse where complaint was filed by someone in a different firm
- **Business competition is seen as more problematic than prior professional association as there is a relationship to financial interest and gain
  - *Gedge v Hearing Aid Practitioner's Board*:
    - Decision-maker a business competitor of a party – reasonable apprehension of bias, especially when operating in a small market and a setback for the competitor will create an advantage for the decision-maker

Prior Involvement with the Case Itself

- Generally, it is considered improper for an adjudicator to sit on an appeal of his or her own decision.
- Difficulties can arise when an attempt is made to extend this principle to participation at more than one stage of a multi-stage proceeding
- Note that in these situation bias concerns are also compounded by concerns about knowledge of adjudicative facts that are not part of the record
- If you were a lawyer or consultant on the case itself, and the adjudicating it, this result in a reasonable apprehension of bias.
- Where a decision is overturned on appeal or judicial review, it may be necessary to have a new panel rehear the case (*Re Township of Vespra*)
- However, statutory schemes can contemplate the same individual being involved at multiple stages of the same proceeding.

Two Scenarios that Can Occur n this Context:

1. Prior involvement with case outside decision-making capacity generally considered disqualifying (*Committee for Liberty and Justice v NEB*)
   - An application was made under s 44 of the *National Energy Board Act,* to the NEB by Canadian Arctic Gas Pipeline for construction of a natural gas pipeline.
   - Chairman of the board at the time had been president of Canada Development Corporation before his appointment, and partook in discussions with NEB about planning.
   - Majority of SCC agreed that this prior commitment to the pipeline based on his past relationships at other stages was a reasonable apprehension of bias.
2. Prior involvement with case in different decision-making capacity can be disqualifying.
   - *New Brunswick v Comeau*: A single individual's participation at investigative, recommendation, and adjudicative stages of a proceeding can give rise to a reasonable apprehension of bias. Statutes and policies in this case showed the need to keep these roles separate.

Attitudinal Bias

- A decisionmaker may make statements or engage in activity in other contexts that suggest they may be pre-disposed to decide the case in a particular way

- Not all supposed pre-dispositions give rise to a reasonable apprehension of bias as a matter of law, though parties often feel aggrieved if they believe that an adjudicator is pre-disposed to decide the case in a manner that is not in their interests.

Three Situations:

1. Schemes that contemplate pre-conceptions or an element of pre-judgement
   - *Paine v University of Toronto*
     - CA concluded that decision refusing tenure in which a committee member has, as a referee, written a negative assessment of the candidate was not unfair.
     - Note that tenure process assumes that committee members have personal knowledge (both positive and negative) of candidates for tenure
2. General advocacy/sympathy with groups or ideas is NOT disqualifying
   - *Large v Stratford*
     - University professor selected to hear case concerning mandatory retirement of firefighters as a bona fide occupation requirement was not disqualified as a result of having made statements preferring flexible to mandatory retirement for university professor
     - Not that Professor Kerr has no personal involvement in the case before him, and had not made a statement suggesting he had pre-judged the issues he had to decide. He had just made a public opinion about a public issue.
     - To exclude everyone who has had an opinion of human rights on a human rights tribunal would be nearly impossible.
3. Distinguish personal interest or statements indicating pre-judgement
   - *Great A&P Co. v Ontario HRT*
     - University professor selected to hear sex discrimination case was disqualified because she had previously been a party to a systemic sex discrimination case filed with the Commission
     - Note that Professor Backhouse was not disqualified because of her views on sex discrimination in and f themselves, but she was a party to a case based on a party view of sex discrimination
     - Arguably the problem had as much to do with perceived self-interest as with attitudinal bias.
   - *Pelletier* (statements made DURING hearing give reasonable apprehension of bias)
     - Statements to media by head of Commission of Inquiry into Federal Sponsorship Program prior to hearing all of the evidence gave rise to a reasonable apprehension of bias
     - Court not satisfied with explanation that it was important for Commissioner to keep the public informed about the progress of the inquiry
     - Statements gave rise to a reasonable concern that the Commissioner had pre-judged key factual matters before hearing all the evidence

Financial or Other Material Interest in the Outcome

- A decision make may NOT have a DIRECT financial interest in the case they are hearing

- Generally speaking, the amount of the interest is treated as irrelevant (*Dime*), but there is a trend in recent decisions to suggest that a de minimis principle will be applied to avoid disqualification for trivial interests (*Locobail*)
    - *Dimes v Proprietors of the Grand Junction Canal*
        - Chancellor owned shares in a company where he made order in favour of them.
    - *Locabail (UK) Ltd v Bayfield Properties Ltd*
        - De minimis will presumably apply in situation which an adjudicator holds mutual funds or is a member of a pension plan with a diverse portfolio and sits on a case involving companies within this fund or portfolio.
- For financial interest in the outcome to be disqualifying, the interest must be DIRECT, and MUST NOT be not that is shared with other members of a relevant community. Must be distinguishable from larger group interests.
    - *Energy Probe*: President of company supplying cables to nuclear power plants was not disqualified from sitting on licence renewal of Ontario Hydro nuclear power plant since financial interest in outcome was not sufficiently direct.
    - *Pearlman*: Ability of Law Society to recover costs in disciplinary proceedings against members does NOT give rise to a reasonable apprehension of bias since tribunal members would only have indirect and insignificant interests as member in recovery of hearing costs.
    - *CP v Matsqui Indian Band*: Members of Indian Band NOT disqualified form sitting on appeals of property tax assessments on property held by non-band reserve members on reserve-financial interest is too remote.

Variations of Reasonable Apprehension of Bias Depending on Context

Key Factors:

- Influence of role of decision-maker (significant in the case of elected officials as decision-makers)
- Policy preferences vs statements regarding preferred outcome of the case
    - Already seen in *Kerr*
    - There's an expectation that adjudicators will already have views on certain things, remember OPEN MIND NOT EMPTY MIND.
        - In *Paine*, sometimes administrative schemes contemplate the use of decision makers who have pronounces views on the very issues they are called upon to decide.
- Timing of statements that are considered evidence of bias
    - The further back a statement is in time, the less relevant it is for the purposes of the reasonable apprehension of bias test.

Three considerations are relevant to the determination of how much "flexibility" is built into the "reasonable apprehension of bias" test in any given situation:

1. To what extent does the choice of decision maker or the nature of the issues before the decision maker suggest that pronounced preferences are acceptable?
2. To what extent are expressed preferences "policy" preferences as distinct from statements of a preferred outcome in relation to the case?
3. At what stage in the proceedings are particular remarks made?

Tribunal Decision Maker Case Law

Newfoundland Telephone Company v Newfoundland (Public Utilities Board)

- Andy Wells was a member of the utilities board; prior to appointment he had been a consumer advocate and was vigorous in his criticisms of the telephone board.
- Media comments of consumer advocate on Commission, made DURING the hearing on the issues create reasonable apprehension of bias
- Apprehension of bias test shaped by composition and function of relevant board- mere fact that persons is a consumer advocate does not automatically disqualify them from membership on Commission
- SCC distinguished between pre-commitment to policy direction and pre-commitment to issues before tribunal (how easy or practical is it to maintain this distinction?)
- SCC distinguishes between comments made PRIOR to a hearing and comments made DURING the course of a hearing- there is a stricter standard for comments made during
    - Statements made prior to hearing gave notice that he was concerned to these types of thing, but not enough for a reasonable apprehension of bias
    - Once he stated making comments during the hearing before having heard all the evidence, he is now showing he made he decision before all the evidence was in, which is inappropriate and a reasonable apprehension of bias

Elected Officials as Decision-Makers

- Courts will apply closed-mind test to elected official; the fact they were expressing views, specifically in relation to outcomes, is not disqualifying as lng as they do not have a closed-mind.
- Not all municipal decision-making attracts procedural fairness; if councillors are making decisions of by-laws of general application, no procedural fairness applies.
- Given that these scheme contemplates that elected officials will be decision-makers and they have a right to express views that may be relevant to deliberation during the course of political campaigns, how do we assess the reasonable apprehension of bias test?
    - If there is a conflict of interest, such as a financial interest or development proposal made by a spouse, they will get disqualified.

Next 3 cases are looking at development applications made before municipal councils, where members have expressed views of the development during committee hearings or campaigns.

- Recall in *Homex* case that municipal councils owe a duty of fairness to the applicant for development permits (individua property issues effects one developer, or specific properties, more in the situation where procedural fairness is owed)

Old St Boniface Residents Association v Winnipeg

- City Councillor spoke in favour of development application at committee hearing and then participated in Council deliberations on the application
- SCC rules that Council is obliged to behave in procedurally fair manner in hearing applications, but Councillor's are not precluded from showing their support or opposition to applications because that is expected as part of the decision-making structure

- Distinction drawn between personal interest in application (which WOULD give rise toa reasonable apprehension of bias) and mere support of application on the merits (which does not)
- Here, the conduct was the latter and did not give rise to a reasonable apprehension of bias.

Save Richmond Farmland v Richmond

- Court rejects bias argument in relation to alderman who campaigned in support of development and then voted in favour of rezoning making development possible
- Court finds that the alderman is entitled to have a closed-mind for noncorrupt policy-related reasons
    - Since this instance is on the legislative side of things, a closed-mind is allowed to be brought to this decision as long as it is not a result of corruption, but of honest opinion strongly held.
- Court places emphasis on "quasi-legislative" nature of decision placing it close to the legislative end of the procedural fairness spectrum

Seanic Canada Inc v St John's (City)

- THIS DECISION WAS OVERTURNED ON APPEAL
- Trial Division judge applies "closed-mind" test to determine if City Councillor was sufficiently impartial in voting against developer's rezoning application
- CA agrees closed-mind test is right test to use here
- Trial Division judge concludes that Councillor was inalterably opposed to rezoning application because of the view of his constituents and did not have sufficient regard to the merits of the application
- CA disagrees, and holds it was legitimate for Councillor to take into account the views of the constituents, if that means being opposed that is within the scope of their authority and cannot form the basis for an argument for bias

Statutory Authorization

- It is not unusual for statutory schemes to give a single institution a mandate to perform a multiplicity of functions (eg. Investigation; prosecution; adjudication; and appeal)
    - Normally one might have though that it would give rise to a reasonable apprehension of bias if a single individual performed more than one of these functions in respect of a single case.
    - However, if a statute REQUIRES a particular individual to perform more than one function, the common law rules of procedural fairness must yield to that requirement because statute law prevails over common law.
- Where a statute authorizes an organization to perform multiple functions, individual members of the organization can perform multiple functions in respect of the same case unless these functions are mutually incompatible (*Brosseau v Alberta (Securities Commission*))
    - In particular courts have been willing to allow a single individual to participate in investigative aspects of a securities, or other type of proceedings , and the adjudicative phase.

- Sometimes agencies for their own reasons adopt internal policies that don't allow people to play multiple roles in multiple phases, but the Court did not do this, that was their own decision.

Brosseau v Alberta Securities Commission

- It is alleged that the chair of a securities commission was disqualified from sitting in an adjudicative capacity.
- At the request of a senior government official, the Chair had instructed Commission staff to investigate a company; B was the company's solicitor
- Chair also received the staff's investigative report that alleged B made fale or misleading statement abut the company's prospectus filed with the Commission. The Chair then sat on the panel.
- In this case, the Chair acting as both investigator and adjudicator gives rise to reasonable apprehension of bias.
- As a general principle, this is not permitted because the taint of bias would destroy the integrity of proceedings conducted in such a manner. There is an exception to this overlap when it is authorized by statute.
- So long as the Chairman did not act outside of his statutory authority and as long as there is no evidence showing involvement above and beyond the mere fulfillment of statutory duties, no reasonable apprehension of bias.
- STATUTORY AUTHORITY PREVAILS OVER ANY COMMON LAW RULE RESTRICTING INDIVIDUAL TRIBUNAL MEMEBRS FROM PERFORMING OVERLAPPING FUNCTIONSAs long as s 7 of the *Charter* does not apply, there is no constituional barrier to oversee multiple roles.

- *Quebec Charter* (and by implication other applicable constitutional or other quasi-constitutional rules) can prevent individuals within an organization that has multiple functions from performing multiple functions in respect of the same case (*Regie*)
  - Courts have been willing to accept the argument that the constitution or a quasi-constitutional law CAN create a requirement that separate individuals must perform each of the relevant roles in respect of any particular case (*Quebec Inc. v Quebec Regie des permis d'alcool)*
    - The SCC held that the Quebec Charter required the liquor licensing agency used separate individuals to engaged in investigative activities and adjudicator activities on the other hand
    - Always ask yourself, is there a constitutional or quasi-constitutional issue that section 7 would be engaged at federal level or section 2e of Bill of rights
    - In most jurisdictions that's not going to be an issue, particularly in relation to economic or professional regulatory agencies.
- Courts are also reluctant to accept the proposition that the existence of a "reasonable apprehension of bias, in respect of SOME members of an agency can be transformed into a reasonable apprehension of bias in respect of ALL members of the agency (the doctrine of corporate taint) (*EA Manning Ltd v Ontario Securities Commission*)
  - Rejected the idea that there may be some individuals disqualified from a proceedings but doesn't mean other members will be.
  - Securities Commissions, at their very nature, are expert tribunals, and may have repeated dealings with the same parties in carrying out statutory duties. As long as they act fairly and impartially while executing these duties, it is fine.

Typically, when a statute authorizes a single agency to perform multiple functions, two questions are relevant:

1. Do the common law requirements of procedural fairness require different individuals to perform these functions in respect of any particular case; and
2. Do constitutional or quasi-constitutional rules require different individuals to perform these functions in respect of any particular case?

Independence

General Principles:

- The **purpose** of law governing tribunal **independence** is designed to provide institutional guarantees that tribunal members are able to be impartial
- To put it another way, the rule governing independence are designed to ensure that other people cannot interfere, directly or indirectly, with that ability of adjudicators to decide the case before them on their merits
- Independence has two dimensions: individual and institutional/structural
  - Individual: Procedural fairness prevents tribunals from putting in place consensus decision-making structures that compromise individual independence of adjudicators (*Tremblay v Quebec*). Tribunals prevented from adopting internal consultation procedures that compromise autonomy of adjudicators who hear cases.
    - Principles typically prohibit tribunals from making institutional arrangements that interfere with the ability of members to decide independently.
    - These arguments typically do not require attacks on legislation and can be made using the common law.
  - Structural: By analogy with courts, tribunal members must have site degree of (1) security of tenure, (2) security of renumeration, and (3) administrative independence.
    - Principles typically require statutory schemes to have affirmative guarantees of independence
    - These arguments typically challenge the statutory scheme itself
      - Therefore, arguments most normally rely either on the constitution (section 7 of the *Charter* or the unwritten constitutional principle of judicial independence) or quasi-constitutional law (section 23 of *Quebec Charter*, section 2(e) of the *Canadian Bill of Rights*)
    - Two questions tend to be relevant to structural independence challenges:
      1. What constitutional or quasi-constituional provision, if any, provides safeguards for the tribunal's independence?
      2. If there are constitutional or quasi-constituional safeguards for the tribunal's independence, what is their content?

Regie

- Section 23 of *Quebec Charter* require quasi-judicial tribunals to be independent
- Directors' conditions of employment held not to give rise of reasonable apprehension of bias

- Directors need not hold office for life, but must be subject to removal at executive's pleasure
- Interaction between Minister and tribunal held insufficient to raise independence concerns
- Note that Gontier J. disregards Minister' role in renewing Directors' appointments
- What independence guarantees are designed to do is make sure that the decision-makers are not so beholden to the government that they will not be making decisions with one eye on whether or not the Minister will fire them or is potentially going to reappoint them. The idea is they should be independent enough so the Minister cannot manipulate their decision making. SO, limiting the Minister's power through tenure and renumeration helps that.
- individuals within an organization that has multiple functions from performing multiples functions in respect of the same case
- *Quebec Charter* requires members of quasi-judicial tribunals to have guarantees of security of tenure, but these do not have to be the same as guarantees for judges
- *Quebec Charter* prevents Directors of Regie form being appointed "at pleasure"
- **Only relevant where it is quasi-constituional.**

Ocean Port

- BC Liquor Appeal Board suspended applicant's liquor license
- Common law independence principle cannot overcome limitations on security of tenure imposed by statute
- Unwritten principle of judicial independence does not apply to BC Liquor
- Applicant challenges decision on ground (among others) that Board lacked sufficient institutional independence to meet *Regie* standard
  - Board members appointed for fixed terms on part-time basis, receiving per diem payments when they sat
  - *Liquor Control and Licensing Act* authorized Lieutenant Governor in Council to dismiss members without cause and without compensation.
- Did Board's decision need to be set aside for lack of sufficient institutional independence?
  - BCCA: Yes
    - BCCA regarded Board members' appointments as no better than "at pleasure"
    - Board's composition violated common-law's insistence on structural independence
  - SCC: No
    - Absent constituional constraints, degree of independence required of particular government decision-maker or tribunal determined by enabling statute.
    - SCC found no constituional basis for interfering with Legislature's decision to set up tribunal whose members enjoyed very limited guarantees of independence
      - Applicant had not relied on sections 7 or 11(d) of *Charter*

- SCC rejected argument that implied constituional principle of judicial independence (*Provincial Court Judges Reference)* extended to administrative tribunals as well

- Absent constituional constraints, the degree of independence (SUCH AS RENUMERATION OR SECURITY OF TENURE) required of a particular government decision-maker or tribunal is determined by its enabling statute(STATUTE>COMMN LAW)

Walter v BC(AG)

- Involved the Chair of the BC Review Board (board that determines whether individuals who are held as not criminally responsible will be subject to continued detention for mental health treatment of released on conditions).
- W was unhappy with the approach the BC Governor had taken to filing his renumeration
- Chair of BC Review Board challenges approach taken by BC Government to fixing his renumeration, arguing that his independence is protected by either (1) the unwritten constituional principle of judicial independence or (2) section 7 of the *Canadian Charter of Rights and Freedoms.*
- HOLDING: The independence of the Chair of the BC Review Board was not protected by the unwritten constituional principle of judicial independence, and the independence protections available under section 7 of the charter were not as expansive as the protections afforded to the independence of judges.

Judicial Independence Argument:

- Court review post-*Ocean Port* decisions that seek to distinguish *Ocean Port* in order to find SOME tribunals are protected by unwritten constituional principle of judicial independence
- Therefore, BC Review Board Chair does not enjoy guarantees of security of renumeration provided by this principle.
- Court declines to follow reasoning in *McKenzie v Minister of Public safety* (held that judicial independence applied to BC tenancy, this was an odd case because Appeal dismissed it as moot because scheme had been altered between hearing and appeal) and adopt reasoning in *Sask Federation of Labour v Saskatchewan*

Section 7 of the *Charter* Argument:

- Section 7 of the Charter does protection the independence of the BC Review Board
- Role of BC Review Board in addressing liberty of individuals detained because they are found to be not criminally responsible for otherwise criminal acts DOES engage protections of section 7 of the *Charter*
- Applicant is entitled to SOME guarantee of financial independence, but content of independence guarantee need not be the same as that provided to courts
- Court declines to express a view on precise content of financial independence guarantee since declaration sought by application was that it s the same as the financial independence guarantee provided to judges

Institutional Decision-Making

- The trial-type hearing model assumes that an individual adjudicator is responsible for making the decision in each case.
- This model is unrealistic in some administrative settings for a variety of reasons:

- Problems of consistency in multi-member agencies that have no system of appellate review
- The desirability of delegating adjudicative functions to make more efficient use of time
- The desirability of using staff to make more effective use of decision-makers time, to bring specialized expertise to bear on the issues, or to assist with quality control

- Two themes of institutional decision making:
  1. Sheer volume f the decisions to be made may demand a large staff and some arrangement for dispersal of authority, socialization, and control.
  2. The range and complexity of the issues may make it impossible for any individual or small group of individuals to have the tie, expertise, and perspective to make an intelligent decision.
- There is no discrete legal doctrine about institutional decision-making, although some aspects of procedural fairness have bee proven to be particularly relevant:
  - The rule restricting the delegation of legal powers and duties
  - The principle that only those who head the evidence and argument may participate in the decision making, the duty of disclosure
  - The impartiality and independence of the decision-maker.

Unauthorized Sub-Delegation

- A delegated decision-making power is the grant of statutory authority by person originally given it to another person without original delegate exercising substantial control
- Typically, the delegate is not able to delegate
  - Sometimes, either as part of an empowering statute or other more general legislation, the delegate will be authorized specifically to delegate to more subordinate individuals.
  - There is also a common law presumption that ministers of the Crown as entitled to act through officials in their department
- The law prohibits unauthorized sub-delegation
  - Example of unauthorized sub-delegation:
    - Where officials make recommendations, but Minister signs grant forms personally: no sub-delegation
      - Even though the Minister has relief on advice from ministers, and even though the Minister may give relatively little thought before singing the grant form, the Minister has actually made the decision.
- The two questions that must be addressed when determining whether or not there has been a lawful delegation of decision-making are (1) has here bee a delegation of decision-making authority? And if so (2) is that delegation expressly or impliedly authorized by statute?
- Two-part test:
  1. Has decision-making power been sub-delegated?
  2. If so, was sub-delegation expressly or impliedly authorized?
  - In modern ministerial decision-making, it is very common to see statutes expressly authorizing delegation.
    - Express authorization examples:

        - *Immigration and Protection Act*, s 6: General power for Minister to delegate authority subject to specific expectations.
            - In *Baker*, the Minister has general authority to delegate decision-making power.
        - *Government Organization Act*, s 9: General power for Ministers to delegate all functions except power to make regulations
            - The Minister can delegate decision-making authority, but not the power to make regulation.
    - If we do not have expressed authority there can still be implied authorization.
- Delegation cannot only take place in decisions granting authority from one delegate to another person, but to different kind of structures through incorporation by reference
    - Where municipal building safety by-law states "safety by-laws are those found in April 1, 2002 Canadian Safety Council safety code": no sub-delegation
        - Obviously the municipality didn't think up and turns its mind to the particular rules, but they have chosen particular rules that are fixed in time, so that incorporation does not include sub-delegation
    - Where municipal building safety by-law states "safety by-laws are those set out in whatever version of the Canadian Safety Council safety code is currently in effect": sub-delegation
        - This is because in effect the Canadian Safety Council is being given authority to change the safety by-laws whenever it chooses, rather than whenever the municipality chooses, the that means the municipality has taken its authority and given it to the safety council.

Vine v National Dock Labour Board

- Board has express power to delegate decision-making authority to Local Boards, then Local Board delegated this power to discipline committee which fired Vine.
- Local Boards have no express authority to delegate decisions to discipline committee, and nature of decision was inconsistent with implied authority to delegate.
- Court found when deciding if one has power to delegate, one must look to the nature of the duty and the character of the person.
- Typically, disciplinary powers cannot be delegated.

Morgan v Acadia University

- General authority to control institutional discipline construed as including power to delegate disciplinary authority.
- In this instance, the Board of the University was granted disciplinary authority, and NS Court held that the implication of this authority could be delegated to university committees or other staff.

What is the distinction between *Vine* and *Morgan* as they both involve disciplinary decision?

- The difference is that the Local Board in the *Vine* case was assumed to be directly responsible for the exercise of its authority and delegating decision-making powers after they had already been delegated to themselves was considered to be improper
- In *Morgan*, they took a generous interpretation of the Board of Governors to infer that it had implied authority to delegate disciplinary authority to other party's of the University.

Unauthorized Sub-Delegation in the Context of Tribunal Decision-making and the Possibility (or lack thereof) of Delegations Powers from Panels to Sub-set Panel Members or to the Chair

IBM Canada v Deputy Minister of National Revenue

- Panels set up with 3 people in the quorum.
- 2 of the members had participated in the entire decision-making process, and the third member was not available for part of the hearing process and was going to send in their thoughts later
- Court said this was procedurally unfair
- In order to meet quorum requirement, sufficient members to constitute quorum must participate at ALL STAGES of the hearing (and any other member's who did not hear the whole hearing are not allowed to participate in the decision as per *Re Ramm*)
- Notice if the quorum had been two, this would have been fine.

Volk v Saskatchewan (Public Service Commission)

- Chair of an agency is not, by virtue of their office, authorized to exercise powers granted to panels
- When there is a specific power conferred only on panels, chair cannot exercise authority
- What we see in more modern statues now is a greater specificity of the nature of power of chairs

Re Schabas and Caput of the University of Toronto

- University committee where chair of panel is making ruling on legal matters in the course of the hearing and there is an objection raised that this is procedurally improper
- Chair of a panel cannot exercise powers of panel, but panel members can acquiesce to Chair's rulings on legal matters

Deciding without Hearing

- General principle is that only those who hear a hearing can decide on it.
  - Rationale of this argument is that a person is denied an adequate opportunity to influence the decision if unable to address those directly making the decision.
- Those members of a panel who participate in a decision must hear all the evidence and submissions
  - *Re Ramm*
    - As long as quorum is met, judicial fairness is met, but those who do not make all meetings cannot participate in said areas of decisions.
- Especially where the decision-maker is a Minister, it may be possible to delegate the conduct of a hearing to an official whose recommendation is the basis for a decision (but Minister is person actually making the decision (*Local Government Board v Alridge*)
  - In the *Alridge* case, the volume of work entrusted to the Minister was high and he could not do a great bulk of it himself. He has duty to obtain material vicariously through his officials.
- On rare occasions Canadian courts require Ministers to make decisions personally
  - *Suresh* (deportation of person likely to suffer torture)- note limitation of Ministerial delegation power in s 6(3) of *IRPA*

- *AG (Quebec) v Carriere St-Therese Ltee* (order shutting down a hazardous factory)
  - An environment Minister in QB had to personally make a decision with respect to an order shutting down a hazardous factory, Court was not prepared t accept implied delegation authority as the decision was significant.
- In contrast, courts use the *Alridge* principle to allow local officials to exercise powers granted statutorily to Deputy Ministers as well as powers granted to Ministers
  - *Canada v IBM Enterprises* (power to make assessments exercised by local officials)
    - Courts allow sub-delegation of power conferred statutorily on Deputy Ministers

Consultations among Agency Members

- The Problem: How can adjudicative agencies with multiple members deciding cases independently achieve consistency?
- Possible solutions:
  - Develop rules
  - Develop guidelines
    - Not binding, but nevertheless, would be instructive
  - Rely on precedents
    - Although, one of the issues here, is the decision-maker gets to set the precedent and perhaps others may not regard that as desirable.
    - In court, appellant courts resolve conflicts among coordinate levels of judges, but in administrative tribunal settings, if there is no right of appeal or reconsideration, then the use of precedents has the above shortcoming.
  - Have internal discussions in the absence of concreate cases
    - Not uncommon for tribunals to have seminars, particularly when there are amendments to legislation, where they discuss as a group the types of issues that may come up in future areas and how to address those.
  - Have internal discussions as concrete cases are being decided
    - Benefits: The advantage is that you've got a concrete factual matrix and that may make policy discussion more productive and more well-informed.
    - Risks: Particularly from standpoint for litigants, who may perceive the decision-makers are being influenced improperly by their colleagues and at minimum the council or the parties are not in a position to know what was said, and may result in them nt being able to affectively give their submission to those issues.

General Principles:

- Person who hears case must be free to decide it
- Decision-maker may consult colleagues but
  - Consultation must be voluntary
  - Must be no discussion of adjudicative facts because we want the adjudicative facts the be decided based on the record before the decision-maker

    - If there are new lines of argument that become relevant as a result of the consultations, parties should normally be permitted to make submissions about any new line of argument that become relevant as a result of consultation

IWA v Consolidated Bathurst

Holding concerning formal consultations prior to making a decision by members of an adjudicative body who heard a case with other members who did not hear the case:

1. The members who heard the case must be free to decide it
2. The members who heard the case must not be compelled to participate in discussions with colleagues who did not hear the case

In other words, consultation among board members is permitted, but the consultation must be voluntary; the panel that actually heard the case must be free to decide it; improper pressure must not be put on the panel in making its decision; and if any new issues are raised during the consultation that partie must be given an opportunity to address them.

- SCC majority upholds use of full board consultation process by OLRB
- OLRB "policy meeting" in absence of parties to the proceeding does not violate natural justice
- Recognition of value to OLRB of policy meetings as a way of developing consistent approaches to cases
- "Rules" pf the meeting created by OLRB
    - Facts taken as given
    - No minutes or attendance
    - Decision by those who heard the case
    - No compulsion to agree with will of majority (in fact, decision is split)
- Grounds for challenge by Bathurst
    - Decision not on record; losing party argues for right to participate re: policy arguments
        - Majority rejects this argument
            - Facts vs policy distinction
                - The policy approach taken by the OLRB is that facts are taken as given, so had to be assumed no discussion of adjudicative facts, just questions of interpretation of law and policy.
            - Requirement to inform parties if new grounds or issues are raised
                - In the view of the majority of Canada, that was not the case here.
    - Undue influence; sense that decision is made or improperly influenced by other board members
        - Majority reject this argument
            - Discussion with colleagues in and of itself does not interfere with ability of decision-maker to decide independently

Tremblay v Quebec (Comm'n des affaires sociales)

- SCC rejects use of "consensus table" process by CAS

- CAS “consensus table” process violates principles of procedural fairness that has been laid down in *Consolidated Bathurst*
- Compulsion in “consensus table” process gives rise to perception that decision was taken out of hands of people who hear the case
- Court recognizes the desirability of mechanisms for achieving consensus, which was requested by decision-makers themselves to elp them achieve consistency in decision-making
- Nevertheless, particular consultation mechanism chosen in this case was inappropriate
- Factors that give rise to perception of compulsion or undue influence on independence
    - Factual finding of “systemic pressure” on panel reinforced by voting, taking of minutes, and taking of attendance (not voluntary)
    - Also problematic that President or legal counsel can require a consensus table, not the panel who heard the case
    - System compromises both individual independence of adjudicators and gives rise to reasonable apprehension of bias
- Obligation to submit draft decision for review interfere with the independence of panel members.

****Points of distinction between *Tremblay*’s consensus table and *Consolidated Bathurst*’s full board consultation meeting:**
- Ability of CAS president to require consensus table vs OLRB full board consultation only being triggered by members who heard the case
- CAS took attendance, minutes, and voting, which put undue pressure on adjudicators who heard the case to agree with majority view

Ellis-Don Ld. v Ontario (Labour Relations Board)
- Dispute about bargaining rights in the construction sector
- The first draft on the panel’s decision would have dismissed the grievance based on the abandonment of bargaining rights.
- However, after a full-board meeting, the majority of the panel found no abandonment had occurred and changed their decision.
- An unsuccessful attack on OLRB consensus table process where decision changed after a full board meeting
- SCC majority upheld the OLRB decisions on grounds that appellant had not satisfied evidentiary burden of showing failure to follow *Consolidated Bathurst* and *Tremblay* rules for consultation

Dissent (Binnie and Major JJ):
- Recognized that abandonment of collective bargaining rights has a policy component
- Nevertheless, that policy component was insufficiently discrete to allow it to be addressed by full Board without interfering with factual determination made by panel that heard case
- Concludes policy issues were too interwoven with facts to allow discussions without interfering with panel’s factual findings

Majority:
- Concerned that the Dissent’s reasoning would make it difficult for full Board meetings to discuss cases where outcome turns on fine factual distinctions incapable (or difficult) of separation from policy

    - Make it difficult to address policy issues that turn on factual distinctions
- Also concerned about undermining OLRB's ability to work through policy issues if the minority approach had been followed
- Concludes that changing of tentative outcome following full-board consultation does not invalidate decision
- Main difference between majority and dissent is that the majority concluded that the appellant had not satisfied its onus to show evidence of improper interference in the panel's deliberative process as a result of the LRB's full-board consultation process and it would be inconsistent with the panel's deliberative secrecy to allow the appellant to obtain that evidence, whereas the dissent concluded that the appellant had discharged its evidentiary onus and the LRB did rely on the principle of deliberative secrecy to justify its failure to present evidence that could have rebutted the appellant's argument.

Deliberative Secrecy:

- Majority:
    - Principle of deliberative secrecy, paired with section 11 of ON *Labour Relations Act*, means appellant is unable to obtain direct evidence from those present at full Board meetings as to whether *Consolidated Bathurst* principles were violated
        - In other words, they couldn't seek to examine members of the tribunal who were present at the meeting or ask questions or examine them because they are immune from that type of disclosure as a principle of deliberative secrecy
- Dissent:
    - OLRB cannot use deliberative secrecy to preclude appellant from obtaining information necessary to determine compliance with *Consolidated Bathurst*
        - They would have said once a *prima facie* case had been raised non-compliance was an issue, there would be an obligation on OLRB to set aside deliberative secrecy and make people available for questioning.

Canadian Association of Refugee Lawyers v Canada

- Chair of Immigration and Refugee Board certified certain Refugee Adjudication Divisions decisions as "Jurisprudential Guides" to claims from specific countries.
- Chair of Board is given statutory authority to designate certain decisions as jurisprudential guides and there is an expectation that will assist members of the adjudicative division when dealing with similar types of cases from different countries from which refugee claimants are coming
- Some overlap between this case and *Thamotarn* in that both deal with efforts to provide guidance to adjudicators in the refugee adjudicative board when dealing with refugee clients.
- Guides were challenged as violating *Consolidated Bathurst* requirements on two grounds:
    1. The Guides related to factual maters, since they dealt with the experiences of groups who might face persecution in the relevant countries; and
    2. The Guides put undue pressure on RAD members to conform to the approaches o refugee claims from he relevant countries that are set out in the guides
- **FCA rejects both of these arguments**
    1. Prohibition of Discussion of Facts

- The types of facts discussed in the guides were not adjudicative facts specific to the circumstances of particular refugee claimants but background (or legislative) facts about the experience of different groups who might be vulnerable to persecution in different countries
- FCA finds that *Consolidated Bathurst* prohibition on factual discussion focussed on discussion of the adjudicative facts of the particular case in question.
    - There the court held that people who were not part of the decision-making process (did not hear the evidence) could not comment on the adjudicative facts, they had to be taken as given as presented by the panel that heard the case

2. Improper interference with Adjudicative Independence

- FCA finds that Guides are an important mechanism for maintaining consistency in a high-volume, multi-member tribunal
- Although policy states there is an expectation that RAD members will follow Guide in cases involving similar circumstances, but it also allows RAD members to depart form the Guide provided they offer a reasoned justification for doing so.
    - As was the case with *Thamotaran*, the court felt that kind of constraint is not unreasonable.
- As result, Guides do not unreasonably constrain independence of RAD members justification for doing so

- FCA recognizes risk of using Guides where country circumstances change, but this is a matter to be addressed by the IRB rather than the Courts

Payne v Ontario (Human Rights Commission)

- Another case that deals with deliberative secrecy
- Majority rules that limited discovery of Commission staff is permissible where there is a serious allegation that Commission decided case on the basis of irrelevant considerations
- Abella J dissents, arguing that Commissioner whose affidavit raised the concern had abused his position and that parties should not be entitled to circumvent deliberative secrecy in these circumstances
- Bryden thinks it is fair to say that Abella's views represent a significant strand in the jurisprudence and if there are exceptions made to the principle of deliberative secrecy, they are going to be made on a fairly narrow basis and parties who try to circumvent deliberative secrecy are going to have to make a compelling case.

Case Law Surrounding Deliberative Secrecy

- *Ellis Don Ltd*
    - SCC Majority: Presumption of regularity not rebutted by change in draft decision; principle of deliberative secrecy prevents examination of Board members
    - SCC Dissent: Board cannot withhold relevant information on its deliberative processes and the same time rely on absence of evidence of irregularity to dismiss claim
- *Payne*
    - ONCA Majority: Affidavit alleging inappropriate comments by staff; complainant entitled to discovery of staff on arguments put to Commission before case dismissed

- Abella Disset: Deliberative secrecy should prevail
- Conclusions re Deliberative Secrecy:
  - Courts are extremely reluctant to allow parties to look behind agency decisions by obtaining discovery of internal documents or questions decision-makers or staff
  - *Payne* and *Tremblay* are unusual in that there was affidavit evidence of impropriety
  - In most cases courts refuse to allow discovery based on speculations that improper action has occurred (*Milner Power v AB*)
    - The ABCA was very reluctant to allow discovery based on speculation that improper action had occurred.

Agency Counsel

- Most agencies have some staff and typically have access to their own legal counsel
- The rules of procedural fairness impose some limits on the role counsel can play in assisting agency decision-makers
- Issues arise in three contexts:
  - Role when appearing at a hearing
    - Agency counsel may appear at a hearing for two different reasons:
      1. To present the agency's case before a hearing panel (for example, Law Society counsel presenting a discipline case before a disciplinary panel); and
      2. To give advice or guidance to a panel on legal issues, especially if the panel is composed of non-lawyers
         - Must distinguish between advocacy and advice
         - May advise but cannot dictate or direct results
    - Legal opinions given to an agency by the staff counsel are the subject of lawyer-client privilege (*Pritchard*)
  - Assistance in preparing reasons
    - Constraints of time and expertise may prevent tribunal members from preparing proper reasons for decision without assistance
    - *Re Sawyer and Ontario Racing Commission*
      - Cannot have counsel for one of the parties help you make the reasons
    - *Kahn v College of Physicians and Surgeons*
      - In *Kahn*, a panel member prepared the first draft, counsel revised and clarified the draft, the panel met to consider and review the draft as revised in the absence of counsel, and entire panel signed final product.
      - Reason-writing function cannot be completely delegated to counsel, this can compromise the integrity of the hearing
        - At minimum panel has to give its assessment behind reasoning to their decision and whether they need to prepare first draft or not (*Spring v Law Society of Upper Canada*)
      - Court found that no specific element of the process taken was considered essential, but the overall effect was that counsel had

not "co-opted or had delegated to him the reason-writing function"

- Reasons review
  - Some agencies, especially ones that have a large number of members, adopt formal policies with respect to reasons review. They do this in order to ensure some level of consistency in policy issues, but also to provide for quality control.
  - *Borvbel v Canada*
    - IRB policy promoting but not requiring reasons review does not violate procedural fairness
      - Basically policy encourages the members of the Board, the great majority who have no legal training, to submit their reasons for decision to the Legal Services Branch (composed of lawyers who do not participate in the hearings of the Board) prior to putting reasons in final form.
    - The policy encouraged review of reasons by counsel and treated review as a general practice but did not require it.
    - Note as well that the Policy reflect *Consolidated Bathurst* principles concerning factual findings.
      - In other words, the role of counsel was to engage in quality control with respect to the way reasons were crafted and reviewed in compliance with the law, but factual findings were made by panel who heard the evidence.
    - Notes that any policy is susceptible to abuse, but does not make the policy against principles of natural justice.
    - Conclusion: Policy did not inappropriately interfere with the independence of adjudicators, Policy encouraged review of reasons but did not require it, and the Policy reflected *Consolidated Bathurst* principles in respect of factual findings.

Agency Guidelines

- Distinction between rules, which are legally binding on decision-makers, and guidelines, which represent guidance on how discretion will normally be exercised, but may not be treated as legally binding
- Discretion can be structed but ability to respond to merits of particular case must be preserved (fettering of discretion)
- Guidelines are proactive and can be used to formulate a general and comprehensive approach to a problem without being confined by the facts of the particular dispute
- Guidelines should always be published and made available to those appearing before the agency

Thamotharm v Canada

- Court found that Guideline 7 was a valid exercise of the Chairperson's power to use guidelines and the Procedural guidelines did not fetter discretion of adjudicators or

interfere with their independence. If it does fetter discretion of adjudicators, than it is invalid.

- Obligation to justify departures did not interfere with independent decision-making
- Court upheld the validity of IRB Guideline 7 which directed adjudicators to allow the Minister's representative to question refugee claimants first rather than letting counsel for the claimant put questions to the claimant to set out the basis for the claim
- The rational of the Guideline was to save time and direct the hearing to the key issues that may be in contention
  - In other words, in refugee determination often there will be a number of background facts that are not controversial, but may be areas o individual's claim where there may be a dispute
- The guideline allowed adjudicators to depart from it but if they did they were supposed to explain why
- The guideline was held to be an exercise of the Chairperson's statutory power to make Guidelines and not an attempt to make a rule
- The Guidelines did not improperly fetter the discretion of adjudicators in the conduct of hearings or interfere with their independence
- The Court observed:
  1. The Guideline as drafted expressly preserved the adjudicator's discretion to depart from it
  2. There was evidence that some adjudicators did so
  3. The expectation that departures form the guidelines be explained dis no improperly interfere with independence
- Adjudicative independence is not an all or nothing thing, but is a question of degree.
- Independence of members of adminsrttaive agencies must be balanced against the institutional interest of the agency in the quality and consistency of the decision, from which there are normally only limited rights of access to the courts, rendered by individual members in the agency's name.

Duty to Consult and Accommodate Indigenous Peoples

Introduction

- Sources of Aboriginal and Treaty Rights
  - Recognition of Aboriginal rights at common law as reconciliation of pre-existence of Indigenous people with assertion of Crown sovereignty
  - Includes both distinctive rights (hunting and fishing) and title
  - Ancient and modern treaties – argument that rights are surrendered and replaced through umbered treaties
- Role of Section 35 of *Constitution Act, 1982*
  - Constitutional protection Aboriginal rights not absolute
  - Justification of Infringement

Duty to Consult and Accommodate

- Duty to Consult is a mechanism that is used to protect the Aboriginal and Treaty rights of Indigenous peoples

- Role to address and, if possible, avoid infringement of Aboriginal or Treaty rights as a result of inconsistent Crown action
- Administrative tribunals do play an increasingly important role in the process of consulting and accommodating the rights of Indigenous peoples, as well as in assessing the adequacy of Consultation efforts made by others
- Some background understanding of the substantive law is necessary for this purpose, but our main focus is on the law governing the role that must be played by administrative tribunals

Source of Duty to Consult

- The source of the duty to consult and accommodate is the "Honour of the Crown" (*Haida Nation*)
  - The Honour of the Crown addresses the relationship between Indigenous peoples and the Government
  - The Crown will not take action that will compromise Aboriginal or Treaty rights without consulting Indigenous peoples and accommodating those rights and the interests of the Indigenous people who hold those rights
- Section 35 of the *Constitution Act, 1982* gives constituional recognition and protection to Aboriginal and Treaty rights, but it does not specify the content of those rights
  - Aboriginal rights are those rights recognized by Canadian law that deal with rights of Indigenous people of ownership of traditional lands and uses of said lands
  - Treaty rights include both rights that were acquired by Indigenous peoples in historic treaties with the British Government during the colonial period, the numbered treaties, and the more recent modern treaties

The "Honour of the Crown"

- The "Honour of the Crown" has a more limited application than the principles of procedural fairness. It is both narrower and broader.
  - Narrower: The "Honour of the Crown" principle only applies to Aboriginal peoples who can assert a s. 35 right.
  - Broader: Includes not only procedural right to be consulted, but substantive right to have interests accommodated.
  - Additionally, procedural fairness is a concept that applies more generally to administrative action
- The "Honour of the Crown" gives rise to different duties in different circumstances. These can include:
  1. Fiduciary duties to act in the best interest of Aboriginal peoples where the Crown has assumed discretionary control over specific Aboriginal interests
  2. Duties to consult and accommodate Indigenous interests where Aboriginal rights have been asserted but not established by treat
  3. Honourable negotiation of treating defining Aboriginal rights and reconciling them with other interests
  4. Honourable interpretation and application of treaty obligations
- The "Honour of the Crown" is open to criticism that is an anachronistic and paternalistic concept on the one hand, and vague and excessively rigid on the other.
- It is part of the process of reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown (*Haida Nation*)

Threshold for Consultation

- The duty to consult and accommodate Aboriginal interests is triggered where **the Crown:**
  1. Has actual or constructive knowledge of an Aboriginal or treaty right;
  2. Is contemplating conduct that potentially affects that right; and
  3. The right is potentially adversely affected

(Test set in *Haida Nation*, reinforced in *Rio Tinto Alcan*)

- Issues concerning the threshold for consultation include
  - Does the duty apply to asserted but unproven claims?
    - YES. Asserted (so long as credible) but unproven claims can trigger duty, but strength of claim may affect extent of duty (*Haida Nation*)
  - What role does the cumulative impact of activity that has impact Aboriginal rights have on the existence of a duty to consult?
    - Duty ONLY applies to new conduct (*Rio Tinto Alcan; Chippewas*)
    - Past action that had an impact on Aboriginal rights does NOT trigger a duty to consult (*Rio Tinto Alcan*)
      - Past impacts may be relevant to assessment of whether and to what extent new proposal has adverse impact on Aboriginal rights (*West Moberly*)
    - The duty to consult is not triggered by historical impacts, it is not the vehicle to address historical grievances (*Chippewas*)
    - Incremental new impact will trigger a duty to consult but it may be limited in scope
  - Does the duty apply where the contemplated conduct is primary or delegated legislation?
    - Duty applies to delegated legislation where *Haida Nation* conditions are met (*Dene First Nation; Tsuu T'ina Nation*)
      - Delegated legislation refers to those laws made by persons or bodies to whom parliament has delegated law-making authority
    - Duty does NOT apply to process of making legislation (*Mikisew Cree*)

MIkisew Cree

- All members of SCC agreed that Federal Court has no jurisdiction to address the claim, so the appeal has to be dismissed
- Nevertheless, the Court considered whether enacting legislation could give rise to a duty to consult
- By a 7-2 majority, the Court concluded that the primary legislative does not trigger the duty to consult, though for two different sets of reasons
- Abella and Martin J disagree and found that as long as legislative action meets the *Haida Nation* threshold, it is subject to the duty to consult like all governmental activity
- Justices Brown, Row, Modlaver, and Cote, found that engagement in the legislative process was no the type of "Crown conduct" that could trigger the duty to consult
- They also found that applying the duty to consult to legislative action was impractical and could significantly disrupt the legislative process

- Karatsanis J, Wagner CJ, and Gascon J found that separation of powers and respect for Parliamentary sovereignty dictate the courts and should not attempt to intervene in the legislative process by imposing a duty to consult
- The reasons of Karatsanis and Abella leave open the possibility that "the Crowns honour may well require judicial intervention where legislation may adversely affect – but does not necessarily infringe – Aboriginal or treaty rights, a proposition rejected by Brown and Rowe"
- The text refers to a consultation protocol between the Haida Nation and the BC government with respect to the review of legislation implementing a reconciliation protocol, and one can imagine circumstances where governments might be interested in entering into similar types of consultation protocols, which may raise enforceability issues in the future.

Content of the Duty to Consult and Accommodate

- The content of the duty to consult and accommodate Aboriginal interests lies on a spectrum depending on strength of claim and degree of impact on aboriginal or treat rights
- At one end of the spectrum lie cases where the claim to title is week, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice (*Haida Nation*)
- Where there are deep consultation requirements, accommodations efforts have to be responsive to indigenous concerns even if they do not provide Indigenous groups with precisely the relief they are seeking (*Clyde River*; *Tsleil-Waututh Nations)*
  - (Some First Nations not satisfied by government's decision after consultation, and FCAC said there is no veto of these communities over the government and as long as concerns were heard and various efforts were made, it does not mean the approval does not have to be quashed)
  - In other words, deep consultation requires indigenous concerns to be discussed and responded to (*Clude; Tesleil-Watuth*)
- On the other hand, to date at least, courts have taken the view that deep consultation does not give Indigenous communities a veto over projects (*Coldwater First Nation*)

Parties to Consultation

- Both federal and provincial Crown have a duty to consult where *Haida Nation* threshold is met
- Crown can delegate process of consultation to administrative bodies or to private parties seeking governmental approval of projects
- Indigenous parties to consultation are the relevant right holders or their authorized representatives
- Indigenous parties may or may not be represented by *Indian Act* Band Councils
- Aboriginal and treaty rights are site specific (ie. they are owed particular groups of people in particular locations

Indigenous Parties to Consultation

- The duty of consultation is owed to the holders of the Aboriginal or Treaty rights that may be adversely affected

- Since these rights are collective rights, consultation should take place with the authorized representatives of the holders of these rights (*Newfoundland and Labrador v Labrador Metis Nation*)
- As authorized representation may or may not be a Band Council under the *Indian Act* (*Kwicksutaineukl Ah-Kwa-Mish First Nation*)
- Because consultation occurs with Aboriginal communities, individuals acting in their own capacity are not appropriate parties to consultation (*Behn v Moulton Contracting*)

Crown Parties to Consultation

- The duty to consult is owed by both the federal and the provincial Crown
- While the ultimate responsibility to satisfy the duty to consult and accommodate is borne by the Crown, the Crown may delegate the process of carrying out that duty either to administrative bodies or to private parties who are seeking Crown approval for projects

Roles of Administrative Tribunals

- For an adminsrttaive tribunal to carry out the duty to consult, it must have the express of implied statutory authority to do so (*Rio Tinto Alcan*)
- While the Crown always owed the duty to consult, regulatory processes can partially or completely fulfill this duty (*Clyde*)
- Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty.
  - Where the Crown is relying on regulatory to fulfill the duty to consult, it should be made clear to Indigenous participants that this is the case (*Clyde*)
- Unless the jurisdiction have been expressly withdrawn, tribunals that have the power to determine questions of law must also determine whether or not consultation was adequate if that question is raised before them (*Clyde*)
- "where deep consultation is required and the affected Indigenous peoples have made their concerns known, the Honour of the Crown will usually oblige the agency where its approval process triggers the duty to consult, to explain how it is considered, and address these concerns" (*Clyde*)
- Administrative tribunals may also have authority to assess adequacy of consultation; tribunals that have authority to decide questions of law also have the obligation to determine questions of adequacy of consultation efforts
  - Where consultation is inadequate, Crown is obliged to take additional steps (*Clyde; Tsleil-Watuth*)

SUBSTANTIVE REVIEW OF ADMINISTRATIVE DECISIONS

The Development of Substantive Review: From *CUPE* to *Dunsmuir* to *Vavilov*

Reasons for the Development of the Standard of Review Framework:

- Potential for conflict between courts and administrative agencies over spheres of authority
  - Who ought to have the final say on what aspect of decision-making
- Potential for conflict between courts and administrative agencies over the implications of statutory schemes

    - Judicial values (and ways of thinking about problems) may be at odds with legislatively mandated change
    - Judicial values may promote justice for individuals at the expense of other goals (such as efficiency, timeliness, and cost)
- Attempt to reconcile court and agency roles
- Desire to avoid duplication of effort (analogy with appellate review in court system)
- Desire to make best use of skills administrators may have and judges may not (and vice-versa)
- Desire to respect implications of legislative choice of decision-maker
- Desire to ensure that administrative decision-makers respect the rule of law
- Desire to ensure that parties to administrative proceedings are provided with a just outcome

General goals of all standard of review frameworks:
- Respect proper relationship between initial decision-maker and reviewing court
    - even when appellate courts are looking at decisions of trial judges, they look at some questions through a different lens then others
        - True in administrative law as well
- Ensure adherence to the rule of law
- Enable courts to advance the cause of justice

Timeline of Changes to Substantive Review

Traditional Focus on Authority Prior to *CUPE*

- Traditional resolution of tension between the two roles through division of authority between courts and administrative bodies
- Emphasis on division of authority
    - Courts control questions of law and jurisdiction
    - Administrative decision-makers control facts and (with limited exceptions) discretion (aka the merits)
- Within its sphere of authority administrative decision is not reviewable
- Legislative use of "privative" clauses to limit judicial review to questions of jurisdiction
- Judicial tendency to expand what is meant by a question of law or a question of jurisdiction to encroach on administrative sphere
- Questions within judicial sphere were subject to "correctness" review; other issues were immunized from review (fell within administrative sphere, and it was not of the courts business to interfere with those decision)
- Malleability of questions of law or jurisdiction and potential for expansion of judicial role

The *CUPE* Decision

- Traditional approach was modified by *CUPE v New Brunswick Liquor*
- Court upholds LRB decision protected by privative clause (clause that essentially said to courts do not interfere with decisions of the labour board, at least decisions taken within the scope of the labour board's jurisdiction)
    1. No aspect of administrative decision-making immunized from judicial review

2. SCC discourages characterization of issues as "jurisdictional" and therefore, subject to "correctness" review
3. Introduction of "patently unreasonable" standard of review applicable to interpretation of statute
    - decision-makers who were protected by a privative clause could have some sphere of autonomy in relation to the interpretation of the enabling legislation, so long as it was not "patently unreasonable"
4. Suggestion that administrative interpretations of statute may be better than judicial interpretations – origins of deference based on relative expertise

The Impact of *CUPE*

- Development of concept of "standards of review"
- Idea that all issues addressed by agency are subject to judicial review, but different questions could attract different levels of standards of judicial scrutiny
- Idea that legal questions may be susceptible to more than one justifiable answer
    - To some extent this is familiar to us, especially in dissenting judgements in appellate courts and in SCC
- Odea that they may be good reasons for courts to defer (at least to some extent) to administrative agency determination on legal questions
- Post-*CUPE* a number of questions emerge:
    - How many standards of review are there? (one? Two? A spectrum?)
    - Do standards of review apply to all substantive review issue or only some?
    - How should courts decide which standard to use?
    - How should different standard of review be applied?
        - Ie. What makes a decision unreasonable versus patently unreasonable?
- Overtime, the SCC adopted different, and seemingly inconsistent, answers to these questions…. This is where *Dunsmuir* comes in.

Dunsmuir

- Dunsmuir was a court official with the New Brunswick Department of Justice. He was dismissed after being reprimanded 3 times and given a 4.5 month salary pay out in lieu of notice.
- Governor relief on s 20 of the *Civil Service Act* when dismissing him. His interpretation of it mean that he could dismiss Dunsmuir by providing him with reasonable notice OR salary in lieu of notice.
- Governor believes he did not have to establish cause of give him a hearing before dismissal. However, another statute gave Dunsmuir these rights, and the Governor avoided this statute by saying Dunsmuir was just not "suitable for the position he was occupying"
- Key objective of SCC is to simplify law of judicial review
- Standard of review analysis applies to all substantive review issues
- Only two standards of review: "correctness" and "unreasonableness"
- "Patently unreasonable" standard eliminated for common law judicial review analysis but could be preserved as a statutory standard of review
    - Courts took the view that legislatures could determine the standard of review and BC did so through *Administrative Tribunals Act*. Only jurisdiction to do so.
- Attempt at simplifying choice of standards (only partially successful)

- Choice of standards is a search for legislative intent with respect to standard of review
- Multi-factor test for choice of standard of review for each issue
- Key factors include:
    - Presence or absence of "privative" clause
    - Purpose of decision-making body
    - Nature of question (jurisdiction, law, fact, mixed law and fact, discretion)
    - Expertise of decision-maker
- Limited guidance on application of standards

Vavilov

- Case involved denial of certification of citizenship to Canadian-born child of Russian spies
- Registrar determines Vavilov's parents were "representatives or employees in Canada of a foreign government" within the meaning of s3(2)(a) of the *Citizenship Act* and he was therefore not eligible for Canadian citizenship
- Agrees with *Dunsmuir* that "judicial review functions to maintain the rule of law while giving effect to legislative intent"
    - But SCC in *Vavilov* thinks review needs to be more clarified and simpler.
        - Sets the presumption of "reasonableness" review. Only other types of review include "correctness" and "palpable and overriding error".
            - Distinction between "reasonableness" and "correctness: is that in a reasonableness review the court must focus on the decision the administrative decision-maker actually made, including the justification offered for it, and not on the conclusions the court itself would have reached in the decision-maker's place.
- SCC determines standard of review for this issue is "reasonableness" (both majority and minority agree on this point)
- Both majority and minority agree that registrar's decision was unreasonable and must be overturned (because FCA had come to same conclusion, appeal was dismissed)
- Both majority and minority agree that clarification and refining of law governing judicial review in this case is a desirable goal (not so surprising since the court had announced this was something they wanted to do)
- The big issue here is that majority and minority approach to carrying out that goal are dramatically different
    - Majority decision pursues simplicity of judicial review and coherence with goal of giving legislatures control over standards of review by:
        1. Adopting a presumption of reasonableness review subject to limited exception
        2. Elimination of expertise as a rationale for deference (too complicated and difficult to employ, was never entirely satisfactory)
        3. Assuming that when legislatures crate rights of appeal from administrative bodies, they want those to be treated using the same appeal standard that appellate courts use in dealing with appeals from civil trial courts)
        4. Ceases to recognize jurisdictional questions as a distinct category attracting correctness review.

- Minority decision criticizes the majority for eliminating expertise as a rationale for deference and requiring adoption of civil litigation standards of review for statutory appeals
  - This reverses decades of deference jurisprudence
  - For the minority, it represent a return to pre-*CUPE* formalism and dramatically expands opportunity for judicial inference in administrative decision-making

During the time of *Vavilov*, two companion cases, *Bell Canada v Canada (AG)* and *NFL v Canada (AG)*, were occurring. These were statutory appeals after the Canadian Radio-Television and Telecommunications Commission, under the *Broadcasting Act*, ordered commercials in the Superbowl aired in Canada be replaced by Canadian commercials. They sued correctness review here.

Vavilov is now the leading precedent for substantive review, and has evolved the law significantly since *CUPE v New Brunswick* and the SCC, engaging in **substantial revision** in *Vavilov*.

The Choice of Standard of Review

Vavilov's Approach to which Standard of Review Should be Used

Relative Expertise Eliminated as Justification for Reasonableness Review

- Majority states that relative expertise is no longer to be treated as a consideration in justifying judicial deference to tribunal decision-making
- Majority concludes use of relative expertise as a factor creates confusion in determining standard of review
- Majority concludes reliance on expertise is inconsistent with legislative choice rationale for deference
- Majority concludes creation of presumption of reasonableness review makes reliance on relative expertise unnecessary
- Relative expertise may still be relevant in applying reasonableness analysis (as opposed to reasonableness or correctness being the appropriate standard of review)
- Bryden says relative expertise was very problematic because no one had a way for judging expertise versus specialization and having different tribunals. Was proven to be very difficult for subject of argumentation. Especially with relative expertise, how do you show the judge does not know as much as the tribunal decision-maker?
  - Former Chair of ONLRB ended up sitting on ON Provincial Court and reviewing decisions of Labour Adjudicators who had just been appointed to the Labour Relations seat. It is almost certain he knew more about Labour law then the others, but you cannot change the standard of review depending on who the judge is

Presumption of Reasonableness Review

- Standard of review analysis starts with presumption of reasonableness review (for any type of question, does not matter if law, fact, mixed fact and law, or discretion)
  - With issues involving procedural fairness, we do not look to standard of review, just fairness principles.
  - BUT if we are looking at substantive review, we start with this presumption.
- Choice of administrative decision-maker implies legislative intent to limit review (at least as a starting point)

- Presumption critical to simplification of choice of standard of review
  - desire to simplify analysis is a major motivation for majority's abandonment of deference based on expertise as a consideration
- Presumption of reasonableness review can be rebutted in limited circumstances either to address legislative choices and rule of law considerations
  - Standard of review based on implied legislative intent (subject to rule of law limitations)
- Rationales to adopt the presumption of reasonableness:
  - Post-*Dunsmuir* multi-factor standard of review analysis is unclear and unduly complex (wanted to simplify it)
  - Legislative creation of agencies implies legislative intention to limit judicial inference
    - Choosing to assign decision-making authority to decision-making bodies will add some limitation/difference to judicial review)
  - Presumption of reasonableness is consistent with direction of development of jurisprudence
    - Majority and minority agree here
    - In other words, most post-*Dunsmuir* cases have taken a relatively expansive view of where reasonableness review was appropriate, so felt presumption was practice and consistent

Derogation from Presumption of Reasonableness Review

- Rationale for reasonableness review is express or implied legislative intent to limit judicial interference with administrative decision-making
- Rationale can be overcome by need to respect rule of law constraints on legislature's ability to limit judicial review o on the basis of explicit legislative determination
  - Rule of law consideration prevail over statute
- Correctness should be used only where the legislature has expressly or by implication chosen the correctness standard, or where rule of law considerations require it, namely with respect to constituional questions, general questions of law of central importance to the legal system as a whole, questions involves the jurisdictional boundaries between one or more administrative decision-makers, and possibly other as yet unspecified situations.
- **Explicitly legislative determination of standard of review**
  - Legislative Standards of Review
    - **<u>Subject to rule of law requirements</u>**, standards of review can be whatever legislature chooses
      - Basically, whatever the statute says the standard should be.
        - BC *Administrative Tribunal's Act*
        - AB *Municipal Act*
        - ON *Human Rights Code*
    - BC's *Administrative Tribunal's Act* uses correctness, reasonableness, patent unreasonableness, and fairness in different combinations for different types of issues depending on whether or not the tribunal's decisions are protected by a privative clause

            - Only deals with tribunals, not judicial review of ministerial decision-making which still uses common law *Vavilov* standards of review
        - Relatively unusual to do so
    - Appeals
        - Where a legislature provides "that parties may appeal from an administrative decision to a court, either as of right or with leave, it is subjected to the administrative regime to appellate oversight and indicated that is expected the court to scrutinize such administrative decisions on an appellate basis"
        - Distinction between appeals and judicial review
            - Judicial Review = presumption of reasonableness
            - Appeals = correctness for questions of law
                - Side note: lawyers prefer to try and show a judge something is wrong, because it is easier than saying something is unreasonable. Not jut that something should have been differently, but what was done was incorrect.
            - Appeals = palpable and overriding error for questions of fact, mixed fact and law, and exercise of discretion.
        - Majority concludes that creation of Statutory appeal to the courts reflects a legislative desire to make the courts "part of the enforcement machinery"
        - Courts therefore apply appellate standards of review (in the same way they would in appellate review of lower court decisions)
        - Majority believes change in approach to statutory appeals is necessary for two reasons:
            1. To achieve conceptual coherence with the underlying rational for deference: legislative intent
                - If a legislature created statutory appeal, that had to mean something, therefore, they took the view the creation of an appeal meant they wanted courts to use same type of approach appellate courts sued with lower court decisions.
            2. To maintain simplicity in standard of review analysis
                - Traditionally, the subject of deference based on expertise, they did not want to make review more complicated, so just look at whether there is an appeal and would just use appellate standard of review.

- **Correctness Required by Rule of Law**
    - Rules of constraints
        - Not the case the legislatures can simply say we do not want an judicial oversight as some is necessary to protect rule of law
        - BUT within those restraints the theory was the legislatures can choose either explicitly to adopt greater degrees of deference or correctness review, in the sense they wanted judges to exercise a more searching kind of oversight of an administrative decision

- The majority concludes that rule of law consideration require correctness review in the following situations:
  - Constituional Questions
    - Questions regarding the division of powers between Parliament and provinces, relationship between legislature and other branches of the state, and the scope of Aboriginal and treaty rights under s 35 of the *Constitution*
      - Difference between review due to the effect of the administrative decisions unjustifiably limits rights under the Charter (*Dore* and use reasonableness) and issues on whether a provision of the decision-maker's enabling statute violates the *Charter (Martin* and uses correctness)
    - Distinction between constituional validity and exercise of discretion in accordance with *Charter* values
    - Majority believes constituional questions need to be given final and determinative answers by the courts
    - Using the correctness standard of review for constituional questions is consistent with *Dunsmuir* and other SCC decision
    - Court refuses to address issues raised by *Dore v Quebec* in which reasonableness standard was used in determining whether an administrative exercise of discretion (as distinct from a statute) violated the *Charter*
      - In *Dore v Quebec*, court held that the reasonableness standard was appropriate in determining whether administrative discretion was consistent in a manner that aligned with Charter valyes
  - General Questions of law of central importance to the legal system
    - <u>Questions need to be important to legal system as a whole, not just to relevant area of law</u>
    - Majority states that general questions of law of central importance to the legal system requires review using the correctness standard.
      - This follows *Dunsmuir* and post-*Dunsmuir* decisions.
    - Rationale is that certain questions require "uniform and consistent answers"
    - Examples include:
      - Scope of protection of solicitor-client privilege (*Alberta (Information and Privacy Commissioner) v University of Calgary)*
      - Scope of doctrine of abuse of process
      - Scope of protection of parliamentary privilege (*Chagnon v Syndicat*)
    - Majority seeks to limit expansion of this category
      - Issue being of public importance is insufficient, must be significant to legal system as a whole.
  - Jurisdiction boundaries between or among statutory decision-makers

            - Where there is potential overlap between tribunal authority
                - Labour arbitrator vs Human Rights Tribunal in *Quebec c Quebec*
                - Labour Arbitrator vs Police Tribunal in *Regina Police Association v Regina Police Commissioners*
            - Not jurisdiction questions more generally
            - Majority concludes that where question involves the jurisdictional boundaries between two or more agencies (not just that the wrong jurisdiction made the decision, that would be reasonableness), the standard of review is correctness.
            - Rationale is to prevent operational conflicts between orders made by agencies that would each have a plausible claim to assert jurisdiction over an issue
        - Other circumstances
            - Majority leaves open the possibility of additional situations in which the correctness standard of review may apply
            - These circumstances are not encouraged
            - Not to be used to resolve conflict between agency decisions (though reasonableness review will take into account importance of consistency in agency decision-making)

Minority Critique

- Minority agrees with some aspect of majority decision
    - Presumption of reasonableness review
    - Elimination of correctness review for jurisdictional questions
- Minority disagrees strongly with:
    - Elimination of expertise as a rational for deference
    - Use of civil appeal standards of review on appeals
- Minority argues this represents a significant and unjustified change in the rationale for judicial review
- Minority does not believe that shift to appellate review standards can be justified on basis of respective legislative intent after decades of contrary case law
- Majority response that elimination of expertise deference is necessary to preserve simplicity of choice of standard of review

Post- *Vavilov* Case Law

Derogation from Reasonableness Based on Legislative Intent

- Statutory Appeal
    - The *Vavilov* approach to the choice of standards of review applies to rights of appeal that are expressed in general terms, but some appeals are restricted by statute to questions of law or questions of law or jurisdiction.
        - In these situations, the Court must determine whether an appeal is based on a legal question (such as statutory interpretation) then correctness should be used or another issue such as a question of fact or the exercise of discretion which reasonableness should apply.
            - *Neptune Wellness Solutions v Canada*- whether frozen blocks of krill that were being imported and processed were “fit for

human consumption" was a question of statutory interpretation open to appeal; so to be determined based off correctness standard of review.
        - CITT grants a statutory right of appeal to decisions solely on questions of law
        - So had to decide if this was a question of law or mixed law and fact to determine what review should be sued.
  - The existence of a limited right of appeal may leave open the possibility of judicial review on grounds that are not covered by the right of appeal
    - For example, the Alberta *Workers Compensation Act* creates rights of appeal to the Court of King's Bench on questions of law and jurisdiction and judicial review on questions of mixed law and fact and discretion
      - *Tompkins v Alberta*
    - The standard of review for a judicial review on a mixed question of law and fact in this example would be the "reasonableness" standard rather than "palpable and overriding error"
- Shared first instance jurisdiction from Court and a Tribunal (example of "other" category)
  - There are some situations, for example in respect of the *Copyright Act*, where a court and a tribunal share first instance jurisdiction
  - In those instances, the presumption of reasonableness review for questions of law is rebutted for reasons similar to the reasons for correctness review of the jurisdiction boundaries between two tribunals
  - Here, both the court and the tribunal have an equally valid claim to make authoritative interpretations of the relevant legislation.
    - *Rogers Communications v SOCAN*
      - SCC held that in those situations review by the courts of a tribunal determination with respect to the law should be decided on correctness standard
      - Rationale for that is that you have two agencies with equal authoritative decision-making power interpreting the same piece of legislation and they should be interpreted consistently
      - A pre-*Vavilov* decision
    - *CF Entertainment Software Association v SOCAN*
      - In a comment, they indicated that correctness standard should be applied in *Copyright Act* reasons for same reasons adopted in *Rogers*.

Derogation from Reasonableness Based on Respect for Rule of Law

- Constituional Questions
  - The use of correctness standard of review when a tribunal is deciding whether a statutory provision is consistent with the Constitution is uncontroversial
  - The standard of review to be employed where an administrative body's exercise of discretion violates the *Charter* is reasonableness (as per *Dore*)
  - If there is a right to appeal the administrative body's decision, post-*Vavilov* case law indicated that the correctness standard should apply where the exercise of discretion allegedly violates the *Charter*

        - *Strom v Saskatchewan Registered Nurses Association*
            - S was found guilty of professional misconduct in a nursing home for posting comments on her personal FB page that criticized the care her father was given in a different nursing home that she did not work at.
            - A statutory appeal as opposed to a judicial review of the administrative body's decision
            - SKCA held that where an administrative body is exercising its discretion in a way that violates the Charter the correctness should be applied, when hearing in the context of a statutory appeal.
        - *Canadian Broadcasting Corporation v Ferrier*,
            - The Thunder Bay Police Board decided to hold a closed meeting into an application for an extension of time allowing it to serve a notice, so the Board applied s 35(4) of the *Police Service Act*, which defined the circumstances in which the presumption of an open hearing could be rebutted.
            - Board refused to apply *Dagenais/Mentuk* test which held that restriction to open hearings could only be ordered if they were necessary to prevent a serious risk to the proper administration of justice or if the publication ban outweighed it's deleterious effects
            - Courts found that unlike cases where an administrative decision-maker considers how a Charter right engaged by a discretionary decision should bear on that decision, the Board's decision not to use the test was reviewable using correctness
                - Not reviewing whether freedom of expression was infringed, just reviewing whether the test should be used which is correctness.
                - However, noted that decisions that fail to consider an applicable Charter right should be reviewed under reasonableness, but would not meet the standard since not justified and coherent.
- General questions of law to central importance of legal system
    - The majority in *Vavilov* cautioned courts not to expand the category of general questions of law of importance to the legal system as a whole which are reviewed using the correctness standard
    - Parties continue to try to expand this category, but have had little success
        - *Beach Place Ventures v BC (Employment Standards Tribunal)*- Statutory definition of "employment" not subject to correctness review
        - *Bank of Montreal v Li*- ability of employment contract out of *Labour Codes* protections not a general question of law attracting correctness review
            - Statutory provision addressing employment
        - Other examples that DO NOT fit into this category are:

        - Whether a certain tribunal can grant a particular type of compensation
        - When estoppel may be applied as an arbitral remedy
        - Interpretation of statutory provisions pressing timeliness to an investigation
        - Management rights scope in a collective agreement
        - Limited period has been triggered under a securities legislation
        - Parties under confidential contracts could bring a complaint under a particular regulatory regime
        - Scope of an exception allowing non-advocates to represent a minister in certain proceedings.
        - Questions that centred on a provision specific to a statutory scheme with no procedural value outside of issues arising under that scheme (*Canadian National Railway Co*)
  - Courts are generally reluctant to segment decisions involving questions of mixed fact and law into separate factual and legal components in order to discern a general question of law subject to correctness review
      - *Wawanesa Mutual v Renwick*- determination of inadequacy of reasons not subject to correctness review
      - *Raman v Canada*- approach to factual determinations in refugee hearing not subject to correctness review
  - On the other hand, this segmentation can happen, especially where the legal question is one that as previously been defined as one attracting correctness review
      - *BC(AG) v Canadian Constitution Foundation*- disclosure of documents over which privilege is claimed attracts correctness review
- Review of delegated legislation
  - Former FCA Justice John Evans has argued that the use of the *Vavilov* approach to determine whether or not delegated legislation is validly enacted is problematic
      - Main critique is that delegated legislation rarely comes with reasons attached to it, even if the fairness doctrine applied (which normally it wouldn't) there's not generally an obligation to provide reasons
      - Moreover, a lot of the rational for deference to admin tribunals does not make a lot of sense in relation to Ministers, cabinet, or municipalities.
        - So, historically, the approach that was taken was *ultra vires*, so the courts would ask themselves "does this legislation fall within the scope of authority of the decision-maker?" and would be deciding on correctness standard, but then they would be really reluctant to look into the reasonableness of the law.
  - Evans prefers a return to the more traditional approach of correctness review of legal questions about whether the by-law or regulations is *ultra vires* and very limited review of whether the by-law of the regulation is reasonable.
  - Nevertheless, courts post-*Vavilov* have applied the more general reasonableness review approach to the validity of by-laws and regulations
      - *1120732 BC Ltd v Whistler*: municipal by-law

- *Innovative Medicines Canada v Canada (AG)*: Regulation

Applying the Reasonableness Standard of Review

Correctness, Palpable and Overriding Error and Reasonableness Review Contrasted

- A court conducting correctness review is entitled to prefer its own conclusions to those of the administrative decision-maker, but it should still take the decision-maker's reasoning into account in coming to it's conclusion (*Vavilov*)
- 'Palpable and overriding error" and "reasonableness" are both deferential standards
- "Palpable and overriding error" is the test used in civil appeals in *Housen v Nikolaisen* and the jurisprudence applying the standard in civil appeals is not relevant to administrative appeals
    - *Houston v Association of Ontario Land Surveyors*
- Some commentators (for example, Paul Daly) have suggested that "palpable and overriding error" will prove to be a more deferential standard of review than reasonableness review
- Others (for example, David Mullan) have suggested that in practice there may be little difference between the two
- In *Sunshine Village v Boehnisch*, the Court emphasized that decisions of first instance decision-makers should only be overturned using the "palpable and overriding error" standard where the decision is "clearly wrong"
    - Remember that in an administrative appeal there may be some issues where the correctness standard applies and others where palpable should apply, but when palpable is applicable it is hard to get the decision overturned.

Goals of Reasonableness Review

- Reasonableness review requires not only that decisions be justifiable, but they be justified.
    - Meaning that the reasoning process and outcome are both important, so that public power is justified, intelligible, and transparent.
- "Reasoned decision-making is the lynchpin of institutional legitimacy"- *Vavilov*
- Exercise of public power must be "justified, intelligible, and transparent"
- "…It is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must be justified, by way of those reasons, by the decision maker to those to whom the decision applies"
- Note that majority reasons to seek to balance commitment to deference with framework of review that provides ample opportunities for judicial interference
    - One of the things we will see in majority's reasons for every statement that says courts must respectfully consider reasons that administrative decision-makers give and give deference to decisions on reasonableness review, there are equal opportunities for courts to engage in something more than superficial reasonableness review, but some depth (rise concerns of Minority that there is potential for it to become corruptness review in disguise)

Reasonableness Review Process

- Court must review both reasoning process and outcome
    - Are there logical problems with the reasons provided for the decisions? If there are, even if the decision is justifiable, it is not justified.

  - Providing reasons satisfies procedural fairness requirement, but if inadequate they are unreasonable.
- Burden is on challenger to show that decision was unreasonable
  - Cannot just say it is, must use tools in *Vavilov* to demonstrate why that it
- In order to be reasonable, decisions must be:
  1. Based on internally coherent reasoning; and
  2. Justified in light of the legal and factual constraints that bear on the decision
- Courts should be appropriately deferential to decision-makers and sensitive to context
- Framework for argumentation rather than dictating outcomes
  - Not a set of rules that will give outcomes for cases. But arguments for both sides.
- Reasonableness review should not be "disguised correctness review" or a "treasure hunt for error" (majority and minority agree on this)

Reasons and Reasonableness Review

The Central Role of Reasons

- Courts should not conduct their own assessment of the law and evidence and compare it to that of the decision-maker, but should focus on the assessment of whether the decisions offered by the decision-maker justify the decision on the basis laid out in *Vavilov*
  - Compare *SFU v BC* (adopting the approach criticized in *Vavilov*) with *Delios v Canada(AG) (*adopting the approach endorsed in *Vavilov*)
- A reasonable decision is "one that is based on an **internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker"** (*Vavilov*)
- Where reasons are available, courts must focus the review process on the reasons that are provided by the decision-maker rather than conducting their own analysis and comparing it to that of the decision-maker
  - *Vavilov*
  - *Delios v Canada (AG)*
- While courts once used to take the view that they should independently consider the proper interpretation of the relevant legislation and determine whether or not the interpretation taken by the decision-maker was reasonable in light of the court's own analysis (*SFU v British Columbia*).THAT APPROACH IS NOW DISCOURAGED. (*Vavilov*)
- In addition, courts are discouraged from supplementing the reasons offered by the decisionmaker in order to provide a justification that might have been open to the decision-maker but was not offered by them
  - *Vavilov*
  - *Farrier v Canada (PG)*
    - Appealed a decision of the Parole Board denying him pre-release parole on the grounds that the Board had failed to record the hearing due to technical problems
    - He argued this deprived him of certain rights which he had not waived. He said it violated two different statutes and was procedurally unfair.
    - The appeal board only addressed the procedurally unfair argument in its decision

        - FCA held the appeal board did not meet the standard of justification established in *Vavilov* since not all KEY arguments raised were addressed.
- While courts can use the record to understand the context of the decision and to fully understand the decision-makers reasons, they should not use the record to supplement those reasons in order to provide a justification not offered by the decision-maker or create their own line of reasoning which was not addressed by decision-maker.
    - *Farrier v Canada (PG)*

Right to Reasons and Reasonableness Review

- Majority acknowledges that not all decisions require written reasons for decision
    - Particularly regulatory decisions by Ministers or Governors in Council enacting by-laws as opposed to reviewing applications
- Two-stage reasonableness review most appropriate where written reasons are required and available
- Majority focuses on reasonableness review in circumstances where reasons are required and are available, but does not try to change the rules of governing when written reasons are required, this is still based on five *Baker* factors:
    - Nature of decision/decision-making process
    - Nature of statutory scheme
    - Importance of decision to affected person(s)
    - Legitimate expectations of person challenging decision
    - Procedural choices made by decision-maker
- Reasons should not be assessed against a standard of perfection
- Demonstrated experience or expertise may explain why a given issue is treated in less detail
- Even if the outcome of the decision could be reasonable under different circumstances, it is not open for reviewing court to disregard the flawed basis for a decision and substitute its own decision for the outcome.

Relationship between Adequacy of Reasons and Procedural Fairness

- Courts sometimes find that where a decision-maker's conclusions are not justified on the evidence before them, procedural fairness requires the decision-maker to seek additional evidence in order to come to some proper conclusion
- Where a decision-maker raises a concern, but the evidence is insufficient to enable the decision-maker to come to a reasoned conclusion supporting this concern, it may be incumbent on the decision-maker to request further evidence and/or submissions from a party.
    - For example, in *Patel v Canada (Citizenship and Immigration*) the Court found that visa officer's conclusion that an applicant was not a *bona fide* student was not justified based on the evidence and was procedurally unfair because the Officer did not give the applicant an opportunity to adduce further evidence to address the concerns identified.
        - The officer based his conclusion on two basis grounds:
        1. Student wanted to pursue a course in approving one's English, and similar courses were available for cheaper in Patel's home country of India

2. Patel's personal circumstances lead the Officer to believe that he would not return to India when course was finished.
    - The Officer never said what these personal circumstances were, and the Court fund that the justification provided by the Officer was not enough to support his finding, and if he had concerns e should have given Patel the opportunity to adduce evidence to address these concerns.
- Similarly in *Romania v Boros*, the court found that in granting an extradition application by Romania concerning fraud and forgery offences, the Minister failed to adequately address the issue of delay from the Romanian government in seeking extradition of the respondent.
    - The court concluded that it was incumbent on the Minister to seek further information from the Romanian government on whether authorities knew tat the respondent was in Canada as early as 1998, and if so, why they did not commence extradition proceeding until 2008.
    - In other words, these were the inquiries that were necessary to provide the foundation for the decision on whether delay was unreasonable and would therefore, not support the grant of extradition.

In Absence of Written Reasons

- In absence of written reasons, courts can look to record of proceedings and context to provide evidence of the rationale for a decision
- Focus of reasonableness review in the absence of written reasons is on whether the outcome is consistent with the relevant legal and factual constraints, rather than an analysis of the reasoning process (since written reasons were not made required or available)

Reasons Must be Internally Coherent

- A decision is unreasonable if…
    - It fails to reveal a rational chain of analysis
    - A decision is based on an irrational chain of analysis
    - Conclusions reached cannot following from analysis undertaken
    - Reasons read in conjunction with the record do not make it possible to understand the decision makers reasoning on a critical point
    - Clear logical fallacies (such as circular reasoning, false dilemmas, unfounded generalization, or absurd premise)
- Reasons should be read in light of the record and with sensitivity to the administrative setting in which they were given
- Reviewing court should be sensitive to context, but should not fill in gaps in reasons
    - This is a departure from *Newfoundland Nurses*
    - Decision has to be justified by reasons provided, and if decision-maker did not do this, then send it back to have them do it again.
- Nevertheless, reasons must be sufficient to justify the decision
- If reasons "contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision"
    - So the idea is that the reasons of the administrative decision makers should be capable of standing on their own, and the issue is not whether the decision is justifiable, but whether it has been justified.

- A decisions "will be unreasonable if the reasons for it, read holistically, **fail to reveal a rational chain of analysis** or if they reveal that the decision was based on **an irrational chain of analysis"**
- In effect, while inadequacy of reasons is not a sperate ground on which to find that decision is procedurally unfair, inadequacy in the reasoning process will render a decision unreasonable
  - Approach that court takes to why it is invalid changes abit as a result of *Vavilov*

Failures of Internal Rationality

- Failures of internal logic in the reasons supporting a decision render the decision unreasonable
- This is true even if the decision must be supportable on the basis of alternative reasons, since even if the decision is "justifiable" it is not "justified"
- Examples of internal contradictions in reasons:
  - *Longueepee v University of Waterloo*
    - L did bad in school in Dalhousie due to an undiagnosed and unaccommodated mental disability. He applied to transfer to Waterloo and they denied him saying his academic grades were not good and he would not succeed.
    - Where the court overturned a finding by the Human Rights Tribunal that a University Admissions Committee had accommodated a disabled applicant while relying solely on his unaccommodated grades from another institution.
      - Problem with the reasoning is that the sole basis was the unaccommodated grades that the Applicant got, and so how can they say they are accommodating and then base their decision entirely on something where no accommodation occurred.
  - *Zhang v Canada*
    - Canadian citizen sought to sponsor her parents for permanent resident status
    - Father was ill and she would not meet timeline so she asked for a third extension, but they rejected her application before the expiration of the second timeline.
    - Where the court overturned an IAD decision since the IAD had relied on mutually incompatible grounds for its decision (that it was not unfair to decide an issue before a deadline had expired because the result was "inevitable" while at the same time faulting the appellant for not exhausting alternative remedies or ways of solving the problem that was observed in the initial decision)
- The SCC in *Vavilov* offers the following illustrations of the types of failures of internal logical that will render a decision unreasonable:
  - The reasons do not reveal a rational chain of analysis that justifies the decision-maker's conclusion
  - The reasons reveal that the decision is based on an irrational chain of analysis
  - The reasons do not allow the court to understand the decision-makers reasoning on a critical point

- The reasons exhibit logical fallacies, such as circular reasoning, false dilemmas, unfounded generalization or an absurd premise.

Justified in Light of Legal and Factual Constraints

Majority identifies 7 constraints that decision must respect:
(first 3 are legal, last 4 are factual)

1. Governing Statutory Scheme
2. Other Relevant Statutory or Common Law
3. Principles of Statutory Interpretation
4. Evidence Before the decision-maker
5. Submissions of the parties
6. Past practices and past decisions
7. Impact of the decision on an affected individual
   - Decisions need not explicitly address each constraint in detail, but must be attentive to key elements
   - If they find someone has not been attentive to one of these key elements, the decision will be found to have been unreasonable.

Governing Statutory Scheme

- Decisions must comply with the statutory scheme which is adopted
- Discretionary decisions must be consistent with the rational for which authority is conferred
- Administrative bodies must not seek to expand their authority beyond what is granted to them
- Degree of flexibility available to administrative bodies in interpreting the scope of their authority is coloured by the degree of precision in the language used to circumscribe their authority
- Consistency with purpose of statutory scheme and overall limits of statutory scheme

Other Relevant Statutory or Common Law

- Administrative decision-makers are constrained by relevant common law rules
- Decision-makers must have regard to binding judicial precedents, but if they completely ignore it, it becomes unreasonable.
- Consistency with common law and statutory constraints outside of statutory scheme

Principles of Statutory Interpretation

- Administrative decision-makers must follow the “modern principle” of statutory interpretation in interpreting legislation
- “An administrative decision-maker’s interpretation of a statutory provision must be consistent with the text, context, and purpose of the provision” (harmony of these three things)
- Courts engaged in reasonableness review should not independently interpret the relevant statute and compare the administrative decision-makers interpretation to their own
  - (that puts pressure on decision-making process and turns reasonableness into correctness review)
- Respect for “modern approach” to statutory interpretation, harmonizing text, context and purpose

- Assess reasonableness of interpretation as a whole rather than comparing decision-maker's interpretation to court's interpretation

Evidence Before the Decision-Maker

- Courts should not re-weigh the evidence and make new factual findings, just ensuring decision-makers made regard to the evidence
- "The decision-maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them"
- Decision must take account of relevant evidence
- Decision-makers are not required to review all the evidence put before them by the parties, but they do have to address the key evidentiary matters in coming to their conclusions
    - For example, in *Sadiq v Canada (Citizenship and Immigration)* (key evidence)
        - S and her son made claims are refugees as they were receiving threats from her husband's family for her son having autism. Her husband hid them, but the family beat him until he told them where they were so they fled to the USA.
        - Son got status, but mother did not as she failed to show a "fear of persecution". She claims court erred by not considering evidence of statement form her brother saying the in-laws beat him and were in pursuit of her.
        - Court overturned the rejection of a refugee claims on the basis that the RAD did not take into account the evidence adduced by the claimant that show that she was at risk
        - See also *Kanthasamy v Canada (Citizenship and Immigration)*
            - The court said ignoring this type of evidence makes the decision unreasonable as per re: ignoring evidence on the impact of the of removal on children in an h&c application.
    - On the other hand, in *Torrance v Canada (AG)* (not relevant evidence)
        - T was a quadriplegic who was trying to get CPP but failed to show he had contributed to it 4 out of 6 years prior to the accident.
        - He argued not all evidence was accounted for as some lines from a letter he submitted were not addressed.
        - The Court was not willing to interfere were the evidence not mentioned by the decision-maker was not critical and was not sufficient to contradict the decision-maker's conclusion
    - Takeaway from these decision is that failure to take account for critical information or evidence put before the decision-maker, and to explain how the decision-maker treats that evidence in the decisions will be considered unreasonable, but evidence that is not detrimental to the case can be more ignored.

Submissions of the Parties

- Reasons must "meaningfully account for the central issues and concerns raised by the parties"

- Decision-makers need not respond to every submission, but must address key issues and central arguments
- Decision must be responsive to key submissions of parties
- Decision-makers are not obliged to refer in their reasons to every submission made to them by the parties, but they are required to come to grips with the key issues or central arguments raised by the parties
  - In *Vavilov* itself, one of the reasons the Court found the Registrar's decision unreasonable was that the decision failed to consider Vavilov's submissions on the purpose of the relevant statutory provision and the international law that supported Vavilov's view of the purpose of said provision.
  - Likewise in *Mattar v National Dental Examining Board*- The court find that the Committee's reasons di not attempt to explain why her submission with respect to eligibility for a compassionate appeal was rejected.
    - M was licensed to practice dentistry in Egypt and hoped to do so in Canada. She had three opportunities to pass the equivalency assessment but failed.
    - She argued that she requested extra time due to a defective typodont and that others would have been granted it, but she was denied it and had a mental breakdown which caused her to fail.
    - This was a situation where Applicant was arguing that devise on which she was conducting her test was flawed, and nothing was done when she pointed it out, and she did not have time to finish. She thought she based on this she would be entitled to compassionate relief.
    - BUT Board said what the examiners did is just say she failed to work accordingly, and did not address the issue of compassionate relief.
  - On the other hand, a decision-maker's failure to address an argument that was ancillary does not render a decision unreasonable
    - *Subramaniam v Canada (Citizenship and Immigration)*
  - Likewise, in order to show that decision was unreasonable by failing to take account for a key submission, the party challenging the decision must demonstrate that the decision-maker failed tot take a viable submission into account
    - *Bell Canada v Hussey*- where the Court upheld a costs award since Bell did not show why costs should not be awarded on the normal basis.
      - Bell objected the costs, but then did nothing to show costs, so decision was not unreasonable to no address costs, because Bell never made a viable argument to address.

Past Practices and Past Decisions

- Administrative decision-makers are not bound by *stare decisis*
- **Administrative decision-makers are bound by judicial precedents (same way statutes are binding) but not directly bound by past administrative practice**
- Where a decision does depart from established practice (of administrative practices), there is a burden of justification placed on the decision-maker to explain why it was reasonable to do so
- Burden of justification for significant departures from past practice

- On the other hand, the SCC in *Vavilov* stated that where decision-makers depart from past adminsrttaive practice, they are obliged to provide reasons for doing so. Similar to approach court took in *Tammotaran* supported for departures from guidelines.
    - *Canada (AG) v Honey Fashions Ltd*
        - Where there was a customs decision and it went against past-practice, including decisions even related to Honey Fashion themselves
        - CA said decisions are not binding, but important for a decisionmaker to explain and give rationale for this
        - Failure to do so renders decision unreasonable.
    - The SCC in *Vavilov* rejected the submission that where there are competing lines of administrative authority, courts should review decisions using the correctness standard to provide authoritative guidance on the law.
    - As a result, where there are conflicting lines of arbitral authority, it is open to an arbitrator to pick which line of authority best suited to the facts of the case, provided that an explanation is given for this choice
        - *Service d'admisnrtation PCR Ltee v Reyes*
            - Looked to past practices and considered them, but found they were irrelevant to the case at hand and therefore, did not need to be accounted for in the decision.
            - Other side argued the past practices were relevant.
            - Decision was reasonable.
        - *AUPE v Alberta*
        - *Labourers' International Union v GDI Services*
            - Members of Union. She had "unacceptable behaviour" and was banned from TD Centre. Since TD Cenrtea was the site of work, they could not get any for her and placed her on indefinite layoff.
            - The union argues they have terminated her without just cause, but they argue it is just a layoff. Tribunal agreed it was just a lay off.
            - CA says that the Arbitrator gave intelligible and transparent reasons, so decision was reenable.

Impact of the Decision on an Affected Individual

- "If a decision had particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflect the legislature's intention"
- Burden of justification where decision has significant impact on an individual
- The burden of justification is greater as the severity of the consequences of an unfavourable decision for an individual increase
- Where the decision has especially severe consequences for an affected party, the decision-maker has a heightened obligation to explain why the outcome is what the legislature intended
    - Contrast *Kahn v Canada (Citizenship and Immigration)*
        - Court overturned a decision denying refugee status on the basis of inadequacy of the reasons provided for the decision
        - Decision did not reflect the stakes, so unreasonable.

        - In addition to respect other legal and factual constraints, the decision-maker must explain why an outcome that has serious consequences for an individual best reflect the legislature's intentions (same as *Vavilov*)
    - With *Sticky Nuggz Inc v Alcohol and Gaming Commission of Ontario*
        - Upholding decision to refuse cannabis license because the proper outlet was too close to a school, notwithstanding the investment the applicant made in improving the site
        - Straight light versus walking around the block, but divisional court said it a big consequence, but reasonable for decisionmaker to adopt straight line rule and not around the block measurement.
        - The fact the applicant made an investment before approval was their choice and not necessarily the most producent thing to do, so the fact they made this investment did not impose a greater duty on the board to agree with their submission.

Minority Critique

- Concern that majority's multi-factor list of constraints will encourage excessive judicial intervention into administrative decision-making (a "treasure hunt for error")
- Preference for a focus on deference in reasonableness review
    - Deference as an "attitude" of respect for administrative decision-making
    - Reasonableness review is a determination of whether the answer provided by the administrative decision-maker has been shown to be unreasonable"
    - Reasonableness review is a qualitative assessment that must be sensitive to context
      (Bryden thinks it is fair to say the majority in *Vavilov* would agree with those observations, in fact, they are at some paints to argue that the approach that they are taking to reasonableness review is not dramatically different than the minority recommend).
- Minority offers suggestions on how reasonableness review should be conducted
- Suggestions helpfully focus on approaches that restrain judges from engaging in excessive intervention into administrative decision-making, transforming reasonableness review into a disguised form of correctness review
- Difficulty with minority suggest are that they are less helpful in identifying types of situations in which judicial intervention is warranted (helpful in avoiding excessive intervention, but Majority is better at outing exact situations)
- Both majority and minority find Registrar's decision in *Vavilov* was unreasonable because the interpretation given to the relevant statutory provision was unreasonable
    - The minority judges placed an emphasis on the decision0maker not acting in a way in accordance not with just the text of the provision but relevant purposes
    - Lesson from this is not withstanding a general preference for deference, it does not follow that the minority are saying it's never the case that courts should find administrative decisions unreasonable.

The Review of Discretionary Decisions

Introduction: Law, Rules, and Discretion

- Discretion is the express legal power to choose a course of action from a range of permissible options, including the option of inaction.
- Questions of Law vs Exercise of Discretion
  - Standards of Review
    - Law: Correctness (appeal and Judicial Review of some issues) or Reasonableness (Judicial Review on most issues)
    - Discretion: Reasonableness (JR) or Palpable and Overriding Error (Appeal)
- Historically, courts tended to take different approaches to the review of legal and discretionary decisions by administrative bodies, but the separation between the two is not as sharp as one might expect
- Reasonableness review of administrative interpretations of statute reflects an appreciation that there may be room for the exercise of discretion even in interpreting legislation
- On the other hand, by a process known as "segmentation", courts can often break up what appear to be discretionary decisions into a series of components, some of which involve question of law (see *Suresh*)
  - Take a decision on it's face an exercise of discretion, and then say in order to exercise discretion properly there has to be an interpretation of the legislation to see what the legislature wanted
  - Segmentation: separating out the questions the define the limits of the range of choice. Acceptable factors into discrete questions of law potentially subject to more in-depth review.
    - Dividing a discretionary decision into a series of sperate issues, some of which may involve questions of law that may be subject to review using a more stringent standard of review than the discretionary decision itself.

Identifying Discretionary Decisions

What is Discretion?

- Grant of power to use judgement in making decision
- Within range of acceptable choices, final choice should be made by person or body to whom power granted
- Need to define range of acceptable choices and range of factors that may properly influence ultimate choice (but at the end of the day, the idea of discretion is a choice among those alternatives should be made by who the discretionary power has been given, not the court doing judicial review
- "Segmentation" involves separating out the questions that define the limits of the range of choice/acceptable factors into discrete questions of law
- Need to derive clues as to breadth of discretion/relevant consideration from statute

Signs that indicate statutory grants of discretion:

- Use of the term" discretion"
- Subjective grant of authority "in the decision-maker's opinion"
- Use of "may" rather than "shall" (may says choice, shall intends obligation)
- Authority to decide "in the public interest"

- Implication from statutory structure- eg. Choice of among possible sanctions/remedies

Which of the following are discretionary decisions?

1. College of Physicians disciplinary committee finds that doctor committed professional misconduct by having consensual sexual relationship with patient
    - NO. A legal delegated decision, not discretionary.
2. Law Society disciplinary committee imposes sanction of 3-month suspension and costs on lawyer who admits to professional misconduct
    - YES. Discretionary, it's a sentencing decision, so by implication, the law society has some discretion over the severity.
3. School boards impose masking requirements on staff and students in exercise of authority to protect public health and safety of students and staff
    - YES. Discretionary as it would be "in the public interest" since it could be a good idea, it could not be, varying opinions.

Traditional Doctrines for Review of Discretion

- Used to be incorporated into correctness review, not unless statutory appeal question (where it would be palpable an overriding error) it is likely under reasonableness.
- Procedural: focus on who is entitled to exercise the discretion (what we looked at in the first part of the course)
    - Unauthorized sub-delegation (delegating decision to someone not authorized to make it)
    - Fettering of discretion- turning discretion into a rule which is improper
        - "Let the rule decide"
        - Court says it is fine to have guidance, but you cannot make a rule that takes away the residual discretion of the decision-maker.
    - Dictation (allowing person not authorized to make the decision to dictate the result)
- Substantive: whether or not discretion has been properly exercised as a legal matter
    - Three reasons: improper purposes, irrelavnt considerations, and *wednesbury* considerations.
    - Improper purposes
        - Two issues with improper purposes cases:
            1. What purpose (or purposes) are legitimate or proper purposes for the exercise of the discretion in question? And
            2. For what purpose(s) was the discretion exercised?
        - Sometimes proper purposes are identified expressly in the relevant statute (remember the purposes clause in the *Immigration Act*, a it then was, discussed in *Baker*)
        - More often they have to be implied from nature and text of the statutory scheme
        - Many purpose clauses list a number of purposes, not all of which are easily reconciled, and the issue will often be which purpose(s) are relevant to the decision at hand
        - Where purpose must be determined from the overall structure and text of the legislation, there is often a tension between broad and narrow views of what purposes are proper

    - Where a decision-maker has given reasons, it should be possible to identify the purpose form the reasons, though this is seldom the case where the decisionmaker's underlying motivating is illicit.
    - There is no doubt that discretionary decision can be overturned if they are taken for illicit purposes
    - The challenge is that decision-makers who are actually doing something for an illicit purpose rarely announce their bas motives, so proving the existence of an illicit purpose is typically very difficult
    - A more promising argument is the possibility that decision was take for a public-serving purpose that was not contemplated by the relevant statutory scheme
        - An example might be a road construction decision that is undertaken to further urban planning rather than road construction goals
        - As the road construction example illustrates, to successfully advance the argument that a decision was taken for a public-regarding purpose that was foreign to the relevant statutory scheme requires a court to accept a restricted version of what purposes are contemplated by the scheme
    - The more open-textured the language of the legislation is, the more likely it is that court will take an expansive rather than a restrictive view of what purposes are within the statute's contemplation
        - You can have a transportation state that allows for planning considerations to be relevant in making decisions about where to build roads. One might even think that is more likely the rule than the exception
        - But all about how broad the legislation is
- Irrelevant considerations
    - Decision takes into account consideration not contemplated by statute
    - There are two forms of this argument:
        1. The decision-maker took into account a consideration that was not contemplated by the legislation and was therefore irrelevant, or
        2. The decision-maker failed to take into account a consideration that was highly relevant.
    - In either case, much turs on how restrictive or expansive the court's approach is to what considerations are relevant
        - Sometime legislation will spell these things out explicitly, but often it is a question of construing the statute and looking at it entirely and interpreting what it is the legislature imagined was relevant to the exercise of this discretion and what they would consider irrelevant
    - Generally speaking, Courts focused on whether an irrelevant consideration was taken into account or the decision-maker failed to take into account a relevant consideration, and were NOT willing to reassess the appropriate weight that ought to be given to various relevant considerations

        - Sometimes courts, particularly using reasonableness review, can get into what appears to be reweighing the considerations.
        - BUT historically, weight is for decision-maker, relevance of the consideration is for the court.
      - The issue for a reviewing court is whether the decision-maker took into account an irrelavnt consideration (or failed to take into account a relevant one)
      - Courts are normally unwilling to consider whether the decisionmaker gave sufficient weight to a relevant consideration (contrast *Baker* and *Kanthasamy* and *Suresh*)
  - Wednesbury Unreasonableness
      - Decision so unreasonable no reasonable decision-maker could come to it
      - Historically, *Wednesbury* unreasonableness was an attempt to show that some improper purpose or irrelavnt consideration must have been at play, since otherwise the decisionmaker would not have taken such an obviously unreasonable decision
      - Generally speaking, *Wednesbury* unreasonableness arguments fail because courts were rarely willing to accept the argument that no reasonable decision-maker could possibly have made the decision that was in fact made.

Standards of Review and Review of Discretion

- The traditional review of discretion doctrines are "grounds of review"
- BY a ground of review we mean a legal basis on which a court could intervene to invalidate a decision that was statutorily conferred on an administrative decision-maker
- Conceptually, "standards of review" are different as they were signals about the intensity of judicial scrutiny of what historically would have been described as errors of law
- Even before *Vavilov*, the conceptual distinctions between "grounds of review" and "standards of review" were being blurred
- Since *Baker*, traditional substantive review of discretion doctrines have been folded into "reasonableness" review analysis
  - See *Suresh v Canada (Minister of Citizenship and Immigration*)
      - Deporting S on grounds of being a terrorist threat but by deporting S they are subjecting him to the risk of torture
      - Court should not reweigh factors or interfere merely because it would have come to a different conclusion, but must decide if the factors considered were considered in bad faith, considered irrelevant factors, or failed to consider relevant ones.
- Arguments that a decision was made for an improper purpose or took into account an irrelevant consideration became reasons for arguing that the decision was unreasonable
- *Vavilov* reasonableness analysis applies to discretionary decisions as well as to decisions concerning questions of law, fact, or mixed law and fact
- Even prior to *Vavilov*, the SCC cautioned courts reviewing discretionary decisions against segmentation of the decisions intro preliminary legal or jurisdictional issues

that might attract correctness review and discretionary decisions that would be reviewed using reasonableness standard

- *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*
    - The Court said the Commissions decision to forward a complaint to tribunal for hearing was a discretionary decision and should be reviewed using reasonableness standard, rather than separating a preliminary legal issue put that would call for correctness standard
    - As we have seen in *Vavilov*, if there is not a sharp distinction between the use of reasonableness review for questions of law versus questions of discretion, there is not as much temptation to use segmentation because reasonableness would be used no matter what.
    - *Dunsmuir* and *Halifax* firmly establish that discretionary decisions be reviewed on a reasonableness standard. However, it has sometimes been unclear whether reviewing court's application of reasonableness shows a genuine commitment to deferential review, and in particular to *Bakers* promise that courts could give administrative decision-makers leeway in determining the scope of their discretionary powers
        - These questions arose in *Kanthasamy v Canada (Citizenship and Immigration)*
            - This case revisited an Immigration officer's h&c decision
            - K was questioned and detained by police in his home country, so his family sent him to Canada. He claimed refugee protection for fear of persecution from being a member of the Tamil and was denied.
            - He then applied for permanent residency on h&c grounds. Was rejected.
            - The immigration officer paid too much attention to language of Immigration guidelines that it fettered her discretion.
                - She did not just consider them, she considered them almost mandatory.
            - Three considerations majority found to be unreasonable in her decision:
                - Said psychologists assessment of PTSD was hearsay because he was not there for the incidents that occurred
                - Said his dignity and ties to that party would not affect him personally even though it was a liberation group and had deep ties to self-identity
                - Said his best place to be was with family in his home country, and deporting him would not amount to unusual or undeserved or disproportionate harm.
            - This case is argued to disguise correctness review as an exercise of discretion.
- *Forest Ethics Advocacy Association v Canada (National Energy Board)*
    - This is a better example of applying reasonableness review.

        - A pipeline company sought the NEB's approval for a project to allow more Western Canadian crude oil to be transported and refined in Eastern Canada
        - In an interlocutory decision specifying the scope of its review of the project, the NEV rule that it would not consider the contributions to climate change associated with upstream activities, the development of the oilsand, and the downstream use of oil transported by the pipeline because they were "irrelavnt:
        - NEB argued they had authority to exercise this discretion from statute, and FEAA is arguing NEV must consider larger impacts.
        - Court found decision not to weigh these factors was reasonable because it was not within their responsibilities to do so, nothing in the Act requires them to do so, and the Board had discretion to determine whether an issue is directly related or relevant
        - A subsection of the Act also contains a list of examples for what is relevant, which is narrow and does not mention upstream or downstream activities.
- The implication of applying *Vavilov* to discretionary decisions is that, here reasons are required, decisionmakers must logically justify their choices and do so in a way that respects the legal and factual constraints on the decision-makers
- Where reasons are not required, *Vavilov* reasonableness analysis will focus on whether the decision respects the legal and factual constraints on the decision makes
- Courts normally confine themselves to identifying whether the proper considerations were take into account and do NOT consider whether appropriate weight was given to those factors
- "*Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in new weighing process, but draws on an established line of cases concerning the failure of Ministerial delegates to weigh implied limitations and/or patently relevant factors"
    - *Suresh*
        - In other words, not supposed to reweigh factors but supposed to decide if irrelavnt considerations were taken into account or there was a failure to take into amount of relevant factors
- On the other hand, one can find decisions where it appears that the Court is deciding the case on the basis that the decision-maker gave insufficient weight to certain factors
    - *Kathansmy v Canada (Citizienship and Immigration)*
        - Looks like court is reweighing factors
- Courts are not supposed to reweigh factors, but if they feel strongly the decision is problematic there is sometimes the temptation for courts to get into the weight that is attributed to different factors, even though the mainstream doctrine is that is not what they are supposed to do
- Post-*Vavilov*, discretionary decisions must be (probably assessed on reasonableness standard)
    1. Based on internally coherent reasoning, and
    2. Justified in light of the legal and factual constraints that bear on the decision

- Where legislation explicitly identifying the factors that are relevant to the exercise of discretion and the decision-maker weighs those factors in a logical manner that is consistent with the purposes of the legislation, the discretionary decision should normally be upheld as reasonable.

Review of Delegated Legislation

This section is about the debate around the framework of review that should apply to the review of delegated legislation- rules of general application made under an express statutory grant of power that is often framed as broad discretion… includes municipal councils, the governor or lieutenant in council and various agencies, boards and commissions, including worker's compensation and law societies.

- Historically, Courts were not particularly deferential in relation to municipalities who were enacting delegating legislation. The idea was that if a municipality enacted a piece of legislation that was *ultra vires* in the sense that it fell outside the scope of its statutory authority, that statute would be reviewed using correctness and the Court would overturn the bylaw
- The traditional approach to the review of delegated legislation enacted by municipalities was that the question of whether the by-law fell within the powers conferred on the municipality by its enabling legislation was reviewed using the correctness standard (*Shell Canada v Vancouver*)
- If a decision feel within the municipality's enabling authority it could still be overturned as unreasonable if it was taken for a purpose that was not a proper municipal purpose
    - *Shell Canada v Vancouver*
        - City decided to boycott a Shell in its purchase of fuel because Shell was indicated as part of the Apartheid regime in South Africa, so they were showing support for anti-apartheid movements.
        - There was no question that Vancouver could decided who they wanted to buy fuel from, but to make a decision about who it was going to buy fuel from for what was essentially international relations or an ethical purpose was not considered to be a proper municipal purpose.
- At the time the *Shell Canada* case was decided, some members of the SCC favoured using a differential approach to a municipality's interpretation of its enabling legislation and an expansive view of what constituted proper municipal purposes (*Shell Canada* dissent)
    - Dissenters would have said it was appropriate to defer to the municipality in interpreting the scope of its enabling legislation, so reasonableness rather than correctness would have been good to see if the legislation fell within the enabling statute.
    - The Court also said municipalities had a broad scope with respect to what a municipal purpose is, and what Vancouver did was appropriate and within their decision.
- Even prior to *Vavilov*, courts had begun to shift to a differential approach to the question of whether municipal by-laws feel within the authority of the municipality's enabling legislation (*Catalyst Paper Corp v Nort Cowichan*)

  - NC enacted a municipal taxation by-law that taxed industrial properties at a rate 20 times greater than residential properties in order to protect long-term fixed-income residents from the impact of high property taxes in a rising housing market
  - C argued NC could only consider objective factors, like consumption of services, not social, economic, or political issues.
  - Court asked "whether the bylaw is reasonable having regard to process and whether it falls within a range of possible outcomes"
  - In this context, reasonableness considers past decision but respects context, respects the responsibility of elected representatives to serve the people who elected them, the legislative framework (the community charter here allows for the setting of different tax rates) and still must conform to the statutory regime
  - True test is: only if the by-law is one that no reasonable body informed by these factors could have taken will the by-law be set aside. They are granted wide deference.
  - Court concluded this by-law was not unreasonable.
- Subsequently, the SCC extended the reasonableness review approach adopted in *Catalyst Paper* to delegated legislation made by self-governing professional bodies and administrative agencies that have been given rule-making authority.
  - *Green v Law Society of Manitoba*
    - Upheld law society rule that mandated continued professional development courses under their statutory decision-making power
    - Self-governing professional bodies that have rule-making authority
  - *West Fraser Mills Ltd v BC (Workers Compensation Appeal Tribunal)*
    - Upheld as reasonable a regulation made by the BCWCB under their authority to make regulations as they see necessary or advisable.
    - Administrative agencies that have rule-making authority
- Even though this approach is criticized, lower courts have continued to employ the *Vavilov* reasonableness analysis in assessing the validity of delegated legislation
  - *1120732 BC Ltd v Whistler*: municipal legislation
  - *Innovative Medicines Canada v Canada (AG)*: federal regulations
- Unreviewable Discretionary Powers:
  - Prerogative Powers and Non-Justiciability (ie. privileges)
  - Private Powers of Public Authority (ie. contracts)

Confining and Structuring Discretion

- Adminsrttaive bodies that have the authority to make rules may sue them to structure the exercise of discretion
- Even in the absence of explicit rule-making authority, it is typically open to administrative agencies to use guidelines, administrative precedents, and policy statements to structure the exercise of discretion
- The text provides some interesting commentary on different instruments for structuring the exercise of discretion, their strengths and limitations, and the processes for developing them.

Tribunals and the Constitution

Introduction

- The development of the law concerning the ability of administrative bodies to address constituional issues has been long and contentious
- It is useful to begin by distinguishing among three questions and seeing what the court has concluded for now

Summary of Three questions and Answers:

1. Can administrative bodies refuse to apply portions of their enabling legislation on the basis that the provision violates/is inconsistent with the constitution?
    - Jurisdiction of administrative bodies is established by the legislature.
    - Where the legislature has given a tribunal the power to address questions of law, that impliedly includes the power to address the constituional validity of its enabling legislation unless that authority is explicitly withdrawn.
    - Precedent setting case here is *Martin*.
2. Can administrative bodies provide similar remedies to "courts of competent jurisdiction" for violations of *Charter* rights?
    - Tribunals that have the power to address questions of law can remedy *Charter* violations within the limits of they statutory authority
    - BUT remedies available under s 24(1) of the *Charter* are still limited y the tribunal's statutory mandate
    - Precedent setting case here in *Conway*.
3. Must administrative bodies exercise discretion in accordance with *Charter* values?
    - Administrative discretion must be exercised in a manner that is consistent with *Charter* values.
    - Those determinations are subject to a reasonableness standard of review.
    - As per *Dore*.

Main difference between review of discretionary decision violating a Charter right and review of constituional validity of enabling legislation are:

- Review is conducted using reasonableness standard for decisions and correctness standard for enabling statute.
- Decision-makers are required to take Charter values into account in exercising discretion rather than conducting a full Charter analysis.

Question 1: Jurisdiction of Tribunals to Decide Constituional Questions

- Administrative tribunals that have the express or implied authority to answer general questions of law also have the authority to refuse to apply provisions of their enabling legislation that are inconsistent with the constitution, providing that jurisdiction has not been withdrawn by the legislature. (as per *Martin*)
- The ability of some tribunals to refuse to apply portions of their enabling legislation on the basis that the provision violates the constitution flows from section 52(1) of the *Constitution Act, 1982* (aka the constituional supremacy clause)
    - Section 52(1) reads: "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"

- Existence of constituional supremacy is different than who decides whether a law is inconsistent with the constitution
    - Constitutional supremacy applies to all elements of the constitution, including federalism and constitutionally protected Aboriginals and treaty rights
    - Constituional supremacy concerns the constituional validity of laws, whereas *Charter* values concerns the exercise of administrative discretion.
- Courts have consistently said that administrative tribunals cannot declare a statutory provision to be invalid as declaratory relief is a power reserved to courts.
    - BUT what tribunals can do is refuse to apply a provision on the basis that it is inconsistent with the constitution and in light of constitutional supremacy, the provision is of no force or effect to the extent of the inconsistency.

Background to *Martin* (Not the Law Today… Just what lead to the law today)

First came the cases of *Cuddy Chick, Douglas/Kwantlen Faculty Association,* and *Tetrault-Gadoury*

- In three cases decided in 1991, the SCC concluded that **some** administrative decision-makers could refuse to apply provisions of their enabling legislation on the basis of inconsistent with the constitution and **others** could not do so
    - *Cuddy Chicks* and *Douglas/Kwantlen Faculty Association*
        - In these cases, the Court held that the labour board and arbitrators did have the authority to refuse to apply provisions of their enabling legislation on the basis of inconsistency with the Constitution.
    - *Tetrault-Gadoury*
        - The Court held that boards of referees under the *Employment Insurance Act* did NOT have the authority.
    - The key distinction between the two decisions and the types of decision-makers was whether the decision-maker had the explicit power to consider and apply any law necessary to carry out its mandate
    - If so, that power included the power to determine whether or not its enabling legislation was inconsistent with the Constitution.

This was followed by the *Cooper* decision

- This line of reasoning was reconsidered in *Copper*
- *Cooper* revealed some fracturing in terms of Courts views and analysis of Tribunal Authority with respect to constituional questions.
- The majority in *Cooper* concluded that the Canadian Human Rights Commission did **not** have the authority to address all questions of law, and therefore could not consider whether the *CHRA*'s failure to prohibit mandatory retirement was a kind of age discrimination that violated s 15 of the *Charter*
    - The dissenting judge disagreed, and held that because the Commission necessarily has the power to address some questions of law in carrying out its mandate, that implied that it could decide constituional questions
    - Lamer, CJ concluded that only courts should decide questions of the constituional validity of legislation. He though *Cuddy Chick* and the above cases were wrongly decided.

Current Law as per *NS(WCB) v Martin*

- In *Martin*, the court overruled *Cooper* and effectively adopted the reasoning of the minority (dissent) in *Cooper*
- The court in *Martin* restated the test:

1. Whether the Administrative Tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision?
2. (a) Explicit Jurisdiction must be found in the terms of the statutory grant of authority, (b) Implied Jurisdiction must be discerned by looking at the statue as a whole
3. If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*

Facts

- M suffered from chronic pain and challenged the constitutional validity of the *Worker's Compensation Act* for excluding chronic pain from the purview of the regulars workers' compensation system
- Instead the Act provided a four-week restoration program beyond which no further benefits were available.

Key Distinctions between *Martin* and *Cooper*

- The key distinction between *Martin* and *Cooper* is the willingness of the SCC in *Martin* to take an expansive view of the implied authority of administrative bodies to address general questions of law.
- As per *Martin* relevant factors to finding implied authority will include:
  - the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively
  - the interaction of the tribunal in question with other elements of the administrative system
  - whether the tribunal is adjudicative in nature
  - practical consideration, including the tribunal's capacity to consider questions of law
    - BUT courts went on to say that practical consideration could never be determinative.
    - Most important is really the nature of the tribunal's mandate and what would be needed to carry out mandate effectively.

Policy Consideration Underling *Martin*

- The SCC in *Martin* took the view that taking an expansive view of the authority of administrative bodies to address constituional questions enhanced access for the public to constituional protections
  - The Court was primarily interested in the *Charter*, although *Martin* is not confined to the *Charter* → it applies to other areas of the Constitution such as aboriginal rights in s 35.
- The contrary view is that encouraging constituional argument before administrative tribunals distracts from the work of the tribunal
  - Supporter of this view tend to believe that the ability to make constituional arguments before administrative tribunals provides a kind of illusory access to the ability of individuals to challenge the constituional validity of statutory provisions.
  - Some believe that is a tribunal refuses to apply a statutory provision on constituional grounds, the Attorney General (who is entitled to notice of

constituional question) will inevitably seek judicial review, so successful constituional challenges will end up in court in any event.

Implications of *Martin*

- The reasoning in *Martin* applies not just to constituional challenges on Charter grounds by to federalism issues and aboriginal and treaty rights claims
  - *Paul v British Columbia (Forest Appeals Commission)*
- Accordingly, tribunals that have jurisdiction to address general questions of law must also address arguments concerning the adequacy of Crown compliance with duty to consult and accommodate Indigenous peoples
  - *Clyde v Petroleum Geo-Services Inc*
  - Note that tribunals may not have sufficient remedial authority to address shortcomings in consultation, and sometimes that requires additional measures to be taken by government officials or judicial intervention to establish that the Crown did not meets its duty.

Alberta, BC, and Manitoba Legislation Limiting impact of *Martin*

- Legislatures have the right to expressly limit jurisdiction of administrative bodies to address constituional questions, and AB, MB, and BC, have done so.
- S 11 of the AB *Administrative Procedures and Jurisdiction Act* restricts authority of administrative decision-makers to address questions of constituional law unless given express authority to do so by regulation.
  - So default in AB is administrative agencies do not have power to address questions of constitutional validity of their own enabling legislation, even if they have the general power to address questions of law.
  - The Designation of Constituional Decision-Makers Regulation currently allows only 10 AB decision-makers to address some or all questions of constituional law.
  - Alberta's statutory exclusion of AB Energy Regulator jurisdiction to assess the adequacy of Crown consultation in approving projects in the public interest does not prevent the AER from being required to consider whether other aspects of the honour of the Crown were satisfied
    - *Fort McKay First Nation v Prosper Petroleum*
- MB's *Administrative Tribunal Jurisdiction Act* is similar to Alberta's law and has been in force since January 1, 2022.
  - MB's regulation designated 9 tribunals with jurisdiction to address all or some constituional questions
- Part 5 of the BC *Administrative Tribunals Act* creates 3 categories of tribunals:
  1. Those that have jurisdiction over constitutional questions
  2. Those that have NO jurisdiction over constituional questions
  3. Those that have jurisdiction over SOME constituional questions (typically federalism) but not *Charter* questions

Question 2: *Charter* Remedies

- Section 24(1) of the *Charter* states:
  "Anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considered appropriate and just in the circumstances."
- Early *Charter* case law suggested that only "courts" were "courts of competent jurisdiction" for purposes of s 24(1) (ie. *Mills v the Queen*)

- In 2010, SCC in *Conway*, decides that the *Mills* line of authority needs to be revisited in light of constituional decisions culminating in *Martin* in 2003

R v Conway

- Writing for a unanimous Court, Abella states:
  " We do not have on *Charter* for courts and another for administrative tribunals"

Test of *Conway*:

- The Court in *Conway* sets up a multi-step process for determining whether a particular tribunal has the power to grant remedies under s 24(1) of the *Charter*, and if so, what those remedies might be:

1. Does a particular tribunal have the jurisdiction to grant *Charter* remedies generally?
   - This is determined by whether the tribunal has the power to decided questions of law (follow *Martins* test)
   - If no, then no jurisdiction to decide *Charter* remedies.
2. If yes, has *Charter* jurisdiction been explicitly excluded by statute?
   - Like in AB, BC, or MB legislation.
   - This is respecting *Martin* decision that said legislatures can determine the scope of tribunal jurisdiction.
   - If yes, the no jurisdiction to decide *Charter* remedies.
3. If no, tribunal is a "court of competent jurisdiction" under s 24(1) and has the power to issue *Charter* remedies in relation to *Charter* issues that arise in the court of carrying out it's mandate.
4. Can Tribunal under this jurisdiction grant the particular remedy sought, based on its statutory mandate?
   - This will be dependent on legislative intent, as discerned from the tribunal' statutory mandate.
     - Example: if granting a remedy violates another part of the statute it goes against the statutory mandate.
   - This is a recognition of the rationale from *Mills* that the authority of tribunals is limited

Background facts of *Conway*

- A decision involving the ON Review Board, an agency that review whether a person who is heled in a mental institution having committed a "not criminally responsible act" is entitled to be released based on them no longer being a danger to the public
- Conway's *Charter* rights were violated as he was held in solitary confinement for a long period prior to his hearing.
- On the merits of the *Conway* case, court concluded the Review Board was a court of competent jurisdiction but did not have the remedial authority under s 24(1) to grant an absolute discharge or prescribe specific treatment, as this was inconsistent with legislative intent.
  - Power to gran absolute discharge is inconsistent because it would not make sense to allow Review Board to let someone out into the public if they are a danger to others regardless on if their Charter rights were violated
  - Also treatment is the job of a physician, not the review board.

Relationship between s 24(1) and Tribunal Independence

- Note that *Conway* determines that some tribunals are "courts of competent jurisdiction" for purposes of s 24(1) of the *Charter*

- Does this mean they are "courts" for purposes of the unwritten constituional principle of judicial independence?
    - On the basis of jurisprudence to date, NO.
        - *Walter v British Columbia*
    - Courts continued to be concerned about the appropriateness of using an unwritten constitutional principle to engage in major restricting of the institutional architecture of administrative tribunals

Question 3: *Charter* Values and Standards of Review

- Sometimes discretionary decisions can impinge on constituional rights
    - For example, customs seizures of allegedly obscene material or law society sanctions for lawyers who violate professional conduct rules with respect to civility can both constrain freedom of expression
        - *Little Sisters* and *Dore*
    - Another example is restrictions on Sikh students wearing kirpans in schooling can constrain freedom of religion
        - *Multani*
            - Courts applied *Oakes* test here and overturned decision.

Attacking the Decision not the Statute

- The first issue for courts (and lawyers challenging these decisions) is whether to attack the statute under which the decision was made or the decision itself
    - In *Canada v Canadian Council for Refugees*, the FCA allowed an appeal from a decision of the FCC that held that the provisions of the *IRPA* that allowed the government to refuse to hear refugee claims from claimants who had arrived in Canada from a designated safe third country (more specifically, the US) violated s 7 of the *Charter*
        - In doing so, Court relied on two key principles:
            1. Litigants may not selectively attack aspects of an integrated statutory scheme without regard to the other elements of the scheme
            2. Where an alleged *Charter* violation flows from administrative action rather than legislation itself, the challenge must be to the action rather than the statute
    - The FCA found that the claimants had not properly challenged the relevant actions, which was the ongoing designation of the US as a safe third country, and therefore the challenge was dismissed.
- Once it is clear the challenger has attacked an administrative decision rather than the enabling statute, the next issue for reviewing courts then becomes whether an attack on the decision should be treated as if it was an attack on the statue
    - In this case a full *Charter* analysis should be conducted and review is done using the correctness standard.
- If not the above, should it be treated as an attack on an exercise of discretion
    - In this case, review is done by using the reasonableness standard supplemented by *Charter* values analysis as per *Dore*

Dore v Barreau due Quebec

Background

- Lawyer who was criticized by a judge and sent the judge an intemperate letter

- Judge sent the letter to the QB's Law Society, who held a disciplinary hearing on the basis that the lawyer violated Code of Ethics' rules against incivility
- Barreau found lawyer breached Code, and issued a suspension; lawyer sought judicial review, alleging a violation of his *Charter* right to freedom of expression
- Lawyer does not challenge validity of Code or length of suspension, rather he argues that the decision to sanction him violated his freedom of expression

Analysis

- SCC decided that decision to sanction lawyer is a discretionary decision that is subject to reasonableness review
- SCC concluded that full *Charter* analysis using correctness standard is inappropriate, in part because it is not clear who has the burden to adduce evidence and argument in support of s 1 "reasonable limits" analysis
- Instead, SCC concludes that Barreau must exercise its discretion in accordance with *Charter* values, and reasonableness review is done to assess if Barreau gave appropriate weight to freedom of expression concerns
- Decision to sanction lawyer was upheld by SCC
- Administrative decisions cannot be justified using section 1 analysis.
- Proportionality: is there a balance between the right being infringed and the objective of the decision, and not being unreasonably limited.
- Ensuring that the decision interfere with the relevant *Charter* guarantees no more than necessary given the statutory objectives.
  - If disproportionately impairing, it is unreasonable
  - If it r**eflects a proper balance of the statutory mandate and the Charter protection of certain Charter value**, it is reasonable.
- **Holding: *Dore* requires courts to use the reasonableness standard of review in reviewing the discretionary decisions of administrative bodies that may have an impact on the *Charter* protected rights of individuals affected by the decision, but the court must ensure that the administrative decision-maker took account of *Charter* values in exercising its discretion.**

Critique

- Some commentators (and members of the SCC) believe that *Charter* values provide too nebulous a standard against which to assess potential infringement of rights protected by the *Charter*
- SCC had been divided on use of *Dore* framework in later case
  - *Loyola High School v Quebec*
    - Issue: the lawfulness of a decision by Minister of Education to deny High School request for an exemption from a requirement that public and private school offers and Ethics and Religious Culture Program to teach students about the beliefs and ethics of different religions from a neutral and objective perspective
    - Loyola proposed an alternative class which would explore these other religions but in a Catholic perspective, and the Minister denied
    - The Court applied *Dore* to find that the Minister's decision to not grant Loyola an exemption did not proportionally balance the values of the religious freedom with the statutory objectives of the ERCP.
  - *TWU v Law Society of Upper Canada*

            - TWU wanted to open a law school and teach law from a Christian perspective in a religious environment.
            - Law society said no because the belief would impact the legal profession by making it inaccessible to minorities.
            - Using *Dore*, the court found this decision to be a proportionate balancing of statutory objectives and the *Charter* rights, awards deference to decision-makers, and decision is upheld.
- Critiques are particularly concerned that the *Dore* framework both undermines the need for rigorous justification of infringement of the *Charter* and leads to inconsistent protection of *Charter* rights

Impact of *Vavilov* on *Dore*

- SCC in *Vavilov* explicitly refuses to comment on the ongoing soundness of the *Dore* decision
- On the other hand, *Vavilov* principles would seem to suggest that where decision-maker provides reasons for decision, the reasons must provide an adequate justification for the decision, which would include addressing potential *Charter* implications of the decision if these were raised by the parties
    - For example, *Lethbridge and District Pro-Life Association v Lethbridge*
        - The applicants successfully challenged the City's refusal to permit anti-abortion ads on city buses on the basis that the City's justification inadequately address *Charter* values.
        - They say it is hard to follow both *Vavilov* and *Dore* as non-legal experts do not know how to justify and use *Dore* in their written reasons.
        - Court said they needed more than the reasoning just stating "carefully weighed the Applicant's Charter rights" in one sentence.
        - Decision-maker must engage in an **effort to provide reasons that** balance concerns with Charter values
            - If they do not do so, this is sufficient basis for overturning a decision.

Charter Values

- *Charter* values are the values that underlie *Charter* rights that are used to assess rules of decision in which Charter rights are not directly applicable.
    - For example, the assessment of common law rules governing defamation in light of the *Charter* value of freedom of expression in *Hill v Church of Scientology*
        - Constituional challenge of common law rules for libel
        - No statute to be justified since it is a common law rule
        - Court is saying, how can we have a fair process for justifying this common law rule? Who introduced what evidence?
        - So, Court says they will not do a full Charter analysis and measure the common law rules against Charter values
    - Power to modify common law rules will consider representing an appropriated balance from representing *Charter* values on one hand and common law rules on the other
    - Justice Abella said this set out ideas should be incorporated into the review of administrative exercise, because problems are similar.

- Some commentators (and some judges) are skeptical of decisions relying on *Charter* values as lacking the analytical rigor associated with the adjudication of *Charter* rights

Applicable Standards of Review for Each Question

1. Whether or not a tribunal has jurisdiction to decide constituional challenges or remedies? The review of the tribunal's decision with respect to its jurisdiction over constitutional challenges to its enabling legislation and over remedies, as discussed in *Martin and Conway*
    - A true question of jurisdiction, but better seen as a tribunal's interpretation of its enabling statute and presumptively subject to reasonableness review.
2. The review tribunal's determination of the constitutional validity of legislation or award of a constituional remedy
    - As per *Vavilov*, the question of whether a provision of a decision-maker's enabling statute violated the Charter (such as questions in *Martin*) is a constituional question that requires correctness review.
3. The review of an administrative decision that allegedly violates a *Charter* or Aboriginal right
    - This involves the review of an exercise of administrative discretion based on statutory authority that is presumably constituional
    - Should be determined via reasonableness review as per *Dore*

- Standard of review also points to the methodology used to determine whether the infringement of a right can be justified
    - If the issue arose from a challenge to the legislation as a whole, the use of correctness standard requires *Oakes* test (section 1 analysis) to be applied.
    - If the issue arose from a challenge to the exercise of administrative discretion, then the reasonableness standard allows for deference, albeit adjusted to incorporate the question of "proportionality" as per *Dore*.

REMEDIES

In many situations there are other ways to seek relief than through the court that are not just appeals or judicial review. These can include:

- Dispute resolution approaches pursued before and sometime even after a decision is made
    - Some people have preference to this as it can be better than going to a court battle that occupies time and resource
- Internal administrative reconsideration of a decision
- Recourse to an elected official
- Ombudsman review
    - Can provide information and issue reports, but cannot issue decisions
    - Useful for clients who do not have finances to afford court battles

There are also practical considerations that affect the approaches lawyers and clients take in pursuit of their goals. These can include:

- The cost of pursuing relief in court
- The time needed to pursue relief in court
- The availability of interim relief
- Whose interests are served by maintaining the status quo pending a judicial decision

- Whether the presentation of oral evidence will assist in advancing a claim

Relief

- From a procedural standpoint, there are four ways that a person can make a challenge to an administrative decision in court:
  - By way of appeal
    - Appeals have to be created by statute
    - There is no general right to appeal administrative decisions
  - By way of petition for judicial review
    - In the absence of a right of appeal, the most common way for persons to challenge the validity of an administrative decision in court is by way of application for judicial review, which is a summary proceeding commenced by petition.
  - By way of action
    - Such as an action for damages, declaration, or injunction
  - As a defendant in a proceeding by way of collateral attack
    - Raising as a defence to the proceeding the invalidity of a decision that is relevant to the claim being made against you
- Most Canadian jurisdictions have consolidated the procedures for obtaining the traditional prerogative writs of *certiorari*, *mandamus*, and prohibition into a single application for judicial review, and then public law remedies in relation to declaration and injunctions into a single application for judicial review
  - In some jurisdictions this is done by statue (such as *Federal Courts Act* in Ontario and the BC *Judicial Review Procedures Act*)
  - In others, a similar result is achieved through the Rules of Court (Rule 3.15 in Alberta's *Rules of Court*)

Public Law vs Private Law Remedies

- Benefit of public law remedies is that they can enable courts to quash decisions (*Certiorari*) or require governmental actions, like issuing a permit (*Mandamus*)
- The availability of public law remedies also carries with it an implication that certain obligations (eg. the duty of fairness) are owed to persons affected by decisions that can be supervised using these remedies
- Where there is a breach of a legal obligation that is enforceable only using "private law" remedies, the person affected may be restricted to a right of compensation (eg. damages for breach of contract) as opposed to the invalidation of an injurious decision
- Remedies of declaration and injunction span the boundary of public and private law remedies
  - In the public law context they are not available through summary proceedings
  - Where in private law, they are normally obtained by commencing an action
- Classic Private Law Remedies is damages and is obtained through commencing an action.

Reach of Public Law Remedies

- Key issue is "public" character of a challenged decision
  - Sometimes easy to find like Human Rights Tribunals or Worker's Compensation Boards, but when not so obvious use below.

- In considering whether decisions have a sufficiently public character to be amendable to review using public law remedies, courts engage in a multi factor analysis (*Air Canada v Toronto Port Authority)*
    - Issue in *Air Canada* case was whether the Toronto Port Authority was acting in a business capacity as distinct to a public capacity in allocating landing spots at Billy Bishop Airport and protection pre-exisiting landing rights
    - Factors are the following:
        - The nature of the action or decision
            - In doubtful cases, the nature of the act or decision is likely to be more important than the nature of the actor or decision-maker
                - For example, there are times when statutory bodies (eg. Crown corporations) are engaged in activities of a sufficiently private character (eg. running a broadcasting business) that their actions are not subject to public law review
                - Similarly, there can be times when the actions of non-statutory bodies have a sufficiently governmental or public character that they are subject to public law review
        - The nature of the decision-maker
        - Extent to which decision founded in law rather than private preference
        - Decision-maker's relationship to government
        - Extent to which decision maker is an agent of government
        - Suitability of public law remedies
        - Existence of compulsory power
        - Whether conduct has a serious public dimension
    - Court concludes that Toronto Port Authority is acting in a business capacity and not a public capacity. Therefore, public remedies are not appropriate.
    - Accordingly, decision is not subject to judicial review under s 18.1 of the *Federal Courts Act*.

Borderline Settings

Government in the Conduct of Business

- Contrast in *Volker Stevin* with *Air Canada v Toronto Port Authority*
    - ***Volker Stevin***
        - Decisions of a non-statutory advisory committee that designated businesses as eligible for governmental incentives were subject to public law review (such as tender bids)
        - The Court observes that when government made ordinary purchases under procurement contracts these decisions are not subject to public law review (buying paperclips, photocopiers, etc.… any oversight will be under contract remedies)

        - Divergence of views on whether this is true of procurement decisions made pursuant to tending processes

Government as Employer

- Contrast *Dunsmuir* with *Masters v Ontario*
    - Recall in the SCC's decision of *Dunsmuir*
        - The Court held that *Dunsmuir* had no right to procedural fairness in relation to his dismissal and was restricted to any remedies for possible breach of contract
        - In other words, neither public law rights nor public law remedies were available to him
    - Contrast *Masters*, where the Court held M was entitled to procedural fairness in the investigation of harassment complaints that led to his resignation, though the court also found he was treated fairly.

Non-Governmental Agencies Controlling Access to Employment

- Bodies regulating access to occupations… Sometimes these organizations are voluntary, sometimes appointed by statute, but government does not control the personnel making decisions.
- Contrast *Seaside Real Estate* with *Ripley v Independent Dealers Association*
    - ***Seaside***
        - Decisions of Real Estate Board incorporated under statute expelling a member company was amendable to public law review using *certiorari*
    - ***Ripley***
        - Disciplinary decision of voluntary self-regulatory investment dealer's association not amendable to public law review using *certiorari*
        - Court concludes that relief was available by way of declaratory relief, but application failed on the merits
    - The point to be made here is that even though both of these organizations are regulating access to professions or are useful in one's pursuit of occupation by having membership in them, one has no regulatory authority and is more akin to a club and therefore, is voluntary and public law remedies are not available.

Voluntary Associations

- The SCC has also had occasions recently to address the availability of public law remedies to address decisions by voluntary religious organizations to expel members
- Courts have been reluctant to interevent
- *Congregation of Jehovah's Witnesses v Wall*
    - The Court ruled public law remedies could not be employed to review the decisions of religious bodies in expelling members since these remedies are only available in relation to public bodies
    - This was true even if it was procedurally flawed under public law, because public law does not apply here so this argument is not available.
- *Ethiopian Orthodox Tawehado Church v Aga*
    - The Court went further and held that the decisions of religious bodies excluding members could not be subject to actions for breach of contract
    - Evidence of reluctance of court to deal with disputes in religious communities

Impact of Statutory Remedies Regimes

- The *Federal Courts Act*, BC and ON's *Judicial Review Procedure Act*, and Rule 3.15 of AB's Rules of Courts.
  - Access to public law remedies from the courts is combined into a single application for judicial review
  - Procedure is summary which means there is no trial with in-person testimony by witnesses, and the factual background is provided by the record of proceedings before the administrative decision-maker supplemented by affidavit evidence
- Remedies available are prerogative writs (like *cererotia* and *mandamus*) and equitable remedies (such as a declaration or injunction)
  - Prerogative writs are by nature public law remedies
  - Declarations and injunctions are typically private law remedies, but the legislation makes them available by way of judicial review in a public law context
- The content of the remedies is not frozen in time, but evolves along with underlying administrative law principles

Exclusions

Administrative Action

- Some forms of administrative actions are not amenable to public law remedies because no person's rights or obligations are determined by them and they have no detrimental effects to members of the public
  - For example, there is no right to judicially review a decision of the Federal Commissioner of Lobbying to investigate a complaint filed by a member of the public (*Democracy Watch v Canada*)
  - Similarly, where the NEB made a recommendation to Cabinet that a pipeline be approved, Cabinet's decision to approve the pipeline was judicially reviewable but the recommendation was not (*Gitxaala Nation; Tsleil-Waututh Nation*)
  - Recall in *Canadian Council for Refugees*, the FCA held that persons who wanted to make a *Charter* challenge to the provisions of the *IRPA* that authorized the designation of the US as a "safe third country" had to challenge the designation, not the legislation
    - This could be done by challenging a decision refusing to hear a refugee claim on the basis that the claimant was intelligible and seeking relief requiring the Governor in Council to revoke the safe third country designation in support of this application.

Authorities/Public Bodies

- Decisions of "public law" Parliament, provincial legislatures, superior courts, and the Crown cannot be reviewed using prerogative remedies
  - Superior Court judges have immunity from prerogative relief when they are acting in their capacity as superior court judges, but not when they are serving as members of an administrative body, such as the Canadian Judicial Council (*Gorourard*)
    - When they are acting as a tribunal they are not immunized from review.
  - Parliamentary privilege does not extend to legislature when acting as an employer (*Vaid; Chagnon*)

- Modern status governing judicial review allow these remedies to be employed against the governmental decision-maker, when where the decision-maker is the Governor in Council or Lieutenant Governor in Council
- Various Crown Proceeding Statutes preserve the Crown's immunity from injunctive relief against the Crown, but offer the alternative of declarative relief which tends to achieve the same purpose
- Courts are sometimes willing to grant injunctive relief, especially interim injunctive relief, against Crown agents and servants (*Government of PEI v Summerside Seafood*)

Federalism Consideration

- Judicial review jurisdiction is divided between the Federal courts and the Provincial superior courts
- Provincial superior courts are courts of **inherent** jurisdiction
  - This means that they automatically have jurisdiction in relation to any dispute, unless jurisdiction was taken away from them by parliament
- Federal courts have NO jurisdiction over PROVINCIAL administrative bodies
  - Courts of statutory jurisdiction
  - So, if it is a provincial body, you can automatically say, no federal court authority.
- Therefore, Provincial Superior Courts have EXCLUSIVE judicial review jurisdiction over the provincial administrative bodies in that province
- With some important exceptions, the Federal Courts have EXCLUIVE judicial review jurisdiction over the decisions of federal boards, commissions and tribunals as defined in the *Federal Courts Act*
  - So if it meets the definition of a federal board, Federal Courts presumptively have exclusive jurisdiction.

Important Provisions in the Federal Courts Act

- S 2: definition of "federal boards commissions and tribunals:
- S 17: Concurrent original jurisdiction for FC in actions for damages against Federal Crown
  - Provincial superior courts have jurisdiction in relation to actions for damages to Federal Crown, but so does Federal Court
- S 18: "Subject to section 28" exclusive FC original jurisdiction in respect of public law relief against "federal boards commissions and tribunals"
- Section 18.1: Procedure for obtaining relief through application for judicial review application under s 18
- Section 28: Exclusive FCA jurisdiction in respect of judicial review of 16 named federal tribunals

History of Constituional Considerations

- As noted, until the enacted of the *Federal Courts Act,* judicial review of federal agencies took place in provincial superior courts, as is the case with provincial agencies today
- One of the perceived difficulties of this was that you could have departments of Fisheries dealing with a particular legislation in BC and they could interpret it differently than a court in Newfoundland
- Eventually, SCC will grant leave of appeal and create a consistent approach to be used across all agencies

- Uniformity of national treatment of federal agencies as rationale for the creation of the *Federal Court Act* main role was to have national judicial review jurisdiction in relation to federal administrative agencies
- ***Pringle v Fraser***
    - Parliament has the constituional authority o deprive provincial superior courts of ordinary administrative law review of decisions of federal administrative agencies
    - So for ordinary administrative law purposes, parliament could take that jurisdiction away from provincial courts and get it to federal courts
    - **Exclusive federal court jurisdiction over ordinary judicial review is constitutionally valid.**
- ***Jabour* (*AG Canada v LSBC*)**
    - SCC held that Parliament DOES NOT have the constituional authority to deprive provincial superior courts of CONSTITUTIONAL review of federal legislation or actions of federal administrative agencies
    - This does not mean that FC does not have right to engage in constitution review of federal legislation or federal decisions, but that provincial superior courts cannot have that power taken away from them
        - Lawyers have preference to bring disputes to their provincial court because they are more familiar with system and judges
    - So, they have **concurrent jurisdiction in relation to challenges to federal legislation or more important, constituional challenges to the actions of federal administrative agencies.**
- ***Reza v Canada***
    - FC and PSC have CONCURRENT jurisdiction to hear Charter challenges to validity of *Immigration Act* scheme for review of deportation order
    - Superior court properly exercised discretion to stay application because FC was more appropriate forum for addressing constituional validity of immigration legislation
    - Superior Courts have discretion to stay constitutional challenges to federal administrative action if federal courts are a superior forum.
    - The FC deals with Immigration matter all the time, so therefore ON Courts took the right view that it was more appropriate for the FC to hear it
    - **Ratio: Superior courts have discretion to stay constitutional challenges to federal administrative action if federal courts are a superior forum.**

Federal vs Provincial Superior Court of Jurisdiction

- Section 2 of the *Federal Courts Act*:
  "federal board, commission, or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, **other than** the Tax Court of Canada or any of its judges, any such body constituted or established by or **under a law of a province or any such person or persons appointed under or in accordance with a law of a province** or under section 96 of the *Constitution Act, 1867*.
    - Appointed under or in accordance with a law of a province = any body provincially created even if exercising authority under federal legislation

            - Ie. Review Boards for not criminally responsible individuals created by province, but powers come from Criminal Code
                - Not subject to review of FC, but instead PSC
    - Under s 96= Cannot have FC review of decisions of PSC even though they may be exercising powers enacted by federal parliament.
- Some residual provincial court jurisdiction remains where federal courts have not been given jurisdiction
    - For example, PSC can grant *certiorari* in aid of *habeas corpus* where individual is being held in a federal penitentiary (*R v Miller; May v Ferndale Institution*)
    - Likewise, *Canada Labour Code* says labour arbitrator appointed pursuant to collective agreements are not federal boards, so judicial review is in PSC.
- Until relatively recently, Courts viewed the use *habeas corpus* in PSC as an inappropriate remedy for reviewing immigration detentions since the IRPA was considered to provide a mechanism for review of such detentions that was at least as broad as *habeas corpus* and no less advantageous for the applicant
    - *Peiroo v Canada*
    - In *Canada (Public Safety and Emergency Preparedness) v Chhina*- a majority of the SCC reached the opposite conclusion
        - An administrative scheme may be sufficient to safeguard the interests protected by *habeas corpus* with respect to some types of challenges but may also need to be re-examined with respect to others.
        - The Court retained the *Peiroo* test, that *habeas corpus* was not available if the administrative alternative was at least as broad and no less advantageous, but found that this was not the case under the IRPA's review regime
        - Dissent: would have addressed the alleged deficiencies in the IRPA regime by taking an expansive approach to the review jurisdiction of the IRB
- PSC retains concurrent jurisdiction to hear damages claims against the Federal Crown (s 17 implied this)
    - In *Canada (AG) v Telezone Inc*, Court rejects argument that damages claim could not be dealt with comprehensively by the ON courts where there is a collateral attack on validity of a federal order
    - SCC notes that it is a disguised attempt at judicial review of a federal order.

So, Concurrent FC and PSC jurisdiction exist when…

- Damages actions against the federal Crown
    - *Telezone*- damages action can be heard by provincial superior courts despite collateral attack pn decision of federal board, commission, or tribunal
- PSC review of detentions in federal institutions using *habeas corpus* with *certiorari* in aid
    - Corrections- *May v Fendale; Mission Institution v Khela*
    - Immigration- *Chhina*

Allocation of Authority between Federal Court and Federal Court of Appeal

- Rationale for two-tier judicial review scheme- important regulatory tribunals reviewed directly by FCA

- FC has general original review jurisdiction under s 18
- If Parliament creates a right of appeal, the appeal is to the court designated in the statute. If the statute does not designate a court, it is heard by the FC.
- If there is a right of appeal, thee is no right of judicial review.
- Within federal courts system, claims for damages MUST originate in the FC and MUST be commenced by way of action (s 17)
  - As a result, damages claims cannot be combined with summary proceedings for judicial review under s 18
- Remedies set out in ss 18(1) and (2) available only through application through judicial review (s 18(3))
- 30 day time limit subject to relief, unless FCC judges finds additional time to be alloweable (s 18.1(2))
- Summary proceedings (s 18.4(1)) unless action ordered by court (s 18.4(2))

***FCA*, section 28**

- FCA has original and exclusive review jurisdiction in relation to 16 named tribunals
- If FCA has jurisdiction, FCC does NOT (s 28(3))
- FCC procedural rules found in ss 18-18.5 apply to FCA (s 28(2))
- Section 28 lists tribunals reviewed directly by the FCA which include…
  - The Review Tribunal established by the *Canada Agricultural Products Act*
  - The Conflict of Interest and Ethics Commissioner appointed under s 81 of the *Parliament of Canada Act*
  - The Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*
  - The Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*
  - The Canada Energy Regulator established by the *Canada Energy Regulator Act*
  - The Governor in Council, when the Governor in Council makes and order under subsection 186(1) of the *Canada Energy Regulator Act*
  - The Appeal Division of the Social Security Tribunal established under section 44 of *the Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of the Act or relates to an appeal brought under subsection 53(3) of the Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of the that Act section 81 of *the Canadian Pension Plan,* section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*
  - The Canada Industrial Relations Board established by the *Canada Labour Code*
  - The Federal Public Sector Labour Relations and Employment Board referred to in subsection 4(1) of the *Federal Public Sector Labour Relations and Employment Board Act*
  - Adjudicators as defined in subsection 2(1) of the *Federal Public Sector Labour Relations Act*
  - The Copy Right Board established by the *Copyright Act*
  - The Canadian Transportation Agency established by the *Canada Transportation Act*
  - The Competition Tribunal established by the *Competition Tribunal Act*
  - Assessors appointed under the *Canada Deposit Insurance Corporation Act*
  - The Public Servants Disclosure Protection Tribunal established by th*e Public Servants Disclosure Protection Act*; and

    - The Specific Claim Tribunal established by *the Specific Claims Tribunal Act.*
- Note that immigration and human rights decisions are reviewed by the FC rather than the FCA

Forms of Permanent Relief

Collateral Attack

- Takes place when the invalidity of a decision or by-law is raised as an argument in another proceeding (typically as a defence in proceedings seeking enforcement of the order or by-law)
- *Consolidated Mayburn*
    - The validity of the Board's proceeding was relevant only in the context of a pleading by the Board that its demolition of the structure was justified by a valid order, and therefore, was not actionable trespass
    - C counted that this justification could not be advanced because the Board's order was tainted by a breach of the rules of natural justice.
    - Constrains the availability of collateral attack in situations where the party raising the collateral attack failed to pursue and opportunity to appeal the order

Prerogative Writs (Direct Attacks)

Certiorari

- Used to quash a tribunal's decision, but it does not have the automatic effect of substituting a decision that the person seeking judicial review wishes to obtain
    - For example, a person who gets an order quashing a penalty may be satisfied with the result, whereas a person who gets an order quashing a decision refusing a benefit has not yet obtained the benefit
- Nowadays, it is common for courts to quash a decision and then remit the matter to the tribunal with directions, where that is appropriate (*FCA,* s 18.1(3)(b))
- Quashing a decision does not automatically prevent the same tribunal from rehearing the case (*Little Narrows Gypsum*)

Mandamus

- Orders a public officer to perform a duty
- Typical restrictions on the use of *manadamus* (*Karavos v Toronto)*
    - Clear right to have the thing sought by *mandamus* done
    - Duty to perform at the time relief is sought
    - **Duty to perform must be obligatory rather than discretionary**
    - Must normally be a demand made and refusal to perform duty
- Power to remit decision with directions often has a similar effect to *mandamus* without all of the limitations

Interim Relief and Stays

- Making an application for judicial review does not automatically have the effect of staying the decision under review (*Re Cedarvale Tree Services Ltd*)
- Some Rules of Court provide expressly that making a judicial review application does not automatically grant a stay (Rule 3.23(2) of Alberta Rules of Court)
- It is common for courts to have the statutory power to grant a stay pending the determination of a judicial review application (s 18.2 of *Federal Court Act*)
- *Metropolitan Stores*

  - Union applied to MLRB for the imposition of a first contract in reply, the employer sought a declaration that the provisions of the ACT authorizing such a contract violated the Carter.
  - SCC sets aside stay of labour board proceedings concerning imposition of first collective agreement pending determination of employer's *Charter* challenge to underlying legislation
  - Test for grant of stay:
    - Has applicant raised a serious question of constituional validity?
    - In absence of a stay would applicant suffer irreparable harm?
    - Which party will suffer the greater harm if the stay is not granted?
  - In constitutional cases, the third branch must take account of the public interest enforcing the law pending a determination of constituional invalidity.

Standing

- In the large majority of cases, the standing of the parties to bring judicial review application is not a matter of significant concern.
- Presumptively, persons who were parties to a proceeding before an administrative decision-maker have standing to seek judicial review of that decision (or where an appeal is available, to appeal the decision)
- Where standing becomes an issue is when the person seeking judicial review was NOT a party to the proceeding or more commonly, where the person seeking judicial review is attempting to challenge a rule or an administrative practice on that basis that is contrary to law in the absence of a concrete decision
- Historically, the AG was the guardian of the public interest in ensuring that rules and governmental actions complied with the law
  - This is fine if the rule is NOT one that established by the government which AG is a member or which the decision is one in which the AG is somehow implicated in the government making decision
  - BUT there are obvious difficulties with this approach where the AG is a member of the government whose rules or actions are challenged
- Courts have adopted two solutions to this problem:
  1. Recognize the right of private individuals who have a "sufficient personal interest" to challenge the rule or action in court (PRIVATE INTEREST STANDING)
  2. Grant discretionary "public interest standing" to an individual or an organization seeking to launch a challenge to the rule or the governmental action
- Consideration that make judges reluctant to expand standing, include the following goals:
  - To allow directly affected parties to achieve a final resolution of a dispute without undue interference from third parties
  - To ensure there is a concrete factual basis on which to assess the lawfulness of governmental activity
  - To ensure that the legal issues are adequately addressed
  - To conserve judicial resources in the face of potentially duplicative challenges
- Interest in the expansion of public interest standing is connected with three phenomena:
  1. The growth of public interest organizations with the desire and means to use the legal process to pursue their goals

a. Includes civil liberty organization, equality seeking organizations, or various other types seeking to promote difference or causing (like environmental)
2. The *Constitution Act, 1982* and in particular the *Charter*, which significantly expanded the range of legal arguments that could be advanced to challenge governmental activity; and
   a. Wasn't simply division of powers challenge, but various kinds of rights challenges and section 35
3. The expansion of public interest intervention, which expanded opportunities for public interest organizations to participate in litigation without being parties
   a. Particularly SCC has expanded these types of opportunities
   b. Trade-off is other people control litigation, but if you have something to contribute and participation is not onerous on creating extra obligations on parties, then insight can be valuable.

Private Interest Standing

The Sufficient Personal Interest Test

- This is standing as of right. If you can satisfy this test, you have a right to seek judicial review (or if appeal, appeal it)
- Traditional test is that applicant must show either:
  - Interference with their private rights; OR
  - Interference with public rights in which the applicant was directly affected and would suffer loss over and above other members of the public
    - Difficult to apply and results of some cases are difficult to reconcile.
      - *Lord Nelson Hotel Ltd v Halifax*- hotel owner HAD STANDING to challenge zoning change on neighbouring property
        - LN owned a hotel AND a residential property on different corners, and the City permitted a third hotel by a different company be opened on the other Corner.
        - Has interest over and above an ordinary citizen, because zoning change would allow for a potential competitor hotel
        - Questions that arise from this are how far away do they have to be before it is no longer a sufficient argument? What if it was not a hotel but something that blocked view from hotel?
      - *Young Manitoba*- treating doctor had NO STANDING to challenge coroner's verdict finding lack of treatment of child who died of drug overdose
        - Child was found to have died because of an excessive dosage of morphine and lack of any actual treatment.
        - Detrimental to Dr's reputation
        - Court found no sufficient private interest to launch a challenge
          - Largely because coroner's verdict is about this individual who died and that person's family does not want to go through this all again just because the doctor is unhappy

        - Additionally, at what point do you draw the line in the standing if you gave it to Dr
    - *Finlay v Canada*- welfare recipient did NOT HAVE SUFFICENT PRIVATE INTEREST to challenge legality of federal social assistance transfer to province
      - Transferring money to MB but MB was not complying with rules for use of funds
      - F did not have private interest even as a potential beneficiary of the funds for financial support.
- If either test was satisfied, applicant had standing as of right (no exercise of judicial discretion)
- Test of no direct use to public interest organizations seeking to uphold general public interest in compliance with law
  - BUT sometimes possible for public interest organizations to find suitable individual plaintiff and support litigation

Public Interest Standing

- Origins in cases where there was a constituional or *Bill of Rights* challenge to legislation (*Thorson v AG Canada*; *NS Board of Censor v McNeil; Minister of Justice Canada v Borowski*)
  - SCC recognized on a discretionary basis that people who are brining constitutional or quasi-constituional challenges, to legislation would have opportunity to bring forward those claims
- Extend in ***Finlay v Canada*** to challenges to legality of government action
  - F relied on social assistance. He sought declaratory and injunctive relief from the FC in the effect that the transfer payments to the province were illegal.
  - Public interest standing granted to challenge the legality of federal social assistance transfer to province- public interest standing was granted, NOT private interest
  - Extended to not only challenges of constituional validity of legislation, but to lawfulness of governmental actions
  - F's challenge was not to the constituional validity of federal transfer to MB, but that those transfers were being made where MB was not applying money in a way consistent with rules
- Three factor test for public interest standing:
  1. **Is there a serious justiciable issue?**
      - Some degree of assessment on if this claim might have some merit
      - BUT it is a fairly low threshold, not trying to asses at outsight if claim will be successful
      - Most of the time that answer to this will be yes if argument is credible
  2. **What is the nature of the plaintiff's interests?**
      - Sufficient interest that the court will be confident that there will be adequate argumentation to enable a court to make a reasonable assessment of lawfulness or validity of government's action
  3. **Are there other reasonable and effective means for bringing the matter before the courts?**

    - If there are better ways to get the case before the courts and it is reasonable to assume these will be forth coming, then do that instead.
- SCC in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence* ruled that each factor must be "weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes"
  - "must be applied in a FLEXIBLE and PURPOSIVE manner and weighed in light of the other factors
  - Making a *Charter* challenge to validity of Criminal Code provisions dealing with prostitution
  - Possibility that challenge might be made by defendants in individual criminal prosecutions
  - SCC ruled that third factor ("reasonable and effective alternative") must be applied flexibly
    - Recognized in this instance tat even though individual defendants might have an abstract interest in challenging the constituional validity of these provisions may not have where withal to bring those challenges in an effective or comprehensive manner
    - A Charter challenge brought by a public interest organization might actually provide court with a great comprehensive set or arguments and better factual background information on which to assess these circumstances
  - Standing granted
- Same approach was taken in non-constitutional case of *Harris*
  - Taxpayer wanted to challenge an arrangement that can be made between Minister of Finance and another taxpayer
  - Normally, one would think that this would be an area that courts would be interested in allowing individual taxpayers to make there own arrangement with the government, but there was a principle and precedent at stake here and decision should be available for challenge by someone who can effectively bring said challenge.
- Test for public interest standing stable, but application of test can be challenging.
  - In *BC(AG) v Council of Canadians with Disabilities,* CCD and individual plaintiff's brought *Charter* challenge compulsory treatment provisions of the BC *Mental Health Act*
    - Individual plaintiffs withdrew and CCS sought public interest standing to maintain case in its own right
    - BCSC denied public interest standing, largest as a result of assessment of the third factor.
    - BCCA reversed, concluding that CCD was able to provide a concrete factual nexus of its claim and therefore, the BCSC erred in finding there was no triable issue
    - The Court commented that the BCSC took an excessively narrow view of the reasonable alternative method branch of the test, but did not make a final ruling on this issue.
    - SCC granted AG leave to appeal and dismissed it
    - Court held the *Downtown Eastside* is still governing authority

        - Court must weight relevant factors bearing in mind both purposes for limiting standing and purposes for granting standing
        - The three factors should be weighed cumulatively, in light of the underlying purposes of limiting or granting standing and applied in a flexible and generous manner that best serves those underlying purposes.
        - No special weight should be given to any particular factor, including ensuring legality of governmental action and promoting access to justice
        - Central issue in this case is third branch of standing test: whether proposed lawsuit is a "reasonable and effective means" of bringing the issues before the courts
        - In considering whether the proposed lawsuit is a reasonable and effective means to bring issues before the courts, courts should consider the following factors:
            - Plaintiff's ability to bring the claim forward
            - Whether the case is in the public interest
            - Whether there are alternative means
            - The potential impact of the lawsuit on others
        - Court concludes that there is a sufficient factual setting for a trial in this case
            - No need for individual co-plaintiffs
            - Impacts of legislation on individuals can be identified through appropriate witnesses
        - Requirement of individual co-plaintiff could frustrate interests of access to justice and promotion of legality of government action
        - Although standing is discretionary, CoA erred in not weighing factors itself and remitting matter to trial judge
        - SCC concluded CCD satisfied standing requirement

Role of Attorney General

- As noted, AG has a historic role as guardian of public interest; federal and provincial legislation reinforce that role
- Federal and provincial constituional questions acts require notice to AGS and right to AG to participate as parties to defend validity of legislation
- Courts consistently recognize role of AG as guardian of the public interest to allow intervention even in non-constituional cases in order to defend the public interest
    - For example, *Energy Probe v Canada (Atomic Energy Control Board)*
        - Where Energy Probe received public interest standing to challenge the validity of renewal of a permit or an atomic energy plant, and AG intervened and even though Energy Probe challenged the right of AG to intervene, the FC recognized Ag's public interest role and ability to comment on validity of decision
        - Was affirmed by FCA
    - Another example is *Canada (AG) v Gaboreault*
        - Judicial review application involving a decision of the Canada Industrial Relations Board

            - The Union which has been the unsuccessful party in the case before the board and decided to abandon case
            - BUT AG wanted to intervene as a party in order to bring the judicial review application
                - Largely because it thought decision of board was potentially problematic as precedent. AG may or may not be successful, but at least they can get a decision and provide guidance in the future.

Status of Authority whose Decision is Being Review

- Often the decision-maker is the only respondent to a judicial review application since the applicant is seeking to overturn a decision denying a benefit (think of *Baker* as an example)
- The situation is more complicated where the decision-maker is a tribunal adjudicating a dispute between two parties because the successful litigant is in a position to defend the correctness or reasonableness of the tribunal decision
- It is typically desirable for the tribunal to maintain a position of neutrality as between the parties, and taking an active role in opposition to the application on judicial review may become awkward if the decision is overturned and remitted to the tribunal for a new hearing
- In *Northwestern Utilities*, the court ruled that tribunal could not appear to respond to arguments that its proceeding violated natural justice
- In *Paccar*, the court rule that the tribunal could appear to argue that its decision was not "patently unreasonable" (this was treated in the above decision as a guidelines not a hard rule)
- Some statutes grant tribunals standing as of right
- Modern approach is best illustrated in ***Ontario (Energy Board) v OPG***
    - OPG asked OEB to approve $145million in labour compensation costs and to incorporate these into utility rate, enabling it to receive payments on the costs. OEB said no.
    - Court should exercise discretion over whether a decision-maker can participate as a party bearing in mind the considerations that militate for and against such participation and the limits on decision-maker participation (an erratic development of the jurisprudence)
    - SCC identified the following consideration to be relevant:
        - Finality
            - Decision-maker should express itself in its reasons and not use participation in judicial review or appeal to "bootstrap" new arguments to support its decision
        - Impartiality
            - Decision-maker should not make submissions that compromise its impartiality if the case is remitted to it for further consideration
            - Council has to be careful not to be too aggressive in their arguments
        - Benefit of the court

        - Case for decision-maker participating is especially strong if there is not other party to the proceeding, or if the decision-maker has particular insight in the issues that would be useful for the court
  - SCC rules Energy Board should be allowed to participating and its submissions did not constitute improper "bootstrapping" council was simply explaining rationale in reasons for decisions
- Where a decision-maker is not entitled to participate as a party, it may be able to apply to intervene
  - *Canada (Human Rights Commission) v Canada (AG)*… practice at Federal Level
  - In intervening, tribunal should bear in mind the limitations on appropriate participation identified in *Ontario (Energy Board) v OPG*
  - Tribunal seeking to intervene must assist court in its discretionary assessment by making detailed submissions in its application for intervention explain why it can be useful to the court and what the nature of its submissions will be
    - *Canada (AG) v Quadrini*

Interveners

- Since the early 1980s, the Courts have liberalized the rules around public interest intervention
- Public interest interveners are non-parties who are granted, on a discretionary basis, limited participation rights in litigation conducted by someone else
- Typically, they have no right to adduce evidence or to appeal decision, but entitled to present legal argument, often only in writing but sometimes orally as well
- Public interest intervention is most common in appellate courts, especially at the SCC, but can occur at first instance as well
- Test for exercise of discretion to allow intervention is:
  - Whether the intervener can add something useful AND distinctive to the court's understanding of the issue; AND
  - Whether the intervener's participation will place undue burdens on the parties?
    - Typically satisfied by limited rights to participate and limits on ability to raise new issues
    - For example in *Vavilov*, SCC allowed intervention by 27 organizations, not including AGs, ranging from lawyer groups and advocacy groups to tribunals and tribunal advocacy organizations

Standing before Administrative Tribunals

- Participatory rights before tribunals, in particular regulatory tribunals, are often determined by the terms of the tribunals enabling legislation
- The tendency toward an expansive approach to standing in regulatory hearings can make those proceedings lengthy and burdensome on proponents
- To some degree, tribunals can manage this by limiting scope of participation
- Courts have used reasonableness standard of review in assessing tribunal decisions to deny standing in regulatory proceedings even though one might characterize these as rulings with respect to procedural fairness, but its partly fairness and partly substantive review, so reasonableness is most appropriate way of assessing standing (*Forest Ethics Advocacy Association v NEB*)

Discretion of the Court and Barriers to Relief

- Historically, *certiorari, mandamus*, prohibition, injunctions, and declarations were equitable remedies and relief could thus be refused by courts on equitable grounds
- Remedial discretion is expressly recognized by some statutes
- The common discretionary grounds for denial of relief include:
    - Failure to exhaust an adequate alternative remedy
    - Prematurity
    - Mootness
    - Delay
    - Misconduct of the applicant
    - Waiver
    - And on rare occasions, the public interest/balance of convenience

Failure to Exhaust Alternative Remedies

Alternative Remedies

- The basis question facing courts is whether it is appropriate for a court to intervene on a judicial review application when the legislature has created another mechanism by which a person affected by a decision can seek relief
- To some extent this can be seen as a question of statutory interpretation: In creating the alternative remedy, did the legislature contemplate this remedy should be pursued to the exclusion of judicial review?
- More generally, however, this issue is seen as a matter of judicial policy. Courts may wish to steer parties into alternative processes in order to make the most efficient use of judicial resources.
- On the other hand, courts may wish to prevent injustice by ensuring that the remedial scheme created by the legislature is truly an adequate alternative to judicial review

Failure of Exhaustion

- Courts have discretion to refuse relief if applicant fails to exhaust **adequate alternative remedies**
- Alternative remedies can include:
    - Administrative Appeals
        - Sometimes legislation establishes a right to appeal the decision of one administrative body to another administrative body
        - In *Harelkin*, the Court in a split decision denied relief to a student on the basis that he should have pursued his opportunity to seek relief from a Senate Appeal Committee
            - H was a student who was required to withdraw from the University's faculty of social work, and when he tried to appeal, the university dismissed his claim without hearing
            - He sought relief in judicial review instead of going through the available right of appeal to another University committee.
            - This decision was controversial at the time, especially in light of the dissent.
            - BUT the basic principle of the duty to exhaust adequate alternative remedies was upheld in the *Matsqui Indian Band* case

- In *Matsqui*, the court identified a number of factors that need to be considered in determining whether an alternative administrative remedy is "adequate" and must thus be exhausted. These included
  - Does the appellate body have the scope of authority to address fully the concerns raised by the applicant?
    - This depends to some extent what concerns the applicant is raising
    - Does not have to be authority over everything, but if they have relief applicant is seeking, that route must be exhausted.
  - Will the Courts eventually be in a position to review fully the decision of the appellate body?
    - Normally yes, but there may be situations in which the scope of review makes it awkward for court to fully assess the decision and give the relief that might have been available under judicial review.
  - Did the legislature express a preference for having a matter addressed by the appellate body because of its specialized character or expertise?
    - Goes back to original statutory interpretation rationale, for exhaustion of adequate alternative remedies
    - If legislature says this remedy has to be pursued, then that is a very powerful argument to court to not intervene.
  - Is the appellate body sufficiently independent, or is there some other defect in its composition or procedures?
    - Important in *Matsqui* itself.
    - Does not come up all that often, but important to bear in mind if you have admin body not regarded as sufficiently independent or has procedures considered not independent of court
- Other courts have added mor factors to the consideration of the adequacy of alternative remedies
  - *Mission Instituion v Khela*- Will pursuit of the appeal cause unnecessary delay?
  - *Ewert v Canada*- Has the person seeking relief from the courts used the administrative process in the past without having their concerns adequately addressed?

- Appeals to the Courts
  - Courts presume that appellate review by a court represents an adequate remedy that must be exhausted if the proposed ground of attack on the decision was available on the appeal (*Miner Power v Alta Energy Board*)
  - This view is sometimes reinforced by Statutes

        - Exceptions are sometimes made in situations in which there are usually short time limits for appeals and where it is doubtful if the appeal court could address the issues adequately (*Conception Bay*)
            - Sometimes legislation gives discretion to grant an extension (ie. s 18 of the *Federal Courts Act* where there is a 30-day time limit but court can extend, but one cannot assume this exercise of discretion will always occur)
    - Appeals to political bodies
    - Ombudsman review
- Courts do not normally treat appeals to political bodies or ombudsman review as adequate alternatives that need to be exhausted before judicial review

Alternative Means of Enforcing Statutes

- This situation is to some extent the reverse of the exhaustion doctrine, since the question is whether judicial review can be used to supplement the remedial powers granted to an administrative body by its enabling legislation
- To some extent, courts are reluctant to use judicial review to augment the penalties available under quasi-crimina law, especially if this would result in avoiding the necessity of giving the respondent the procedural protections available under the criminal law (*Shore Disposal*)

Prematurity

- Judicial review application is premature
- Think of this as an extension of a duty to exhaust adequate alternative remedies, except that instead of asking applicant for judicial review to conclude the proceedings before the decision-maker that is hearing the case
- Sometimes this is an issue where a reasonable apprehension of bias argument is made during a hearing (*Air Canada v Lorenz*) or even prior to a hearing (*Great AP v Ontario (Minster of Citizenship)- Zundel v Citron*
- Courts normally want to hear from the decision-maker before ruling themselves, but can take account of other factors (*Air Canada v Lorenz*)
- In *Lorenz*,
    - The Court identified a number of factors to be considered in deciding whether a judicial review application should be entertained prior to a tribunal rendering a decision on the issue in contention:
        - Hardship of the applicant if they must continue with a flawed proceeding before getting relief
        - Waste of time, especially if the application is made partway through a tribunal hearing
        - The implications of delay
        - The undesirability of fragmenting
        - The strength of the case for relief
        - That statutory context
    - The Court concluded that as a general rule, the implications of delaying administrative proceedings will normally militate strongly against entertaining a judicial review application prior to allowing a tribunal to render a decision on a bias application

- Another example of prematurity is *Thielmann v Association of Professional Engineers and Geoscientists of Manitoba*
  - Where the court refuses to hear a judicial review application raising lack of jurisdictions and bias concerns before the tribunal had an opportunity to address these issues
  - Applicant was arguing engineer professional association did not have jurisdiction to hear his decision

Mootness

- Courts are reluctant to address points of law that have no ongoing practical significance to the parties (*Borowski*)
- Courts will sometimes depart from this policy, for example where the issue is of a recurring nature and where there is a public interest in the resolution of the underlying legal issues (*Mission Institution v Khela*)- *Pulp, Paper, and Woodworkers, Local 8 v Canada*

Delay

- Statutory time limits tend to supplant common law delay as a discretionary ground for refusal of relief. Discretion may come into play if a court has the discretion to extend a time limit.
- Courts may be reluctant to refuse to grant relief to a meritorious claimant if there is a reasonable explanation for the delay (*Friends of the Oldman River Society v Canada*)
- Courts may also be reluctant to address delay issues in isolation without considering the merits of the case (*MacLean v UBC*)
- On the other hand, courts may take the practical consequences of delay into account (*Swift Current Telecasting*)
  - Where the court held that delay in making a challenge to the issuance of a broadcast license until the construction of a news station was well underway justified a refusal of relief
- Delay can also be a factor in courts refusing to allow a collateral attack on the validity of an order during enforcement proceedings where the party seeking to challenge the validity of the order failed to take advantage of a statutory right to appeal the order (*R v Consolidated Mayburn Mines*)
- In *Behn v Moulton*, the court refused to allow logging permit as a defence to a tory action since this would encourage the protestors to interfere with logging operations rather than seek to challenge the permit
- On the other hand, the SCC has not accepted the argument that the limits on collateral attack prevent a plaintiff from challenging the validity of a federal order in the court of bringing an action for damages against the Federal Crown in PSC (*Telezone Inc*)

Misconduct of the Applicant

- Courts sometimes use the misconduct of the party seeking relief as a basis for denying relief
  - Based on the “clean hands” doctrine of eligibility for equitable relief (*Homex Realty*)
    - Equitable relief may be denied to an applicant who does not have clean hands

        - Court denied relief to real estate developer who took advantage of loophole to avoid requirement of development permission by adopting checkerboard scheme or property development.
        - A relatively unusual case, and the courts tend to prefer the view in *Re Tomaro*
- On the other hand, in *Re Tomaro and City of Vanier*, courts have sometimes ordered the issuance of business permits that were wrongfully denied, even though the business owner operated the business in the absence of the permit
    - Massage parlour owner entitled to business license despite questionable character

Waiver

- Waiver can be basis for denial of relief if waiver is given deliberately in full knowledge of relevant information
    - Eg. in relation to situations where there is arguably a reasonable apprehension of bias but no concern about actual bias
- Key is having all relevant information before deciding to waive rights
- Raising an objection and then proceeding with a hearing does not constitute waiver, and may be a safer course of action than refusing to participate in the hearing (*Millward v Public Service Commission*)- *Pierre v Minister of Manpower and Immigration*

Public Interest/Balance of Convenience

- Generally, courts are reluctant to accept that "public interest" is an independent ground for denial of relief
- Courts occasionally conclude that if the tribunal would inevitably reach the same result upon reconsideration, relief can be denied (*Mobil Oil Canada Ltd*)
- One consideration is whether granting relief against a governmental actor has the effect of prejudicing an innocent third party (*Miningwatch Canada v Canada*)
    - Where a governmental decision-maker decided to proceed with an environmental assessment in a particular way, and the company went along with what the government asked them to do
    - Subsequently, Miningwatch came in and the project was well underway, and Court said forcing environmental authorities to redo the environmental assessment is going to achieve the same result
    - Moreover, granting the relief Miningwatch wants will be extremely prejudicial to the mining company conducting the project who has already made expenditures.
    - Declared some relief, but did not halt the construction.

CHAPTER AND CASE SUMMARIES

Procedural Fairness

Case	Facts	Topics	Ratios
Baker	- Visitor status expired, worked illegally in Canada, and was ordered deported.	1. Role of Judicial Review 2. Written Reasons 3. Procedural fairness 4. Oral Hearing 5. Bias	Elements of the rules of procedural fairness when concerning application for h&c relief:

	- Immigration Officer made written recommendation to Officer in charger and it referenced her mental illnesses and being a strain on society. - Baker had four Canadian born children.	6. Substantive Rights	1. Right to written reasons for the decision 2. Right to an impartial decision-maker 3. Right to have application considered in its entirety and in a fair manner. *Baker* Factors to determine threshold of procedural fairness owed: 1. Nature of the decision being made and the process following in making it 2. Nature of statutory scheme 3. Importance of decision to individual affected 4. Legitimate Expectations of the person challenging decision 5. Decision-makers procedural choices Written reasonings are being to be required as they help administrative decision-making be transparent, intelligible, and justified. Whether the decision-maker would be perceived as bias by a reasonable person does not mean they actually had been bas, just that

			there is reasonable apprehension of bias. Substantive rights under the h&c statutory scheme include the weight of Ministerial guidelines and the children. Disagreed with *Shah* in that the procedural fairness obligation for h&c cases is NOT minimal. (However, still not required to give an oral hearing)
Singh	-Refugee claimants landed in Canada -Minister acting on advise of Committee determined they were not refugees	**1.** Constitutional and Quasi-Constitutional Source of Procedure **2.** Section 7 **3.** Section 2(e)	When a statute may expressly deny certain procedural safeguards, leaving no room for supplementation by the common law, only Constitutional and Quasi-Constitutional sources can override the statute to mandate more elaborate procedural safeguards. Security of person under s7 encompasses freedom from threat of punishment suffered by refugee claimants. Principles of fundamental justice are flexible and may not always require oral hearings.
Nicholson	-*Police Act* provided that a hearing is required for officers being dismissed after serving for 18 months, but was silent on process for those being	1. Constitutional and Quasi-Constitutional Source of Procedure	Although Nicholson cannot claim the protections afforded under the Act, he also cannot be denied any protection. Case impact the common law rules of governing administrative procedure

	dismissed with less time. -Nicholson was discharged after 15 months.		as the Court expanded procedural requirements beyond the setting of quasi-judicial decisions and established a continuum of procedural requirements that extended into adminsrttaive as well as quasi-judicial decision-making.
Knight	-Director of schoolboard was dismissed after refusing to sign a renewal of his contract	**1.** Threshold of Fairness Doctrine	The Fairness doctrine is presumed to apply based on the following: 1. Nature of the decision 2. Relationship between decision-making body and person affected by the decision; and 3. Effect of decision on that person's rights. Presumption that fairness doctrine applies can be rebutted by express statutory language. Although SCC in *Knight* refers t the impact on a peron's rights, it is now generally accept that fairness can apply if a decision affect a person's "rights, privileges, or interests" (*Cardinal; Baker*) A decision of a preliminary nature will not IN GENERAL trigger the duty to act fairly, whereas a decision of a more final nature may have such an effect.
Dunsmuir	- Public official who	**1.** Exception to *Knight*	Public officials who hold office "at pleasure" are

	holds office "at pleasure"	2. Confined to situations where there is a contractual relationship	not entitled to procedural fairness in addition to any rights contained in statute or their employment contract
Oberlander	Revoked citizenship because he is an ex-Nazi war criminal.	Example of a decision attracting fairness	Cabinet decisions revoking citizenship or pardons attract fairness
Desjardins		Example of a decision attracting fairness	Cabinet decisions revoking citizenship or pardons attract fairness
Homex Realty	Municipality create by-law that revoked landowner's right to subdivide it's land.	1. Example of a decision attracting fairness 2. Regulations, By-laws, and Rulemaking	By-law affecting single property development attracts fairness. Where a municipal council is addressing a specific property, even if it does so by way of a by-law, that does attract procedural fairness requirements.
Authorson	-Class action against Department of Veterans who failed to pay out interest -DoV enacted statute that said they do not have to pay	**1.** Legislative Restructuring 2. Section 2(e) of the BoR	Introduction of legislation to restructure an organization or alter a program will not attract fairness, even if it has a significant impact on individuals. Section 2(e) dos NOT impose parliamentary duty to provide a hearing BEFORE the enactment of a legislation.
Mikisew	Govt brought budget bills that affected the environment of the Cree Nation.	**1.** Legislative Restructuring **2.** Legitimate Expectations	Courts are very reluctant to interfere with primary legislative processes. Duty to consult does not apply to the law-making process.
Inuit Tapirisat	Goct (CRTC) have ability to regulate utility rates	**CABINET AND CABINET APPEALS**	Cabinet appeals are classified as policy-making decisions that do

	CRTC and Bell both made submissions to Cabinet that were not given to Inuit		not attract the duty of procedural fairness.
Canadian Doctors for Refugee Care	Govt used to have policy that provided public health care to all refugees and asylum seekers, and then changed the policy.	Regulation, By-laws, and Rulemaking	When cabinet or administrative agency is enacting a regulation or rule, the decision is treated as a legislative act that does not attract a duty of fairness.
Vanderkloet	Changing school grade levels involved moving students to different schools.	**1.** Policy-making	Decision concerning reallocation of students does NOT attract fairness doctrine- consultation guidelines inapplicable.
Bezair	Finances resulted in the board deciding to close nine schools	**1.** Policy-making	Decision to close schools DOES attract fairness doctrine due o procedural guidelines for consultation of closures.
Canadian Association of Regulated Importers	Ministerial decision that changed the quote distribution system for the importation of hatching eggs and chicks.	1. Policy-making	This is a policy-making decision that does NOT attract procedural fairness Only exception would be if there was a legitimate expectation for consultation that was either promised or was a "clear, unambiguous, and unqualified" past practice as per *Mavi* and *Agraria*.
Cardinal	Initial placement of prisoner in administrative segregation due to threat of violence.	1. Affect on rights, privileges, or interests 2. Emergencies	Duty of fairness applies whenever rights, privileges, or interests are at stake. In emergency situations, it may be necessary to act before notifying and hearing from an affected person.

			Often in these situations an "after-the-fact" hearing will be required.
Canadian Arab Federation	Minister of Citizenship decided not to enter into a funding agreement under the Language Instruction for Newcomers to Canada	Individualized Discretionary Decision-Making (when benefits are sufficiently discretionary)	NO fairness requirement in a decision to extend contribution agreement, even if reputation was an issue. Not all interests are sufficient.
Everette		Individualized Discretionary Decision-Making (when highly discretionary decisions do NOT affect interests)	Fairness IS required in discretionary decisions not to renew fishing license where basis of non-renewal was allegations of serious violation of conservation rules.
Webb	-Housing corporation recommended termination of Webb's lease due to problems caused by her children -This decision was approved by Board who gave her opportunity to remedy or respond to complaints, but she never did.	**1.** Decisions having a sufficient impact on a persons rights	Removal of access to low-income housing attracted fairness doctrine but fairness was satisfied in this case. Although the distinction between applications for discretionary benefits and removal of exisiting discretionary benefits may affect the content of the procedural benefits available, it does not affect its ability for procedural fairness to apply.
Krever	-Public investigation of the Canada blood system, which had been contaminated with HIV and hepatitis C.	Investigation	Some multi-stage proceedings are deliberately designed to have more than one layer of formal hearings.
Abel	-Advisory Board was created to decide whether those in psych wards for being	**1.** Recommendations	Recommendation to Lieutenant Governor in Council re: release of persons detained as "criminally insane"

	"criminally insane" should be released		REQUIRES procedural fairness The recommendation, although not dipositive, would have a significant impact on the likelihood of release. Some recommendations have the practical effect of final decisions so fairness is required.
Dairy Producer's Co-Op	-Officer investigating human rights complainant	**2.** Investigations	Officer investigating human rights complaint did NOT owe a duty of procedural fairness. When premature disclosure of information to a suspect may compromise the effectiveness of the investigation, fairness protections are NOT ALWAYS guaranteed. Many multi-stage proceedings are deliberately designed with informal preliminary stages
Re Teacher's Federation Act		**1.** Recommendation	Executive Committee's recommendation to Minister concerning sanction to be given to teacher being disciplined DOES attract procedural fairness
Munro		Recommendation	Some recommendations have the practical effect of final decisions so fairness is required.
Masters	-ON government investgated complaints of misconduct of M	Investigations	Recommendation to Premier re: dismissal of provincial agent general because of allegations of sexual harassment DOES attract fairness.

			Some recommendations have the practical effect of final decisions so fairness is required.
Tharmourpour	**-**T was dismissed from RCMP training after being subjected to racial jokes and verbal abuse. -He made a complaint to the Human Right Commission	Recommendations and Investigations	Informal nature of investigative stage not likely to go to CONTENT of fairness obligations rather than existence of fairness obligations. Courts will often differentiate the CONTENT of procedural fairness at different stages of multi-stage proceedings rather than EXCLUDE the application of fairness at preliminary stages.
Hughes	**-**Death of child in welfare system.	Recommendations and Investigations	Informal nature of investigative stage not likely to go to CONTENT of fairness obligations rather than existence of fairness obligations. Courts will often differentiate the CONTENT of procedural fairness at different stages of multi-stage proceedings rather than EXCLUDE the application of fairness at preliminary stages.
Randolph	Interim stoppage of mail that is suspected of being used for criminal purposes	Emergencies	**See *Cardinal***
North End Community Health Association	**-**Mad at municipality for selling property to a private party instead of first offering it to a community griyo.	Legitimate Expectations	Substantial compliance with a promise procedure may be sufficient.
Agaira	Applicant who was ruled inadmissible	Legitimate Expectations	A legitimate expectation can be based on either a

	to Canada on nation security grounds argued that immigration guidelines created a legitimate expectation that processes determining eligibility would be followed.		promise or a pattern or past practice. Must be clear, unambiguous, and unqualified.
Mavi	Statement that the government will not collect money that is owed by sponsors if the default happened because they were abused or other relevant circumstances.	Legitimate Expectations	No need to show detrimental reliance If the expectation is based on an expected substantive result, all that the law will require is that fair procedure is followed in making the decision. (ie. being consulted) Promise or practice must be within the authority of the person making the promise, and must not be inconsistent with their statutory duty.
Canadian Assistance Plan Reference	-Fed government could enter agreements with provinces to pay contributions toward their expenditures on social assistance. -Agreements could be terminated or amended with consent -Fed govt then decided to limit its expenditures to BC, AB, and ON.	Legitimate Expectations	Promise not to introduce legislation change the plan without provincial agree is a SUBSTANTIVE promise that will NOT be enforce using the legitimate expectation doctrine.
Mount Sinai	Refusal of Minister to grant new hospital operating license.	Legitimate Expectations	Canadian law does NOT recognize "substantive legitimate expectations".

			NOT necessary to show detrimental reliance on the promise of consultation.
Blencoe	-B was a politician and there was a human rights complaint against him for seually harassing his assistants -Lost his job and lots of negative publicity surrounding him	**1.** Section 7	The right to a pursuit of employment is not a fundamental choice (part of liberty) security includes the protection of state interference of bodily integrity and serious state-imposed psychological stress (losing a job due to a human rights complaint does not meet this standard.
Sieman	Municipality banned places from operating VLTS	**1.** Section 7	Section 7 does NOT protect purely economic interests or the pursuit of an individual's preferred form of employment.
Suresh	Regime for deportation on national security grounds of persons facing torture.	**1.** Section 7	Court does NOT find that an oral hearing is required, but limits on disclosure OFFEND s 7, and s 1 justification NOT MET.
Charkaouri	Removing convention refugees on national security grounds without disclosing any information due to safety.	**1.** Section 7	Regime does NOT meet 7 standards and fails to be justified under s 1 as it is not minimally impairing.
Gosselin	QB government didn't let those under a certain age claim a benefit	**1.** Section 7	SCC had not to date recognized that social assistance regimes engage interests protection by s 7 of the Charter.. Section 7 protects the deprivation of a benefit but does not guarantee a benefit is given.

G(J)	Child custody being taken away.	**1.** Section 7	Child apprehension proceedings to engage security under section 7.

Statutes

*A statute may only provide a right of appeal to the Cabinet from decisions of administrative agencies.

**Constitution prevails over statutes in case of inconsistent

***Statutes prevail over common law in case of inconsistent

****Statutes and common law prevail over administrative guidelines, policies, and practice statutes in cases of inconsistent

*****Most enabling legislation is silent on procedure, so common law fills in the gaps. Common law does NOT override inconsistent statutory provisions.

Section 7 of the Charter	**Section 2(e) of the Canadian Bill of Rights**
Protects rights to life, liberty, and security of person	Protects rights to a fair hearing in respect of rights and obligations
NOT property rights	CAN include rights to property, liberty, and personal security.
Applies to federal and provincial statutes, and administrative action	Only applies to federal statute and administrative action
Both procedural and substantive protection	Only procedural protection
In *Singh*, protects rights of Convention refugee to a fair hearing since it engages personal security.	In *Singh*, protects rights of Convention refugee to a fair hearing.

	AB	**ON**	**QB**	**BC**
Create procedural obligations AND powers?	No. Only obligations	Yes	Yes	Yes
Only apply to tribunals specifically identified?	Yes	No. Apply to governmental decision-makers making certain types of decisions as well.	No. Same as ON.	Yes

The Content of Hearing Rights

Case	**Facts**	**Topics**	**Ratios**

Re Hardy and Minister of Education	- School district with intention to close school. - Unreasonable to suggest that every resident in the district be personally notified.	Form of Notice	- Some types of decisions require flexibility, especially where the proceeding involves a large group of individuals. - IN these situations, newspaper advertising will be sufficient, or use of government websites or twitter feeds as society evolves more modernly.
Krever Comission	- 1000 Canadians were infected with HIV and 12,000 with Hepatitis C from Canadian blood. - Commissioner waited until last day of hearing to vie notices to all those suffering against claims of misconduct.	Form and Timing of Notice	- Not unfair because it is impossible to give adequate notice without having heard all evidence first. Partiers were also given a reasonable time period to respond. - Must be given sufficient time for preparation, but fairness is sensitive to context.
Re Winnipeg and Torchinsky		Manner of Delivery of Notice	- No general requirement that notice be severed in the same manner as documents instituting court proceedings. - Usually mail is adequate, but if it is possible to do so while still respecting the relevant statutory language, courts will often strain to prevent unreliability of mail delivery from affecting the ability of individuals

			exercising their hearing rights.
Wilks	- W gave a mailing address and a cellphone number to the agency. - Moved addresses and did not receive notice of his immigration hearing until after the fact. - Counsel argued Officials should have called him.	Manner of Delivery of Notice	- Up to the party to notify the agency of his change of address, not up to agency t use alternative means to follow-up.
Zeliony v Red River College	- Z was attending a student attending a hearing in to whether or not she would be suspended from her academic program - Colleges hearing rules said they would give 2 days notice of who witnesses are gong to be, but then did not do so. - Z objectec, and panels offered an adjournment, but she denied.	Timing of Notice	- If the administrative bodies offer an affected party who has not received timely notice an opportunity for an adjournment and it was refused, and if there is no substantial prejudice to the affected party, this will not be considered procedurally unfair.
Mayan	- A chuck wagon race was alleged to	Content of Notice	- Notice was found to be inadequate, mainly on the basis

	have some complaints against him
	- Complaints and consequences were not identified in his notice, M believed it was a minor issue and did not attend the hearing.
	- M received a one year suspension for his conduct.
			that the racer was insufficiently notified on the seriousness of the complaint.
			- **Notice needs to clarify what is at stake, potential consequences, and clarify what the issue is/what is being said.**
			  ○ Saying business advice, when legal advice is in question is misleading,
			  ○ Saying "face serious consequences" is NOT misleading.

Central Ontario Coalition and Ontario Hydro	- Application with respect to a new hydro law where the location said "somewhere in southwestern Ontario" - However, one of the sites being considered was Eastern ON.	Content of Notice	- Court said exact location does not have to be known, but notices cannot mislead people r be inaccurate.
CP Airlines		Discovery	- Administrative bodies do not have an inherent authority to order a discovery - Board's power to compel testimony by witnesses and production of documents at hearing does not allow it the authority to order

			pre-hearing discover to the union.
Ontario v Ontario	- Complaint of racism made by 10 nurses against a hospital - Board considered what degree of disclosure was required to meet duty of fairness in this case.	Discovery	- Courts have taken an expansive view of older statutes allowing tribunals to make rules concerning pre-hearing discovery that may be relevant to an adversary aparty.
Stinchcombe		Discovery	- Principle: accused's right of access in criminal proceedings to any information in the Crown's possession that might be useful - Courts have been reluctant to extend this principle into the administrative law arena.
May v Fendale		Discovery	- Courts have been reluctant to extend Stinchombe principle to admin law arena, generally, it is sufficient if information that is relevant to the party's ability to make out their case is made available.
Prtichard		Discovery	- Limiting scope of discovery in regard to privileged documents
Dofasco		Discovery	- Limiting scope of discovery in regard to protection of privacy where the material sought was of doubtful relevance
Qjikqtaaluk		Discovery Disclosure	- Limiting scope of discovery in regard to preventing the

		Commercially Sensitive Information	unnecessary dissemination of commercially sensitive information - Where a party seeks a document that contains commercial sensitive information, a court may require production of a redacted version of the document that excludes the commercially sensitive information.
Clifford	- Deciding who was entitled to C's death benefits. -	Discovery	- When discovery is provided, it may not entail the type of extra-hearing questioning of witnesses familiar from civil procedure, and may be restricted to relevant documents. - **MAKING WITNESSES AVAILABLE FOR PRE-HEARING QUESTIONS IS NOT A COMMON LAW OBLGIATION OF DISCOVERY.**
Blencoe		Delay	- Some instances appropriate remedy for undue delay will be to quash a proceeding - **Sometimes there will be a stay of proceedings going forward as it creates more harm to the public by halting it.** - Potential remedy to order an epidited hearing and award costs (Minority)
Abrametz	- Professional discipline case in which the SKCA found	Delay	- Implementing principles for delay from *Jordan* (criminal law) is not

	that the law' society delay constituted an abuse in process, and ordered penalty be quashed. - **SCC overturned this.**		appropriate to bring into the adminsrttaive law arena. - 3-part test for determining whether delay is an abuse of process: 1. Is delay inordinate in light of overall context, based on o Nature and purpose of proceedings, o Length and causes od delay; and o Complexity of facts and issues in case? 2. Has the delay itself caused significant prejudice? 3. If the first two elements have been met, courts should make a final assessment of whether proceeding is manifestly unfair to a party or otherwise brings the administration of justice into disrepute. - Remedies include an expedited hearing or mandamus, or reduction in penalty.
Khan	- Grade appeal at University of Ottawa law school. - Normally disciplinary hearings would be oral,	Oral Hearing	- Courts will sometimes require oral hearings for the assessment of credibility of parties or witnesses. - **An oral hearing should be granted where credibility is**

	but this was a grade appeal which was typically heard through written submission. - K maintained he had written 4 exam booklets, and only 3 were graded, so this cases rests on her credibility.		**at issue and the consequences to the interest of the party at stake are grave.**
Masters	- M was accused of sexually harassing 7 women. - After hearing response from M, Premier decided to resign M.	Oral Hearing	- Absent constitutional considerations, nature of proceedings may displace requirement for an oral hearing. - M was aware of all material allegations against him and was provided an adequate opportunity to respond. - Where the nature of a decision is discretionary, such as the use of prerogative power, less procedural fairness will be afforded. - When a decision maker is fulfilling an investigative mandate rather than a determinative one, the affected party will be awarded less procedural protection. - If not oral hearing, no right to cross examination.

Pacific Press		Open Hearing	- Courts have used *Charter* guarantees under s 2(b) of freedom of the press to create a rebuttable presumption that quasi-judicial hearings will be open to the public.
Ontario Police Force v Lalande		Open Hearing	- The presumption of freedom of press can be rebutted for security or privacy reasons, but it is hard to do.
Mllward		Open Hearing	- **OVERTURNED:** originally no obligation to make hearings open and was left to discretion of tribunal.
G(J) v New Brunswick		Right to Counsel	- The right to counsel is qualified by seriousness and complexity of the proceedings relative t the capacity of the person affected - In certain circumstances, s 7 (meaning life, liberty or security must be denied) can create a right to publicly funded legal representation - Consider the seriousness of the proceedings, the complexity of the proceedings, and the capacity of the individual affected when deciding if public funded legal representation is required.
Parrish	- Ship captain who was a	Right to Counsel	- Depending on consequences for

	witness in a safety board investigation is entitled to be represented. - **Normally witnesses are not represented by counsel, but** since he had implications at stake he was allowed counsel.		witnesses, court may even allow them to be represented by counsel
Howard		Right to Counsel	- Particularly, courts are reluctant to accept justifications that parties should take responsibility for addressing problems they created by themselves
Dheghani	- Port of entry interview stage immigration process.	Right to Counsel	- Right to counsel is not absolute and context may make acceptance of right to counsel impractical
Ramadani	- Refusal to grant adjournment of immigration hearing because preferred counsel was unavailable is not an abuse of process.	Right to Counsel	- Right to adjournment to obtain counsel of choice is not absolute - **Even though parties can normally be represented by the lawyer of their choice; in appropriate cases decision-makers have the discretion to refuse an adjournment where the lawyer the party prefers is unavailable.**
Re Men's Clothing	- Court quashes arbitrator's decision	Right to Counsel	- As a general rule, any party entitled to be represented by agent

Manufacturers Ass'n	refusing to allow employer to be represented by counsel in a labour arbitration - Neither of the parties were natural persons, so no matter what they were being represented by agents, and since issues were complex, high interests were at stake, and the GM did nt feel competent to represent himself, it was unfair to not allow them counsel.		in a proceeding cannot have its choice of agent limited unless explicitly done through statute
Kane	- Decision of BoG to sanction an individual who was a faculty member for imporper use of the University's computer. - **Subsequent meeting where more evidence got introduced, but K was not there to rebut it.**	Disclosure	- Generally, administrative body is restricted to use of factual information introduced in a hearing. - One cannot add evidence to a decision-making process if the affected persons did not know about it and thus did not have a chance to fight it.
Napoli	- Worker's compensation	Disclosure	- Courts ar reluctant to accept administrative

	decision where individuals who were looking for worke''s comp wanted access to the full medicial records from Drs who did their assessments. - WCB argued Drs would be uncomfortable and less forthcoming, but Corut said this was not a sufficient reasons		convenience or the effective operation of the system as justification for refusal to disclose relevant information
Charkaoui I		Disclosure; National Security Regimes	- The SCC held that the regime then in place did not give the reviewing judge access to sufficient information to effectively play the review, and Parliament subsequently required full information to be provided to the reviewing judge.
Charkaoui II		Disclosure; National Security Regimes	- The SCC ruled that Charkaoui was entitled to the notes of the CSIS interviews with him, but failure to provide the notes did not result in a stay of the certificate. - Destruction of the notes was a breach of the duty to retain and disclose information.

Harkat		Disclosure; National Security Regimes	- The SCC upheld the constitutional validity of the regime as amended after *Charkaoui I*, but took an expansive view of the individuals right to be reasonably informed.
			- Clarified the degree of disclosure required to satisfy s 7 of the Charter.
			    o Necessary outcome of situations where there is an irreconcilable tension is that the Minister must withdraw the information or evidence whose non-disclosure prevents the named person from being reasonably informed
			    o Only information that raises a serious risk of injury to national security or danger to safety should be withheld.

Khela	- K was transferred from med. to max. secuirty prision when a stabbing occurred, and	Disclosure; Confidential Informants	- Court must show that information from informant was reliable

	an informant said K paid people to do thestabbing with heroine. - They found heroine under his mattress and concluded that was good enough reason to believe the informant - **The Court said the reasons for reliability were inadequate.**		
Canadian Cable Television Association		Official Notice	- Tribunals cannot do their own adjudicative fact investigations without giving notice to parties and allowing them to comment
Akiq'nuk First Nation	- The use of administrative tribunal of historical material and ofen subject to official notice, - However, in this case, the historical material not only gave background to the dispute, it went to the heart of the dispute which concerned whether the Crown breached its fiduciary duty in its	Official Notice	- Cannot use official notice to make findings with respect to adjudicative facts or fill in gaps of evidence with respect to these facts

	historical allocation of reserve lands to the band		
Huerto	- H believes the committee did not confine its own opinions and expertise to assessing evidence, but applied it to enhance evidence	Official Notice	- Expert knowledge of those sitting on tribunal can be used to evaluate evidence, but not as a substitute for evidence.
Miller	- Wheether a piece of land had been used by a business for retail sale of garden sales. - Four witnesses said yes, but one letter contradicted it and this is what the tribunal believed. - **Hearsay can be admitted.**	Admissibility of Evidence	- As a general rule, administrative tribunals are not required to base their findings exclusively on evidence that would be admissible in a court of law.
Timpauer	- A labour board decision was quashed because Board refused to allow claimant to inttoduce expert evidence n imminent danger to tobacco smoke.	Admissibility of Evidence	- Failure to admit crucial evidence can be unfair
Bond v New Brunswick		Admissibility of Evidence	- While reliance on hearsay eviendece can result in a

Management Board			decision being procedurally unfair, especially where hearsay evidence is unreliable
Re County of Strathcona		Admissibility of Evidence; Cross Examination	- Reliance on hearsay evidence does not automatically result in a denial of procedural fairness, especially where there are reasons to think it is reliable.
Universite du Quebec a Trois-Riveres v Larogue		Admissibility of Evidence	- Failure to admit crucial evidence in an arbitration hearing which was procedurally unfair
Re Toronto Newspaper Guild and Glove Printing		Cross Examination	- Board refused to allow cross-examination which is a denial of natural justice
Innisfil		Cross Examination	- Limits on the opportunity to cross-examine witnesses do not automatically result in a hearing that is procedurally unfair, can happen if the efficiency and convenience of the hearing, some witnesses are allowed to present written testimony and not be subject to cross-examination, so long as there are other means of testing the reliability of their evidence
Country of Stratchona			○ Limits on the opportunity to cross-examine witnesses do not automatically result in a

			hearing that is procedurally unfair, can happen if the efficnecy and convience of the hearing, some witnesses are allowed to present written testimony and not subject to cross-examination, so long as there are other means of testing the reliability of their evidence
Djokavc	**SUBPEONA**	Cross Examination	- Nevertheless, failure to issue a subpoena to a physiotherapist to allow cross-examination on his written statement concerning the treatment of a claimant for benefits resulted in denial of a fair hearing where the issues were central to the claim and the written statement was not responsive to his concerns
Future Inns		Reasons	- Generally, it is required to facilitate judicial review of adjudicative (individualised) decisions
Mavi		Reasons	- Reasons not required when enforcing contractual right to collect benefit costs from immigration sponsor
Burnaby		Reasons	- Reasons not necessary where muniiaplity is making a decision/policy decision

Gigiotti		Reasons	- A minister's decision to close a college is a policy decision and no reason ae required to do this
London Limos	- Objectors to issuance of taxi license were not denied procedural fairness despite no formal reasons for decision being provided	Reasons	- Record of proceedings provides sufficient evidence of reasons for the decision
Wall	- Dismissal of police complaint for being out of time overturned since letter informing complainant did not satisfy reasons requirements.	Reasons	
Baker		Reasons	- In some instances, there is a common law obligation to give written reasons for decision in the absence of statutory direction to do so.

Bias, Institutional Decision-making and Duty to Consult and Accommodate Indigenous Peoples

Case	Facts	Topics	Ratios
Committee for Liberty and Justice v National Energy Board	- Application was made under s 44 of the *National Energy Board Act*, to the NEB by Canadian Arctic Gas Pipeline for construction of a natural gas pipeline	Bias- General Test & Prior Involvement with a Case	The test for bias is "what would an informed person, viewing the matter reasonable and practically - and having though the matter through - conclude?" Majority of SCC agreed that this prior commitment to the pipeline based on past relationships was a reasonable apprehension of bias.

	- Chairman of the board had been president of Canada Development Corporation before appointment and partook in discussions with NEB about planning the pipeline.		Prior involvement with case outside decision-making capacity generally considered disqualifying.
Canadian College of Business and Computers	Tribunal member asked applicant for a license whether he was a member of the Tigers (an armed organization of the Tamil separatist movement in Sri Lanka), suggesting some type of prejudice against them.	Bias- Antagonism During a Hearing	Adjudicators may ask questions or express tentative conclusions, but they must be careful not to "descend into the fray" before all facts are presented. Basically, no asking leading or irrelevant questions, or advocating for one part.
Brett v Ontario	During hearing, counsel for tribunal told lawyer presenting the case when to object to questions and put forth certain arguments.	Bias- Antagonism During a Hearing	Requirement of proper behaviour does not only fall on decision-makers, but also to lawyers who are employed to assist a tribunal at a hearing.
United Enterprises Ltd v Saskatchewan	- Council for one party was found often hanging out with tribunal in between hearings - Was only invited to a BBQ at one of the panel member's houses.	Bias- Association with People involved in a Case: Personal Relationships	- Regarding personal relationships, usually the issue is how close the relationship is; spouse or child will typically get adjudicator disqualified, but not just casual acquaintances. - Excessive friendliness can give rise to

			reasonable apprehension of bias. - Bias will not arise when proceedings are informal, but can arise if tribunal treats one party with a degree of familiarity that is not extended to the other.
Marques v Dylex	Ontario LRB adjudicator was a member of a law firm acting for the union (a party to the current case) before appointment to Board. - Chairman's role at firm had nothing to do with the present proceeding - Chairman had not worked for the firm for over a year - Nature and function of board itself regards members of the OLB to have had experience in the law and labour relations, so likely past association with parties may occur.	Bias- Association with People involved in a Case: Professional Relationships	- When analyzing professional relationships, how close they were, how far the relationship was in the past, expectations under the statutory scheme, and directing involvement in proceedings will be considered. - Based on Chairman's relations with the union, he is not disqualified and there is no reasonable apprehension of bias.
Terciera Melo v Labourer's International Union	Vicechair had represented one of the parties 7 years	Bias- Association with People involved in a Case	Court of Appeal in this case would justify that working with someone on unrelated matters more

	earlier on a very similar case.		than 7 years ago is not sufficient to give rise to a reasonable apprehension of bias.
Chartered Accountants v Cole	Two complaints were filed. Member of the panel worker at the firm and with the associate who filed one of the two complaints. She stepped down from the complaint filed by her associate, but not the second one as it was filed by someone in a different firm.	Bias- Association with People involved in a Case	Court found that it was acceptable for panel member to recuse herself where the complaint was filed by an associate at the decision-maker's firm, and appropriate to not recuse herself when the complaint was filed by a different firm.
Gedge v Hearing Aid Practitioner's Board	A licensed hearing aid practitioner was subject to having his license removed. One member of board was ex and ex's new significant other. Another member of the board was competitor of his in a small area. All three had to recuse themselves as per reasonable apprehension of bias.	Bias- Association with People involved in a Case & Financial Interest	Business competition is more problematic than prior professional association, as there is a relationship to financial interest and potential gain when judging a competitor. ** Especially when operating in a small market and a setback for the competitor will create an advantage for the decision-maker.
Re Township of Vespra	Application to annex part of Vespra. Did not hear evidence of population's before making decision.	Bias- Prior Involvement with Case	Refusal to hear new evidence was considered to be a denial of the obligation to give a hearing Where a decision is overturned on appeal or judicial review, it may be necessary to have a new panel reheard the case.
New Brunswick v Comeau	C was stopped and fined $200 for crossing the border of NB to QB for cheaper alcohol.	Bias- Prior Involvement with Case	Prior involvement with case in different decision-making capacity may be disqualifying. - A single individual's participation at

			investigative, recommendation, and adjudicative stages f a proceeding can give rise to a reasonable apprehension of bias. - Statutes and policies in this case showed the need to keep these roles separate.
Paine v University of Toronto	P applied for tenure. One of the members on the board reviewing his request was someone who gave him a bad assessment.	Attitudinal Bias	Court concluded that decision refusing tenure in which a committee member has written a negative assessment is not unfair. - Note that tenure process assumes that committee members have personal knowledge of candidates and it will contain a mix of both positive and negative.
Large v Stratford	University professor selected to hear case concerning mandatory retirement of firefighters had made a previous statement advocating for mandatory retirement of university professors.	Attitudinal Bias	- General advocacy or sympathy with groups of ideas is NOT disqualifying. - Statements made prior to case, so long as there was no prejudgement of the issue, is allowed. (public opinion on a public issue)
Great A&P Co. v Ontario HRT	University profess was selected to hear a sex discrimination case. She was disqualified because she had previously been a party to a systemic sex discrimination	Attitudinal Bias	Professor was no disqualified because of her views, but was a party to a case beforehand. Had lots to do with perceived self-interest, not just attitudinal bias.

	case filed with the Commission.		
Pelletier	Statements to media by head of Commission of Inquiry into Federal Sponsorship Program prior to hearing all evidence. Court not satisfied with argument that it was important to keep public notified of the progress of the inquiry.	Attitudinal bias	Statements made DURING hearing give reasonable apprehension of bias. (it shows a pre-judgment of the facts before hearing all evidence)
Locabail	Applications for permission to appeal rasisng questions concerning the disqualification of judges on grounds of bias. One of the recorder's worked for a firm that wrote about the case and expressed views against a group before. Another had potential interest in gaining profits from the result of the case.	Bias- Financial Interest	De minmis will presumably apply in situations which an adjudicator hold mutual funds, or a pension plan with a diverse portfolio. Avoids disqualification for trivial interests.
Dimes	Chancellor owned shares in a company where he made order in favour of them	Bias- Financial Interest	Generally speaking, the amount of interest is treated as irrelevant BUT turn to *Locobail*.
Energy Probe	President of company supplying cables to nuclear power plants not disqualified from sitting on license renewal of Ontario Hydro nuclear power plant, since financial interest outcome was insufficient.	Bias- Financial Interest	For financial interest in the outcome to be disqualifying, the interest must be DIRECT, and MUST NOT be that is shared with other members of a relevant community.
Pearlman	Law Society charges fines to members in disciplinary	Bias- Financial Interest	Ability of Law Society to recover costs in disciplinary proceedings

	proceedings, which helps the society cover hearing costs.		against members does NOT give rise to a reasonable apprehension of bias since tribunal members would only have indirect and insignificant interests as member in recovery of hearing costs.
CP v Matsqui Indian Band	- Amendments to *Indian Act* enabled First Nations bands to pass their own by-laws for the elvying of taxes against real property on reserve lads. - Matsqui Band's assessment by-law provided for the appointment of Courts of Revision to hear appeals from the assessments. - Members of bands could be appointed to these boards.	Bias- Financial Interest	Members of Indian Band NOT disqualified from sitting on appeals of property tax assessments on property held by non-band reserve member on reserve financial interest is too remote.
Newfoundland Telephone Company v Newfoundland (Public Utilities Board)	Andy Well was a member of utilities board; prior to appointment he had been a consumer advocate and was vigorous in his criticisms of telephone board. - Made comments about the Commission	Variations of Context on Bias- Tribunal Decision-Maker; consumer advocate **IF CONSIDERING THIS CASE TURN TO MINI QUIZ QUESTION IN NOTES.	Statements made prior to hearing gave notice that he was concerned of these types of things, but once he made comments during he was showing he made a decisions before hearing all evidence. SCC distinguished between comme.nts made PRIOR to hearing and comments made DURING course of hearing.

	during the hearing.		
Old St Boniface Residents Association v Winnipeg	City councillor spoke in favour of development application at committee hearing and then participated in Council deliberations on the application.	Variations of Context on Bias- Elected Official	SCC rules that Council is obliged to behave in procedurally fair manner in hearing applications, but Councillor's are not precluded from showing their support or opposition to application because that is expected as part of the decision-making structure. - Distinction between person interest in application (which would give rise to reasonable apprehension of bias) and mere support of application on the merits (which does not).
Save Richmond Farmland v Richmond	Alderman campaigned in support of development and then voted in favour of rezoning, making the development possible	Variations of Context on Bias- Elected Official	Court finds alderman is entitled to have a closed-mind for noncorrupt policy related reasons: Since this instance is on the legislative side of things, a closed-mind is allowed to be brought to this decision as long as it is not a result of corruption, but of honest opinion strongly held.
Seanic Canada Inc v St John's (City)	City councillor voted against developer's rezoning application, and Councillor was inalterably opposed o the application because of the views of his constituents.	Variations of Context on Bias- Elected Official	Legitimate for Councillor to take into account the **views of the constituents**, if that means being opposed that is within the scope of their authority and cannot form the basis for an argument for bias. Closed Mind Test: Whether the decision-maker's mind was so closed that further representation would be futile

Brosseau v Alberta Securites Commission	- At request of a senior government official, Chair had instructed Commission staff to investigate a company. - Chair partook in investigative process and then sat on the panel as an adjudicator.	Statutory Authorization and Overlapping Duties	Where a statute authorizes an organization to perform multiple functions, individual members of the organization can perform multiple functions in respect of the same case unless these functions are mutually incompatible. - So long as the Chairman did not act outside of his statutory authority and as long as there is no evidence showing involvement beyond the mere fulfillment of statutory duties, no reasonable apprehension of bias. - Statutory authority prevails over any common law rule restricting individual tribunal members from performing overlapping functions as long as section 7 of the *Charter* does not apply.
Regie	- SCC held that the *Quebec Charter* required the liquor licensing agency used separate individuals to engage in investigative and adjudicator activities.	Statutory Authorization and Overlapping Duties; Independence	- Courts have been willing to accept the argument that the constitution or a quasi-constitutional law CAN create a requirement that separates individuals that must perform each of the relevant rules in respect of any particular case.

			- *Quebec Charter* requires members of **QUASI-JUDICIAL** tribunals to have guarantees of security of tenure (but do not have to be same as judges). - Also prevents Directors from being appointed "at pleasure" - **Only relevant where it is constitutional or quasi-constitutional.**
EA Manning Ltd v Ontario Securities Commission	- Securities commissions issues a policy statement about Manning saying their actions violated the *Securities Act* - They then held a hearing to decide whether or not Manning violated the law, even though they already made a public statement about it.	Statutory Authorization and Overlapping Duties	The Doctrine of Corporate Taint: Courts are reluctant to accept the proposition that the existence of a "reasonable apprehension of bias, in respect of SOME members of an agency can be transformed into a reasonable apprehension of bias in respect of ALL members of the agency.
Tremblay v Quebec	- Minister refused to reimburse Tremblay of costs for certain dressings and bandages, and whether they fell under the definition of "medicial	Independence	- Procedural fairness prevents tribunals from putting in place consensus decision-making structures that compromise individual independence of adjudicators.

	equipment" under the *Regulation on Social Aid*.		
Ocean Port	- BC Liquor Appeal Board suspended applicant's liquor license. - Applicant challenges decision on grounds that Board lack sufficient institutional independence to meet *Regie* standards - Board members appointed for fixed-term, receiving per diem pay - *Liquor Control and Licensing Act* authorized Lieutenant Governor I Council to dismiss members without cause and without compensation	Independence	Absent constituional constraints, the degree of independence required of a particular government decision-maker or tribunal is determined by its enabling statute.
Walter v BC (AG)	W was unhappy with the approach the Governor had taken on filing his renumeration (determine whether he should be held or released on conditions)	Independence	The independence of the Chair of the BC review Board was not protected by the unwritten constituional principle of judicial independence, and the independence protections available under s 7 of the Charter were not as expansive as the protections afforded to the independence of judges.

Vine v National Dock Labour Board	Board has express power to delegate decision-making authority to Local Boards, then Local Board delegated this power to discipline committee which fired Vine.	Institutionalized Decision-Making: Delegation	Local Board had no express authority to delegate decisions to discipline committee, and nature of decision was inconsistent with implied authority to delegate. - Court found when deciding if one has power to delegate, one must look to the nature of the duty and the character of the person. - Typically, disciplinary powers cannot be delegated.
Morgan v Acadia University	The Board of the University was grated disciplinary authority, and NS Court held that the implication of this authority could be delegated to university committees or other staff.	Institutionalized Decision-Making: Delegation	General authority to control institutional discipline construed as including power to delegate disciplinary authority.
IBM Canada v Deputy Minister of National Revenue	Panel set up with 3 people quorum, 2 of the members had participated in the entire decision-making process, and the third member was not available for part of the hearing process and was going to send thoughts later. Court found this to be procedurally unfair.	Institutionalized Decision-Making: Delegation & Deciding without Hearing	In order to meet quorum requirement, sufficient members to constitute quorum must participate at ALL stages of the hearing (and any other member's who did not hear the whole hearing are not allowed to participate in the decision as per *Re Ramm*) - Courts allow sub-delegation of power conferred statutorily on Deputy Ministers. Allow local officials to exercise powers granted statutorily to Deputy Minister

			as well as powers granted to Ministers.
Volk v Saskatchewan (Public Service Commission)	- Deputy Minister suspended Volk without pay for 30 days for alleged misconduct. - Suspension was extended.	Institutionalized Decision-Making: Delegation	When there is a specific power conferred only on panels, Chair cannot exercise authority. In other words, chair of an agency is not, by virtue of their office, authorized to exercise powers granted to panels.
Re Schabas and Caput of the University of Toronto	University committee where chair of panel is making ruling on legal matters in the course of the hearing and there is an objection raised that tis is procedurally improper.	Institutionalized Decision-Making: Delegation	Chair of a panel cannot exercise powers of panel, but panel members can acquiesce to Chair's ruling on legal matters.
Re Ramm	-	Institutionalized Decision-Making: Deciding without Hearing	As long as quorum is met, judicial fairness is met, but those who do not make all meetings cannot participate in said areas of decision.
Suresh	Deportation of person likely to suffer torture.	Institutionalized Decision-Making: Deciding without Hearing	On rare occasions Canadian courts require ministers to make decisions personally.
Local Government Board v Arlidge	- Household whose property had been condemned as unfit for human habitation has no right to insist an oral hearing at the appeal.	Institutionalized Decision-Making: Deciding without Hearing	Especially in decisions where the decision-maker is a Minister, it may be possible to delegate the conduct of a hearing to an official whose recommendation is the basis for a decision (but Minister is person actually making the decision)
AG (Quebec) v Carriere St-Therese Ltee	Order shutting down a hazardous factory. An environment Minister in QB had to personally mke a	Institutionalized Decision-Making: Deciding without Hearing	On rare occasions Canadian courts require Ministers to make decisions personally. In this case, the Court was not prepared to accept implied delegation

	decision with respect to an order shutting down a hazardous factory.		authority as the decision was significant.
IWA v Consolidated Bathurst	- OLRB "policy meeting" held in absence of parties to the proceeding	Institutionalized Decision-Making: Consultation among Agency Members	- Consultation among board members is permitted, but must be voluntary - Panel that actually heard the case must be free to decide it - Improper pressure must not be put on the panel in making its decision - If any new issues are raised during the consultation, parties must be given an opportunity to address them.
Tremblay v Quebec	- CAS consensus process that gives rise to perception that decision was taken out of hands of the people hearing the case - CAS took attendance, minutes, and partook in voting, which put undue pressure of adjudicators who heard the case to agree with majority view.	Institutionalized Decision-Making: Deciding without Hearing	- Obligation to submit draft decisions for review interferes with the independence of panel members - Consensus table violates rules of procedural fairness
Ellis-Don Ltd v Ontario (Labour Relations Board)	- Dispute about bargaining rights in the construction sector	Institutionalized Decision-Making: Deciding without Hearing and Deliberative Secrecy	- SCC upheld OLRB decisions as appellant had not satisfied the evidentiary burden

	- First draft of the panel's decision would have dismissed the grievance based on the abandonment of bargaining rights - However, after full board meeting, majority of panel found no abandonment had occurred and changed their decision.		of showing failure to follow *Consolidated Bathurst* rules. - Would be inconsistent with panel's deliberative secrecy to allow the appellant to obtain evidence of what occurred during the full-board consultation process. - Presumption of regularity not rebutted by change in draft decision; principle of deliberative secrecy prevents examination of Board members. - Changing outcome does not mean bias.
Canadian Association of Refugee Lawyers v Canada	- Chair of Immigration Board given statutory authority to designate certain decisions as jurisprudential guides, and there is an exception that will assist members of the adjudicative division when dealing with similar types of cases from different countries from which refugee claimants are coming.	Institutionalized Decision-Making: Deciding without Hearing	- Types of facts discussed in the guides were not adjudicative facts specific to the circumstances of particular refugee claimants, but background (or legislative facts) about the experience of different groups who might be vulnerable to persecution in different countries. - The guides were important mechanisms for maintaining consistency in a high-volume, multi-members tribunal.

			- These guides were found not to unreasonably constrain independence of RAD members.
Payne v Ontario (Human Rights Commission)	- P was employee of non-profit and actively opposed a musical due to it's display of black people. - P made an anti-Semitic statement about the musical on tv and was criticized for it, he was fired for his comments. - An investigator recommended complaint be referred to a full hearing, commission did not do so.	Institutionalized Decision-Making: Deciding without Hearing and Deliberative Secrecy	- Majority rules that limited discovery of Commission staff is permissible where there is a serious allegation that Commission decided case on the basis f irrelevant considerations. - Affidavit alleging inappropriate comments by staff; complaint entitled to discovery of staff on arguments out to Commission before case dismissed
Milner Power v AB	- M submitted a complaint, that was dismissed by the Board. - M alleged lack of independence by the Board based on perception that it had improperly consiseted and acceded to driectives set out in a policy paper	Deliberative Secrecy	In most cases, courts refuse to allow discovery based on speculation that improper action has occurred.

	released by the Ablerta Department of Energy.		
Pritchard		Agency Counsel: Role when appearing at a hearing	Legal opinions given to an agency by the staff counsel are the subject to lawyer-client privilege.
Re Sawyer and Ontario Racing Commission		Agency Counsel: Assistance in Preparing Reasons	Cannot have counsel for one of the parties help make the reasons.
Kahn v College of Physicians and Surgeons	A panel member prepared the first draft, counsel revised and clarified the draft, the panel met to consider and review the draft as advised in the absence of counsel, and signed the final product.	Agency Counsel: Assistance in Preparing Reasons	Reason writing function cannot be completely delegated to counsel. At minimum panel has to give its assessment behind reasoning to their decision and whether they need to prepare fist draft or not (*Spring v Law Society of Upper Canada*)
Borvbel v Canada	Policy encourage the members of the Board, great majority who have no legal training, to submit their reasons to the Legal Services branch (composed of lawyers who do not participate in the hearings of the Board) prior to putting reasons in final form.	Agency Counsel: Reasons Review	This policy does not violate procedural fairness because it PROMOTES reasons review, t does NOT require it. - Policy did not inappropriately interfere with the independence of adjudicators, Policy encouraged review of reasons, but did not require t, and the Policy reflected *Consolidated Bathurst* principles.
Thamotharm v Canada	IRB's Guideline 7 directed adjudicators to allow the Minister's representative to question refugee claimants first rather than letting counsel for the claimant put questions to the claimant to set out	Agency Guidelines	- Guideline 7 was a valid exercise of the Chairperon's power to use guidelines, and this guidelines did not fetter direction of adjudicators or interfere with their independence.

	the basis for the claim		- Obligation to justify departures did not interfere with independent decision-making **IF A GUIDELINES FETTERS DISCRETION OF ADJUDICATORS, IT IS INVALID.**
Haida Nation	- BC issues a tree farm license on the Queen Charlotte islands, which Haida Nation had a pending land claim on. - HN also claimed an aboriginal right to harvest red cedar. Minister authorized transfer of the license to a company without consulting HN.	Duty to Consult and Accommodate; Honour of the Crown; Threshold for Consultation; Content of Duty	- Source of duty to consult and accommodate is the "Honour of the Crown" - Part of process of reconciliation of Aboriginal societies with the sovereignty of the Crown Duty to consult and accommodate is triggered where the Crown: 1. Has actual or constructive knowledge of an Aboriginal or treaty right; 2. Is contemplating conduct that potentially affects that right; and 3. Right is potentially adversely affected. The duty to consul applies to asserted but unproven claims, but strength of claim may affect the extent of the duty.
Rio Tinto Alcan	- Damn and reservoir built in the 1950s altered amount and timing of water to river. - In 2007, Fist Nation	Threshold for Consultation; Roles of Administrative Tribunals	- Duty only applies to new conduct - Past action that had an impact on Aboriginal rights does NOT trigger a duty to consult - For an administrative

	asserted a claim for the dam and damage done to their ancestral homeland and right to fish.		tribunal to carry out the duty to consult, it must have the expressed or implied statutory authority to do so.
Chippewas	- NEB issued notice to the Chippewas informing them about a pipeline project, what their role was, and when the hearing would be. - C was granted funding to participate, and delivered oral argument delineating their concerns about how the pipeline could potentially harm their land. - Court agreed that the potential impact would be minimal.	Threshold for Consultation	- Duty only applies to new conduct - Duty to consult is not triggers by historical impacts, it is not the vehicle to address historical grievances
West Moberly	- M waned dam construction to be stopped.	Threshold for Consultation	- Past impacts may be relevant to assessment of whether and to what extent new proposal has adverse impact on Aboriginal rights
Dene First Nation	- Government enacted regulations that authorized First Nations	Threshold for Consultation	- Duty applies to delegated legislation where *Haida Nation* conditions are met.

	to delay elections and extend terms of Band Councils.		
Tsuu T'ina Nation		Threshold for Consultation	- Duty applies to delegated legislation where *Haida Nation* conditions are met.
Mikisew Cree	- Federal legislature considering the adopting of a new environmental legislation which could have potential adverse affects on M's treaty rights to hunt, trap and fish.	Threshold for Consultation	- Duty does NOT apply to process of making legislation.
Clyde River	- NEB received application to conduct offshore seismic testing for oil and gas in Nunavut which could negatively affect the treat rights of the Innuit in Clyde River. - NEB granted authorization, saying proponents made sufficient efforts to consult with Aboriginal groups.	Content of Duty to Consult and Accommodate; Roles of Administrative Tribunals	- Where there are deep consultation requirement, accommodation efforts have to be responsive to indigenous concerns even if they do not provide Indigenous groups with precisely the relief they are seeking. - While the Crown always owed the duty to consult, regulatory processes can partially or completely fulfill this duty. - Where the Crown is relying on regulatory to fulfill this duty, it should be made clear to Indigenous

			participants that this is the case. - Unless the jurisdiction have been expressly withdrawn, tribunals that have the power to determine questions of law must also determine whether or not consultation was adequate if that question is raised before them - Where consultation is inadequate, Crown is obliged to take additional steps.
Tsleil-Waututh Nation	- FCA quashing an Order in Council that approved a pipeline on the basis that the Government did not adequately consult with the affected First Nations - Found that responses from Government were always brief, and did not encourage dialogue, responses were generic, and there was no genuine and sustained effort to pursue two-way dialogue.	Content of Duty to Consult and Accommodate; Roles of Administrative Tribunals	- Deep consultation requires indigenous concerns to be discussed and responded to. - Where consultation is inadequate, Crown is obliged to take additional steps.

Coldwater First Nation	- Potential impact Trans Mountain Pipeline may have on drinking water supply of Coldwater First Nations. - First Nation said preference to a different route that would not be harmful, but then when government started leaning towards that route, Coldwater took position tha no route was safe enough.	Content of Duty to Consult and Accommodate	- Courts have taken the view that deep consultation does not give Indigenous communities a veto over projects
Newfoundland and Labrador v Labrador Metis Nation	- Issue re building the trans Labrador highway. - Individual representative who is member of the affected Aboriginal community, and the Aboriginal group itself both made claims, and both were required duty to consult.	Parties to Consultation	- Since Indigenous rights are collective rights, consultation should take place with the authorized representatives of the holders of these rights.
Kwicksutainekl Ah-Kwa-Mish First Nation		Parties to Consultation	- Authorized representation may or may not be a

			Band council under the *Indian Act*.
Behn v Moultan Contracting	- A group of Aboriginal peoples, who were not members of the affected Aboriginal community tried to bring a claim, but they failed because it has to be the community itself.	Parties to Consultation	- Because consultation occurs wit Aboriginal communities, individuals acting in their own capacity are not appropriate parties to consultation

Standard of Review

CUPE → *Dunsmuir* → *Vavilov* on page 77 of Big CAN.

Which Standard of Review Should be Used?

Scenario	Review Used	Case
For any type of question of law, fact, mixed fact and law, or discretion for judicial review.	**ALWAYS START WITH PRESUMPTION OF REASONABLENESS REVIEW**	*Vavilov*
Legislatures outlines a specific standard of review to use	Rare, but in this case, subject to rule of law requirements, use whatever statute says.	*Vavilov*
Statutory Right to Appeal: question of law (ie. statutory interpretation)	Correctness **side note: lawyers will prefer for correction review, because it is easier to show something is wrong versus something being unreasonable.	*Vavilov*
Statutory Right to Appeal: question of fact, mixed fact and law, or exercise of discretion (ie. whether a definition applies to a certain group based on facts, or the amount of penalties to apply if not outlined in regulation)	Palpable and overriding error	*Vavilov*
Judicial Review of a question of law	Reasonableness (as per presumption)	*Vavilov*

Judicial review of all other questions	Reasonable (as per presumption)	*Vavilov*
Constituional question whether a statutory provision is inconsistent with the Constitution (ie. Constitutional validity)	Correctness	*Vavilov*
Other constituional questions such as: - Questions regard the division of powers between Parliament and provinces - Relationship between legislature and other branches of the state - Scope of Aboriginal and treaty right under s.365 of the Constitution	Correctness	*Vavilov*
Constituional question where decision-maker's exercise of discretion violates the Charter value	Reasonableness if judicial review. If there is a right to appeal the adminsrttaive body's decision, the correctness standard should apply where the exercise of discretion allegedly violates the *Charter*	*Dore* *Strom v Sask. Registered Nurses Association*
General questions important to **legal system as a whole** - Questions of privilege (solicitor-client or parliamentary) - Abuse of Process Other examples of things that do and do not fall here are on page 85 of big CAN.	Correctness	*Vavilov*
Jurisdictional boundaries among administrative decision-makers… ONLY WHEN THERE IS POTENTIAL FOR OVERLAP BETWEEN two or more tribunals.	Correctness	*Vavilov*
Shared first instance between court and tribunal	Correctness (because a decision NEEDS to be made on who has authority)	Examples include *Rogers v SOCAN*, and *CF Entertainment v SOCAN*
True questions of jurisdiction: Argument that wrong jurisdiction made the decision, or the extent of the jurisdiction's power is wrong	Reasonableness	*Vavilov*

Also possible that there are additional, yest unnamed, situations in which correctness could apply.		*Vavilov*
Internal conflict among agency decisions	Reasonableness	*Vavilov*
Validity of delegated legislation (such as by-laws and regulations)	Reasonableness	*Catalyst Paper* Examples: *1120732 BC Ltd v Whistler (*by-law) *Innovative Medicines Canada v Canada (AG* (regulation)
Discretionary Decisions	Probably assessed using reasonableness and must be: 1. Based on internally coherent reasoning and justified in light of the elgal and factual constraints that bear on the decision	*Vavilov*
Delegated legislation of municipal	Reasonableness If the by-law is one that no reasonable body informed by these factors could have taken, the by-law will be set aside and unreasonable.	*Catalyst Paper*
Delegated legislation for professional bodies	Reasonableness	*Green v Law Society of Manitoba*
Delegated legislation for administrative agencies that have rule-making authority	Reasonableness	*West Fraser Mills Ltd v BC (Workers Comp)*
True questions of jurisdiction: Whether a tribunal has jurisdiction to decide constituional challenges or remedies	Reasonableness	*Vavilov*
Review of tribunal's determine of the constituional validity of a provision or award of a constituional remedy	Correctness because they are constituional questions	*Vavilov*
Review of an administrative decision that allegedly violates a *Charter* or Aboriginal right	Reasonableness	*Dore*
If *Oakes* test is used	Correctness	
If proportionately Is used	Reasonableness	Dore

Applies to right of appeal that are expressed in general terms, but some appeals are restricted by statute to questions of law or questions of law or jurisdiction.	In these situations, the Court must determine whether an appeal is based on a legal question (such as statutory interpretation) then correctness or another question then reasonableness.	*Neptune Wellness Solutions*

Reasonableness and Reasons

In order to be reasonable, decisions must be (*Vavilov*):

1. Based on internally coherent and rational chain of analysis; and
2. Justified in light of the legal and factual constraints that bear on the decision

Reasons will not be internally incoherent and found to be unreasonable if…

- It fails to reveal a rational chain of analysis
- It was based on an irrational chain of analysis (ie. conclusions reached cannot follow from analysis undertaken)
- Reasons read in conjunction with the record do not make it possible to understand the decisionmakers reasoning on a critical point
- Clear logical fallacies (such as circular reasoning, false dilemmas, unfounded generalization, or absurd premise)

7 legal and factual constraints:
Legal

1. Governing Statutory Scheme
2. Other Relevant Statutory or Common law
3. Principles of statutory interpretation

Factual

4. Evidence before the decision-maker
5. Submission of the parties
6. Past practices and past decisions (administrative decision-makers are bound by judicial precedent, but not by past adminsrttaive practice)
7. Impact of the decision on an affected individual

Courts are not allowed to perform their own analysis, fill in the gaps of a decision-maker, or create their own line of reasoning which was not addressed by the decision-maker in order to find if the reason was reasonable. (*Vavilov*)

Decisions must not only be justifiable, but justified!! (*Vavilov*)

In absent of written reasons courts are allowed to look to record of proceedings and context to provide evidence of the rationale for a decision.

Case	Facts	Ratio

Wawanesa		Determination of inadequacy of reasons not subject to correctness review. No segmentation (as courts are generally reluctant to segment decisions involving questions of mixed law and fact into separate factual and legal determination).
Raman		Approach to factual determinations in refugee hearing not subject to correctness review No segmentation.
Canadian Constitution Foundation		Disclosure of documents over which privilege is claimed attracts correctness review. Segmentation allowed especially where the legal question is one that has previously been defined as one attracting correctness review.
Patel	- Officer found student was not a *bona fide* student and was not justified based on the evidence.	If Officer had concerns he had have given Patel the opportunity to adduce evidence to address these concerns.
Romania v Boros	- Granting an extradition application by Romania concerning fraud and forgery offences, the Minister failed to adequately address the issue of delay from the Romanian government in seeking extradition of the respondent.	Government needed to seek further information.
Longueepee v University of Waterloo	- University made a decision saying they accommodated, but used unaccommodated	An example of a failure for internal rationality.

	grades as the basis for their decision	
Zhang	- IAD decisions were mutually incompatible	An example of a failure for internal rationality.
Sadiq	- Son and mother made refugee claims - Only son was approved, because mother did not have "well founded fear of persecution"	RAD did not take into account the evidence adduced by the claimant that showed she was at risk. This was KEY evidence.
Torrance	- Quadriplegic who failed to get CPP - All lines of letter were not accounted for in reasons	Evidence not mentioned was not sufficient.
Mattar v National Dental Examining Board	- Egyptian dentist failed Canadian equivalency exam - Says he had a mental breakdown which caused her to fail due to perception she was treated unfairly	Not addressing her compassionate claim was the failure to address all KEY submissions/arguments.
Submramaniam v Canada	-	Decision-makers failure to address an argument that was ancillary does not render a decision unreasonable.
Bell Canada v Hussey	- Bell objected to pay costs, but did not argue why hey were unfair	Submission did not have to be address because there was no viable argument to address
Honey Fashions Ltd	- Customs decision went against past practice	So long as decision-maker explained and gave rationale for decision to go against past practice.
Service d'adminsiration PCR Ltee v Reyes	- Considered past practices, but found they were irrelavnt.	Where there are conflicting lines of arbitral authority, it is open to an arbitrator to pick which line of authority best suited to the facts of the cases, provided they give an explanation for this choice.
Kahn	- Court overturned a decision denying refugee status on the basis of inadequacy	Decision must reflect stales. The decision-maker must explain why an outcome that has

	of the reasons provided for decision	serious consequences for an individual best reflects the legislature's intentions
Sticky Nuggz	- Cannabis license refused - Sticky argued the already made a significant investment in improving the site	Fact applicant made investment before approval was their should, and did not impose a greater duty on the board to agree with their submission.

Review of Discretionary Decisions

Segmentation: dividing a discretionary decision into a series of separate issues, some of which may involve question of law that may be subject to review using a more stringent standard of review than the discretionary decision itself.

Signs that indicate statutory grants of discretion:
- Use of the term "discretion"
- Subjective grant of authority "in the decisionmaker's opinion"
- Use of "may: rather than "shall" (may says choice, shall intends obligation)
- Authority to decide "in the public interest"
- Implication from statutory structure- choice among possible sanction/remedies

Which of the following are discretionary decisions?
1. College of Physicians disciplinary committee finds that doctor committed professional misconduct by having a consensual relationship with patient. NO. A delegated decision.
2. Law Society disciplinary committee imposes sanction of 3-month suspension and costs on lawyer who admits to professional misconduct. YES. Sentencing decision, so by implication some discretion over severity.
3. School board imposing masking requirements on staff and students in exercise of authority to protect public health and safety of students and staff. YES. Discretionary as it would be "in the public interest".

Whether or not discretion has been properly exercised can be determined using:
1. Improper purposes
   - Example mist be road construction decision that is undertaken to further urban planning rather than road construction goals (page 99 of big CAN)
2. Irrelavnt considerations
3. *Wednesbury* considerations.

Discretionary decisions must also be (probably asses on reasonableness standard):
1. Based on internally coherent reasoning, and
2. Justified in light of the legal and factual constraints that bear on the decision

Delegated legislation should be reviewed using reasonableness as per *Catalyst Paper*
- This is the overturning off *Shell Canada* which used correctness.

Case	Facts	Ratio
Suresh	- Deporting S on grounds of being a terrorist threat, but by deporting S they are subjecting him to torture	Court should not reweigh factors or interfere merely because it would have come to a different conclusion, but must decide if the factors considered were considered in bad faith or irrelevant.
Catalyst Paper Corp (page 104 od big CAN)	- NC enacted a municipal taxation by-law that taxed industrial properties 20 times greater than residential properties de to the impact of the rising housing market	- Questions of whether municipal by-laws fall within the authority of the municipality's enabling legislation is reasonableness - True test is: only if the by-law is one that no reasonable body informed by these factors could have taken will the by-law be se aside. Grant wide deference.
Green v Law Society of Manitoba	- Upheld law society rule that mandated continued professional development courses under their statutory decision-making power	Self-governing professional bodies that have rule-making authority will have rules assessed suing reasonableness.
West Fraser Mills	- Upheld a regulation made by the BCWCB under their authority to make regulations as they see necessary or advisable.	Administrative bodies that have rule-making authority will have rules assessed using reasonableness.

Questions re: the Constitution

1. Can administrative bodies refuse to apply portions of their enabling legislation on the basis that the provision violates/is inconsistent with the Constitution?
   - Jurisdiction is established either explicitly or impliedly by legislature.
   - Where legislature has given the power to address questions of law, it impliedly include the presumption of power to address constituional validity of its enabling legislation unless explicitly withdrawn (*Martin*)
   - Legislatures that expressly withdraw authority to answer constituional questions are:
     - Alberta using the *Administrative Procedures and Jurisdiction Act*

- Manitoba using the *Administrative Tribunal Jurisdiction Act*
- BC using the *Administrative Tribunals Act*

2. Can administrative bodies provide similar remedies to "courts of competent jurisdiction" for violations of *Charter* rights?
   - Tribunals that have the power to address questions of law can remedy *Charter* violations within the limits of there statutory authority (*Conway*)
3. Must administrative bodies exercise discretion in accordance with *Charter* values?
   - Administrative discretion must be exercised in a manner that is consistent with *Charter* values and are subject to reasonableness review (*Dore*)

Case	Facts	Ratio/Tests
Martin	- M suffered from chronic pain and challenged the constituional validity of the *Worker's Compensation Act* for excluding chronic pain from the purview of the regular works' compensation system	- Questions about whether the Tribunal has jurisdiction to assess constitutional validity are determined via reasonableness as this is a true question of jurisdiction as per *Vavilov* - Questions about whether the Tribunal assessed the constituional validity correctly is correctness as this is a constituional questions as per *Vavilov* Test: 4. Whether the Administrative Tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision? 5. (a) Explicit Jurisdiction must be found in the terms of the statutory grant of authority, (b) Implied Jurisdiction must be discerned by looking at the statue as a whole 6. If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*
Conway	- Decision of the ONRB on whether a person who is held in a mental institution having committed a "not criminally responsible act" is entitled to be released if they are no longer a danger to the public	5. Does a particular tribunal have the jurisdiction to grant *Charter* remedies generally? o This is determined by whether the tribunal has the power to decided questions of law (follow *Martins* test) o If no, then no jurisdiction to decide *Charter* remedies. 6. If yes, has *Charter* jurisdiction been explicitly excluded by statute? o Like in AB, BC, or MB legislation.

	- Conway’s Charter rights were violated as he was held in solitary confinement for a long period prior to his hearing	○ This is respecting *Martin* decision that said legislatures can determine the scope of tribunal jurisdiction. ○ If yes, the no jurisdiction to decide *Charter* remedies. 7. If no, tribunal is a “court of competent jurisdiction” under s 24(1) and has the power to issue *Charter* remedies in relation to *Charter* issues that arise in the court of carrying out it’s mandate. 8. Can Tribunal under this jurisdiction grant the particular remedy sought, based on its statutory mandate? ○ This will be dependent on legislative intent, as discerned from the tribunal’ statutory mandate. ▪ Example: if granting a remedy violates another part of the statute it goes against the statutory mandate. - If question on whether tribunal has jurisdiction to grant Charter remedies this is a true question of jurisdiction and reasonableness should be used. - If questioning whether the remedy decided was allowed, this is a constituional question and should be decided on correctness.
Walter		“Courts of competent jurisdiction” do not have authority to decide unwritten constituional principles of judicial independence.
Canadian Council for Refugees	- Whether the governments refusal to hear refugee claims from claimants wo had arrived in Canada from a designated safe third country (such as the US0 violated s 7 of the *Charter*	First issue Courts must decide is whether the statute is under attack or the decision itself. - If statute, then it Is a question of law and constituional validity and correctness as per *Vavilov* and *Martin* test - If decision, then reasonableness as per *Dore*
Dore	- Lawyer who wrote an	Review of decisions that violate Charter rights should be reviewed on reasonableness.

	intemperate letter to Judge - Barreau found this decision to be a breach of Code of Ethics and issued a suspension - Dore is arguing the decision to sanction him violates his freedom of expression	If the decision reflect a proper balance of the statutory mandate and the Charter protection of the Charter value, it is reasonable.
Lethbridge and District Pro-Life Association	- City refused to permit anti-abortion ads on city busy, and the group argued this was a violation of there Charter right - City only said "we weighed the Applicant's charter rights carefully" which was not enough to meet *Vavilov* standards.	Decision-makers must engage in an effort to provide reasons that balance concerns with *Charter* values - If they do not do so, this is sufficient basis for overturning a decision.

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Remedies

Types of Remedies

Remedy	What it does?
Certiorari	To quash a decision
Mandamus	To order a person to perform a public or statutory duty
Prohibition	An order to stop doing something the law prohibits
Injunction	A court order requiring a defendant to take some sort of action or to cease doing something to avoid further harm.
Declaration	No order. Just a statement of the rights of the parties. Usually gets them to act.
Habeas Corpus	To bring a person (detainee usually) before the judge

Which Court Should Relief Be Sought From?

Court	When Should it Be Used?	Case/Statute giving this Authority
Provincial Superior Court	- Any body established under a law of a province… ANY PROVINCIAL AGENCY - Concurrent jurisdiction for Federal Court in actions for damages against Federal Crown	*Federal Courts Act*, s 18 S 17
Federal Court	- Have NO jurisdiction over provincial administrative bodies - Have exclusive judicial review jurisdiction over the decisions of federal boards, commissions, and tribunals - Exclusive federal court jurisdiction over ordinary judicial review is constitutionally valid; constituional challenges to federal legislation or actions of federal administrative agencies is concurrent o BUT PSC have discretion to stay a constituional challenged to federal adminsrttaive action if federal courts would be the superior forum.	*Federal Courts Act*, s 18 *Pringle; Jabour* *Reza*
Federal Court of Appeal	Only used in relation to 16 named tribunals: - The Agricultural Review Tribunal - The Canadian Radio-television and Telecommunications Commission	*Federal Courts Act*, s 28

	- The Canadian International Trade Tribunal - The Canada Energy Regulator - The Governor Council in relation to subs 186(1) of *Canada Energy Regulator Act* - The Appeal Division of the Social Security Tribunal - The Canada Industrial Relations Board - The Federal Public Sector Labour Relations and Employment Board - The Copyright Board - The Canadian Transportation Agency - The Competition Tribunal - The Public Servants Disclosure Protection Tribunal - The Specific Claims Tribunal	

Barriers to Relief

Barrier	What is it?
Failure to Exhaust an Adequate Alternative Remedy	Has the plaintiff exhausted all adequate alternative administrative remedies, such as a statutory appeal to the court or tribunal?
Prematurity	Has the plaintiff made an application for judicial review before the adjudicator has made a decision on the issue?
Mootness	Is the issue one that has no practical significance to the parties?
Delay	Is the application over the time period to which the statute has given? (30 days as per *Federal Courts Act*) And if so, is it likely the decision-maker would exercise discretion to extend time period?
Misconduct of the Applicant	Does the applicant have “clean hands”?
Waiver	Did the applicant have full knowledge of all relevant information and waive their rights?
Public Interest/Balance of Convenience	Would the tribunal inevitably reach the same result upon

	reconsideration? Would granting relief effect an innocent third party?

Cases for Remedies

Case	About	Facts	Ratio
Air Canada v Toronto Port Authority	Public Character- Government in Conduct of Business	TPA released a brochure as notice that they were changing landing sports at Billy Bishop Airport Issue is whether or not TPA was acting in a business or public capacity	In consideration whether decisions have a sufficiently public character to be amendable to review using public law remedies, the following factors should be analyzed: - The nature of the action or decision - The nature of the decision-maker - Extent to which decision is founded in law rather than private preference - Decision-maker's relationship to government - Extent to which decision-maker is an agent of government - Suitability of public law remedies - Existence of compulsory power - Whether conduct has a serious public dimension
Volker Stevin	Public Character- Government in Conduct of Business	Decisions of a non-statutory advisory committee that designated businesses as eligible for	Decisions, such as tender bids, ARE subject to public law review. When a government body made ordinary purchases under procurement

		governmental incentives	contracts, like buying paperclips, these decisions are NOT subject to public law review.
Dunsmuir	Public Character- Government as Employer	Court official dismissed without reasonable notice.	Public law does not apply here, and therefore neither do public law remedies.
Masters v Ontario	Public Character- Government as Employer	Recommendation to Premier to dismiss provincial agent because of allegations of sexual harassment.	Entitled to procedural fairness, and also public law remedies if it was found he was treated unfairly.
Seaside Real Estate	Public Character- Non-governmental agency controlling access to employment	Decisions of a Real Estate Board incorporated under statute where members must be associated to be employed in that profession.	Decisions expelling a member ARE amendable to public law review if not as voluntary as a group.
Ripley v Independent Dealers Association	Public Character- Non-governmental agency controlling access to employment	Voluntary self-regulatory investment dealers association, not required to join, more like a club	Decisions made by associations more akin to a club are NOT amendable to public law review.
Congregation of Jehovah's Witnesses v Wall	Public Character- Voluntary Association	Jehovah Witnesses expelled Wall from membership in their church.	Decisions made by religious bodies expelling members are not amendable to public law review.
Ethiopian Orthodox Tawedhado Church v Aga	Public Character- Voluntary Association	Church made decision to exclude a member.	Decisions made by religious bodies expelling members are not amendable to public law review. Also not available for breach of contract.
Democracy Watch v Canada	Exclusions- Admin Action	Applicant applied for judicial review of the Conflict of Interest and Ethics Commissioner's decision refusing to pursue concurrent	No right to judicially review a decision of the Federal Commissioner of Lobbying to investigate a complaint filed by a member of the public, because some forms of administrative actions

		examinations of eight public office holders.	are not amendable to public law remedies because no persons right are determined by them and they have no detrimental effects to the public.
Gitxaala Nation	Exclusions- Admin Action	Nation challenging duty to consult was not met to build a pipeline.	Where the NEB made a recommendation to Cabinet that a pipeline be approved, the Cabinet's decisions t approve it is amendable by the recommendation was not.
Tsleil-Wautuh Nation	Exclusions- Admin Action	Nation challenging duty to consult was not met to build a pipeline.	Same as above
Girouard	Exclusions- Public Bodies	Justice G was suspended with pay in 2013. He filed for judicial review while his conduct was being reviewed by the Canadian Judicial Council.	Decisions of "public law" Parliament, provincial legislatures, superior courts, and the Crown cannot be reviewed using prerogative remedies. Superior court judges have immunity from prerogative relief when they are acting in their capacity of superior court judge, but not when serving as members on an administrative body.
Vaid	Exclusions- Public Bodies	V was dismissed because he allegedly refused to accept new duties under a revised job description and filed for grievance.	Parliamentary privilege does not extend to legislature when acting as an employer.
Chagnon	Exclusions- Public Bodies	Three security guards working for QB National Assembly were dismissed.	Parliamentary privilege does not extend to legislature when acting as an employer.

Government of PEI v Summerside Seafood	Exclusions- Public Bodies	Fish processing plant seeking judicial review of PEI for not granting it a fish processing licence.	Courts are sometimes willing to grant injunctive relief, especially interim, against Crown agents and servants.
Pringle v Fraser	Federalism Consideration	Seeking deportation order be quashed.	Exclusive federal court jurisdiction over ordinary judicial review for federal administrative agencies is constitutionally valid.
Jabour	Federalism Consideration	Jabour sought declaration that *Combines Investigation Act* infringed upon his freedom of speech after he was disciplined for advertising his law practice contrary to the Law Society's rules.	Parliament DOES NOT have the constituional authority to deprive PSCs of CONSTITUIONAL review of federal legislation or actions of federal administrative agencies. So, PSC and FC have concurrent jurisdiction in relation to constituional challenges.
Reza v Canada	Federalism Consideration	Provincial curt chose to stay an immigration matter to the FC because the FC deals with immigration matters all the time	Superior courts have discretion to stay constituional challenges to federal administrative action if federal courts are a superior forum.
R v Miller	Federal vs PSC Jurisdiction	Drunk guy was smoking and lit house on fire.	PSC can grant *certiorari* in aid of *habeas corpus* where individual is being held in a federal penitentiary.
May v Ferndale Institution	Federal vs PSC Jurisdiction	Request t be transferred back to a minimum-security prison was denied.	PSC can grant *certiorari* in aid of *habeas corpus* where individual is being held in a federal penitentiary.
Peiroo	Federal vs PSC Jurisdiction		*Habeas corpus* is not available if the administrative alternative was at least as broad and no less advantageous.

Chhina	Federal vs PSC Jurisdiction	IRPA challenge.	Found the *Pierro* test was still valid, but that the IRPA regime was less advantageous.
Telezone Inc	Federal vs PSC Jurisdiction	Applicant was denied licence by government.	Damages claim can be dealt with comprehensively by the ON courts where there is collateral attack on validity of a federal order. **Damages action can be heard by PSC despite collateral attack on decision of federal board, commission or tribunal.**
Consolidated Mayburn	Collateral Attack	Ordered the demolition of a structure. Application argued this was actionable trespass. C countered that the Board's order was tainted by a breach of the rules of natural justice	Constrains the availability of collateral attack to situations where the party raising the collateral attack failed to pursue an opportunity to appeal the order.
Little Narrow Gypsum	*Certiorari*		Quashing a decision does not automatically prevent the same tribunal from rehearing the case.
Karavos v Toronto	*Mandamus*		Typical restrictions for *mandamus*: - Clear right to have the thing sought by *mandamus* done - Duty to perform at the time relief is sought - Duty to perform but be **obligatory rather than discretionary** - Must normally be a demand made

			and refusal to perform duty
Re Cedarville Tree Services Ltd	Interim Relief and Stays		Making an application for judicial review does not automatically have the effect of staying the decision under review.
Metropolitan Stores	Interim Relief and Stays	Union applied to MLRB for the imposition of a first contract. In reply, the employer sought a declaration that the provisions of the Act authorizing such a contract violated the *Charter*.	Test for grant of stay: - Has applicant raised a serious question of constituional validity? - In absence of a stay would applicant suffer irreparable harm? - Which party will suffer the greater harm if the stay is not granted? In constituional cases, the third branch must take account of the public interest enforcing the law pending a determination of constituional invalidity.
Lord Nelson Hotel Ltd	Private Interest Standing	LN owned a hotel, ad the City permitted the development of another hotel on the other Corner.	Court found LN had interest above and beyond an ordinary citizen, because the zoning change would allow for a competitor
Young Manitoba	Private Interest Standing	Coroner found that child died because of an excessive dosage of morphine and lack of any actual treatment. No criminal charges were laid. Doctor wanted standing because this wrecked his reputation.	Court found doctor has NO standing largely because the case is about the person who died and not putting the family through it all again.

Finlay	Private Interest Standing; Public Interest Standing	Welfare recipient claiming that MB was illegally using funds transferred from federal government. If they did it his way, he would get more money.	No private interests standing BUT has public interest standing to challenge the constitutional validity of the legislation, not the lawfulness of the government action.
Downtown Eastside Sex Workers United Against Violence	Public Interest Standing	Arguing against the constituional validity of the Criminal Code prostitution provisions.	HAD public interest standing. Found all three actors for public interests standing should be weighed cumulatively, flexibly and purposively. Specifically found third factor must be flexible.
Harris	Public Interest Standing	Taxpayer wants to challenge an arrangement that can be made between Minister of Finance and another tax payer.	Courts allowed for public interest standing as a principle and precedent was at stake and the challenge should be allowed to be brought by someone who can effectively do so.
Council of Canadians with Disabilities	Public Interest Standing	Charter challenge against the compulsory treatment provisions in the BC *Mental Health Act*	Re confirmed that the three factors should be weighed cumulatively, in light f the underlying purposes of limiting or granting standing and applied in a flexible and generous manner that best serves those underlying purposes. No special weight should be given to any specific factor. In considered the reasonable and effective factor, courts should consider:

			- Plaintiff's ability to bring the claim forward - Whether the case is in the public interest - Whether there are alternative means - The potential impact of the lawsuit on others.
Energy Probe	Attorney General	Challenging the validity of renewal of a permit for an atomic energy plant. AG intervened, and EP challenges the Ag's right to intervene.	Recognized role of Ag as guardian of the public interest to allow intervention even in non-constituional cases in order to defend public interest.
Gaboreault	Attorney General	Judicial review applicant where Union who was unsuccessful abandoned the case and the AG still wanted to intervene to get guidance for the future.	Recognized role of Ag as guardian of the public interest to allow intervention even in non-constituional cases in order to defend public interest.
Northwestern Utilities	Status of authority whose Decision is being reviewed		Tribunal could not appear to respond to arguments that its proceedings violated natural justice.
Paccar	Status of authority whose Decision is being reviewed		The tribunal COULD appear to argue that its decision was not patently unreasonable. This was treated as a guideline and not a hard rule.
Ontario (Energy Board) v OPG	Status of authority whose Decision is being reviewed	OPG asked OEB to approve $145million in labour compensation costs and to	Courts should exercise discretion over whether a decision-maker can participate as a party bearing in mind the considerations that

		incorporate these into utility rate in order to receive payment son the costs. OEB said no, and OPG is challenging this decision.	militate for and against such participation and the limits on decision-maker participation. Relevant considerations: - Finality - Impartiality - Benefit of the court
Canada (Human Rights Commission) v Canada (AG)	Status of authority whose Decision is being reviewed	Status was denied to be passed on from “Indians” to their children due to discriminatory policies.	Practice at federal level where a decision-maker is not entitled to participate as a party, but still may be able to intervene.
Canada (AG) v Quadrini	Status of authority whose Decision is being reviewed	Unfair labour practice complaint.	Tribunal seeking to intervene must assist court in its discretionary assessment by making detailed submissions in its application for intervention to explain why it can be useful to the court and what the nature of its submissions will be.
Forest Ethics Advocacy Association v NEB	Standing before admin tribunals	A pipeline company sought NEB’s approval for a project to allow more crude oil be refined and transported from West to East Canada. Forest group said NEB did not considered environment when making decision and needed to.	Use of reasonableness standard of review in assessing tribunal decisions to deny standing in regulatory proceedings. Not procedural fairness.
Harelkin	Failure to Exhaust alternative Remedies- Admin Appeals	H was a student who was required to withdraw from the University’s faculty of social work, when he tried to appeal the	Court allowed this to occur, because it was shown Uni would not have been fair.

		Uni dismissing the claim without a hearing. H sought judicial relief instead of his available right to appeal another University committee	
Matsqui	Failure to Exhaust alternative Remedies- Admin Appeals	Members of Indian Band NOT disqualified from sitting on appeals of property tax assessments on property held by non-band reserve members.	Factors to consider when determining whether an administrative remedy is “adequate” and must be exhausted include: - Does the appellate body have the scope of authority to address fully the concerns raised by the applicant? - Will the Court eventually be in a position to fully review the decision of the appellate body? - Did the legislature express a preference for having a matter addressed by the appellate body because of its special character or expertise? - Is the appellate body sufficiently independent, or is there some other defect in its composition or procedures?
Mission Institution v Khela	Failure to Exhaust alternative Remedies- Admin Appeals; Mootness	Information from confidential sources implicated K in a stabbing, but not given any	Added another factor: - Will pursuit of the appeal cause unnecessary delay?

		information on who informant was. Court chouse to quash a decision to transfer K from medium to maximum secuirty prison.	
Ewert	Failure to Exhaust alternative Remedies- Admin Appeals	E argued that decisions made about him in federal prisons were based off tools used for non-Indigenous people, and he was Indingeous.	Another factor: - Has the person seeking relief from the courts used the administrative process in the past without having their concerns adequately addressed?
Miner Power v Alta Energy Board	Failure to Exhaust alternative Remedies- Appeal to courts		Courts presume that appellate review by a court represents an adequate remedy that must be exhausted if the proposed ground of attack on the decision was available on the appeal.
Conception Bay	Failure to Exhaust alternative Remedies- Appeal to courts		Exceptions to the above are made in situations on which there are usually short time limits for appeals and where it is doubtful if the appeal court could address the issues adequately.
Shore Disposal	Alternative Means of Enforcing Statutes		To some extent, courts are reluctant to use judicial review to augment the penalties available under quasi-criminal law, especially if this would result in avoiding the necessity of giving the respondent the procedural

			protections available under the criminal law.
Air Canada v Lorenz	Prematurity	L was a pilot and filed an unjust dismissal complaint against AC.	Courts normally want to hear from the decision-maker before ruling themselves, but can take account of other factors which include: - Hardship of the applicant if they must continued with a flawed proceeding before getting relief - Waste of time, especially if the application is made partway through a tribunal hearing - The implications of delay - The undesirability of fragmenting - The strength of the case for relief - That statutory context
Thielmann	Prematurity	Application was arguing engineer professional association did not have jurisdiction to hear decision, and even if they did, they were bias,	Court refused to hear judicial review application before the decision form the tribunal was made.
Borowski	Mootness		Courts are reluctant to address points of law that have no ongoing practical significance to the parties.
Friends of the Oldman River Society	Delay	AB government wanted to build a dam on the Oldman River to create a reservoir. Minister of Transport allowed	Courts may be reluctant to refuse to grant relief to a meritorious claimant if there is a reasonable explanation for the delay

		the project, the society brought action to quash the decision and they wanted the environmental impacts to be reviewed first.	
MacLean v UBC	Delay		Courts make also be reluctant to address delay issues in isolation without considering the merits of the case
Swift Current Telecasting	Delay	Where the court held that delay in making a challenge to the issuance of a broadcast license until he construction of a news station was well underway justified a refusal of relief	On the other hand, courts may take the practical consequences of delay into account
R v Consolidated Mayburn Mines	Delay	A mine that Minister of Environment concluded to be abandoned and an environmental risk.	Delay can also be a factor in courts refusing to allow a collateral attack on the validity of an order during enforcement proceedings where the party seeking to challenge the validity of the order failed to take advantage of statutory right to appeal the order
Behn v Moulton	Delay		Court refused to allow logging permit as a defence to a tort action since this would encourage protestors to interfere with logging operations rather than seek to challenge permit.
Telezone Inc	Delay		On the other hand, SCC has not accepted the argument that the limits on collateral attack prevent a plaintiff from

			challenging the validity of a federal order in the court of bringing an action for damages against the Federal Crown in PSC
Homex Realty	Misconduct of the Applicant	Real estate developer took advantage of loophole to avid requirement of development permission by adopting checkerboard scheme of property development.	Misconduct of the applicant is based on the "clean hands" doctrine of equitable relief.
Re Tomarao	Misconduct of the Applicant	Massage parlour owner had questionable character	Courts have sometimes ordered the issuance of business permits that were wrongfully denied, even thought the business owner operated the business in the absence of a permit.
Millward v Public Service Commission	Waiver		Raising an objection and then proceeding with a hearing does not constitute waiver, and may be a safer course of action than refusing to participate in the hearing,
Mobil Oil Canada Ltd	Public Interest		Courts occasionally conclude that if the tribunal would inevitably reach the same result upon reconsideration, relief can be denied
Miningwatch Canada	Public Interest	Government told company to proceed with an environmental assessment in particular way. Company followed, and the Miningwatch said another	Another consideration is whether granting relief against a governmental actor has the effect of prejudicing an innocent third party.

		environmental assessment needed to be done even though the project was halfway completed.	