**ADMIN CAN TABLE OF CONTENTS- 2018**

**Introduction:**

 The Rule of law & Different conceptions of such...........................................................................3

**Procedural Fairness**....................................................................................................................................6

 Historical Evolution.........................................................................................................................7

 Questions to consider when looking for PF ....................................................................................7

 *Cooper v Wandsworth*......................................................................................................................7

Modern Common Law Procedural Fairness.....................................................................................8

 *Nicholson v Haldimand Police*............................................................................................8

 *Knight v Indian* ...................................................................................................................8

 *Baker v Canda*.....................................................................................................................9

MODERN TEMPLATE OF PF- THE 5 FACTORS IN CONTEXT.............................................11

**Sources of PF**..............................................................................................................................................12

Constitutional Principles of Procedural Fairness............................................................................12

 Canadian Bill of Rights .....................................................................................................12

 *Charter*...............................................................................................................................12

The anatomy of a s7 Charter claim ......................................................................13

 *Charkoui v Canada*...............................................................................................15

 *Re Harkat*..............................................................................................................16

Aboriginal Constitutional Rights and the DTC.................................................................17

 *Haida Nation v BC*...............................................................................................17

 *Rio Tinto v Carrier*...............................................................................................18

 *Clyde River v Petroleum* .....................................................................................19

Legislation and Statute ..................................................................................................................20

 The *APJA*...........................................................................................................................21

**Limits on PF**..............................................................................................................................................22

Modern limitations (no longer judicial/quasi vs administrative) ..................................................22

 Legislative and policy decisions.......................................................................................22

 *Canada v Inuit Tapirisat*......................................................................................22

 *Homex Realty* – **bylaws**........................................................................................24

*Canadian Association of Importers* .....................................................................24

 The *Dunsmuir* Exception.................................................................................................25

 Investigations/Recommendations/preliminary..................................................................25

 *Re Abel* ................................................................................................................26

 *Dairy Producers Co-op*........................................................................................26

**Expansive PF- PF Applies to privileges and interests as well**................................................................27

*Re Webb and Ontario Housing Corp*..............................................................................................27

 *Cardinal v Kent* ..............................................................................................................................27

**Legitimate Expectations** ...........................................................................................................................28

*Reference re Canada Assistance Plan*............................................................................................28

 *Apotex Inc v Canada*.......................................................................................................................28

 *Canada v Mavi* ..............................................................................................................................29

**The Baker framework- HOW TO GO ABOUT IT**................................................................................29

**What does the duty require in the circumstances?** ................................................................................30

Notice..............................................................................................................................................30

 *Canada v Canada (Commission of Inquiry)* .....................................................................30

Discovery and Disclosure...............................................................................................................30

 *Napoli v BC*........................................................................................................................31

 *CIBA-Geigy v Canada*.......................................................................................................31

FOIPA...............................................................................................................................32

 *Gallant v Canada*..............................................................................................................32

 *Mission Institution v Khela* ...............................................................................................33

Right to an Oral Hearing and Counsel ...........................................................................................34

 *Khan v U of O*...................................................................................................................34

 *Howard v Stony Mountain Institution* ..............................................................................35

 *New Brunswick v G(J)* ......................................................................................................35

Right to cross-examine...................................................................................................................36

 *Innisfil v Vespra*.................................................................................................................36

 *Djakovic v BC (Workers Comp)* .......................................................................................37

The duty to give reasons.................................................................................................................37

 *Newfoundland Nurses Union*.............................................................................................37

 *Wall v Independent Police Review*.....................................................................................38

**Reasonable Apprehension of Bias-The Test**...........................................................................................39

*Old St Boniface*.................................................................................................................40

 *Seanic Canada Inc v St Johns*...........................................................................................40

 *Newfoundland Telephone* .................................................................................................41

 *Pelletier v Canada*.............................................................................................................41

Statutory Authorization- *Brosseau v Alberta/ 2747-3174 v Quebec..............................................42*

Tribunal Independence- *Ocean Port Hotel* ....................................................................................43

Institutional Consultations..............................................................................................................43

 *International Woodworkers v Consolidated Bathurst* ......................................................44

 *Trembley v Quebec*............................................................................................................44

 *Ellis Done Ltd v Ontario*....................................................................................................45

**Substantive Review** ...................................................................................................................................45

Historical Overview........................................................................................................................46

 *Cupe v New Brunswick* and the evolution.........................................................................46

 Modern Day- Dunsmuir- pragmatic and functional approach.......................................................47

 Privative Clauses/ Right of Appeal ..................................................................................49

 Expertise of the decision maker .......................................................................................50

 *Pezim v BC*...........................................................................................................50

 *Canada v Southam*...............................................................................................51

Nature of the question.......................................................................................................51

 Examples of each..................................................................................................51

 Discretionary Questions.......................................................................................52

 *Canada v Khosa*......................................................................................52

Correctness review.............................................................................................................53

 *Pushpanathan v Canada*.......................................................................................53

Reasonableness Review.....................................................................................................54

 Questions of fact- *Dr. Q v College of Physicians.................................................55*

 *Catalyst Paper Corp v North Cowichan..............................................................56*

**Admin Law and the Charter**.....................................................................................................................56

 *Cooper v Canada-* 3 standards of constitutional review ................................................................57

 *Nova Scotia v Martin & Laseur*.........................................................................................57

 *APJA- IMPORTANT*..........................................................................................................58

 *R v Conway*........................................................................................................................59

Section 1 of the Charter..................................................................................................................59

 *Doré v Barreau du Quebec*................................................................................................60

 *Trinity Western v LSBC*.....................................................................................................61

**Remedies**.....................................................................................................................................................62

Practical Considerations..................................................................................................................62

 Options for remedies.......................................................................................................................63

 *Alberta Rules of Court*....................................................................................................................63

 *Federal Courts Act*..........................................................................................................................64

 *Air Canada v Toronto Port Authority* ............................................................................................65

 *Highwood Congregation v Wall*.....................................................................................................66

Stay of Proceedings........................................................................................................................66

 *Manitoba v Metropolitan Stores*........................................................................................66

 *RJR MacDonald v Canada-* TEST FOR STAYS..............................................................67

 Injunctions in Aid of Administrative process ................................................................................68

*Brotherhood of Maintenance.............................................................................................*68

**Standing** .....................................................................................................................................................68

 Standing in Canadian Constitutional Law......................................................................................69

 *Finlay v Canada* (test for public interest standing)...........................................................69

 *Canada v Downtown Eastside Sex Workers* ....................................................................70

**INTRODUCTION- THE ADMINISTRATIVE STATE**

**What is administrative law?**

* Concerns the **legal regulation of public power**, and public decision-making
* Often associated with rule of law principles, which are meant to ensure that public decisions are justifiable in light of the relevant law (statutory rules, common law principles, constitution)
* By defending principles of transparency, due process, and legality, administrative law serves to guard against the arbitrary exercise of executive power.
* When the rule of law breaks down, officials start wielding the power unfairly.
* Applies to:
	+ Decision makers exercising a public function
	+ Private organizations and individuals whose decisions affect the public interest
	+ Municipalities
	+ Public officials and institutions exercising statutorily delegated authority
		- Cabinet ministers
		- Regulatory boards
		- Administrative tribunals
		- Public institutions with statutory or licensing powers
		- Crown Corporations
		- Others (ex: Privacy Commissioner)
* Controversial because judges, lawyers, citizens disagree about the legitimate role of the state, proper scope of individual freedom in a liberal democracy and how law should regulate the relationship between citizens and the state

Facets of Administrative law

* **Procedural Fairness:** (1) Is this type of decision subject to judicial review? (2) If so, did the decision-maker abide by the principles of fair process?
	+ Concerns the process by which a decision is reached
	+ Did the person affected receive prior notice of the decision?
	+ Did the person affected receive adequate disclosure?
	+ Was the person given the opportunity to present evidence, cross-examine witnesses and provide submissions in advance of the decision?
	+ Was the person allowed legal representation?
	+ Were reasons for the decision provided?
	+ Was the decision maker bias?
* **Substantive Legality:** Does the decision contain a substantive error in judgment which warrants judicial intervention?
	+ Concerns the merits of a decision
	+ Reasonable in the sense that is was justifiable?
	+ Did the decision-maker act on proper legal reasons?
	+ Is the conclusion logically supported by the evidence?
* **Remedies**
	+ What can the court/tribunal do to redress wrongs?
* **Standing**
	+ Who can bring challenges?

**The Rule of Law**

* The rule of law is a powerful, evaluative standard which gauges the legitimacy of governmental action. By ensuring that administrative decisions are consistent with the rules of law, we can ensure that government acts consistent with publicly articulated legal standards instead of arbitrary private options.
* Assumption: decisions which are consistent with the rule of law create genuine legal obligations, while decisions which offend the rule of law are fundamentally unjust
* Main virtues of the rule of law:
1. The rule of law enables legal subjects to plan their lives in accordance with the law
	1. It gives people reference points without fear of being hindered or oppressed. It serves a value of freedom/liberty. It is not unconstrained, but it lets us know where we stand.
2. The rule of law acts as a safeguard against arbitrary political power
	1. Once we have those standards in place, leaders cannot do whatever they want.
3. The rule of law treats legal subjects with dignity which entails a degree of due process and reasons
	1. You can’t take action that negatively affects someone without due process.

Different theoretical conceptions of the rule of law

**(1) AV Dicey, *An Introduction to the Study of Law of the Constitution* (1885)**

* Two fundamental principles of the English (unwritten) constitution:
	+ 1. Parliamentary Sovereignty: Parliament can make or unmake any law, no one can override. Based on an argument of democratic legitimacy.
	+ 2. Rule of law
		- (i) “**No man is punishable** or can be lawfully made to suffer in body or goods **except or a distinct breach of law** established in the **ordinary legal manner** before the ordinary **courts of the land**.”
		- (ii) “no man is above the law...every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”
		- (iii) “The general principles of the constitution...are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts” **(maybe not so correct)**
			* No administrative official can be given discretionary power
			* Argues that “administrative law” is inherently illegal – a government official cannot be empowered by statute to act – judges should hold final decision-making power
				+ But, in Dicey’s time, the administrative state in England was limited, so Dicey tended to overlook its role in English society. He was politically opposed to the emerging welfare state
	+ **Problems with Dicey conception:**
		- It seemed to gives judges the license to preserve default rules.
		- It tends to read the Constitution and enabling legislation narrowly, which frustrates the operation of the administrative state

**2. Lon Fuller, *The Morality of Law (1969)***

* + The law must be general;
	+ The law must be publicized;
	+ The law must be intelligible;
	+ The law cannot have retroactive force;
	+ The law cannot be contradictory;
	+ The law cannot impose obligations that are impossible to perform;
	+ The law cannot be so unstable that no one can understand what his or her legal obligations are;
	+ The law must be enforced consistently with declared standards

**3. Modern view:** the welfare state has expanded significantly; society views the franchise as universal.

* Key issue: a formulation of the rule of law that is respectful of popular democratic decisions and the modern administrative state
	+ The rule of law has to be applied with sensitivity to context
	+ Judges will sometimes refrain from quashing decisions to show restraint, other times will be more willing to take more extensive action
* ***Van Harten, Heckman, and mullan on the Big Question***
	+ “We see no necessary inconsistency between, on the one hand, the core values of the rule of law—government that is subject to law and respectful of the claims of individual dignity and basic liberties—and, on the other hand, the public interest in an administration with the capacity to deliver public programs effectively, efficiently, and responsively.”

Different ways to uphold the rule of law

* Political oversight
* Ombudsman
	+ Independent official in government who has a budget to investigate a complaint. May be more cost effective
* Freedom of the press
	+ Writing an anonymous op-ed, or tip off a reporter to write a story to bring down a government.
* Administrative appeals
	+ Usually don’t run off to court when you get an adverse decisions, you should check whether there is a right to appeal etc.

**How do judges uphold the rule of law while respecting the legitimacy of administrative decision?**

**PART 1: PROCEDURAL FAIRNESS**

What is procedural fairness

* A long standing common long doctrine with ancient roots. The idea is basically, anytime someone is **in legal jeopardy** they have the **right to be informed of the case against** them and **submit arguments** in their own defence. AND they should be **entitled to be informed and involved** in the legal proceedings.
* Concerned with whether the claimant’s procedural legal rights were honoured before the decision was announced
* Requires public officials to employ decision-making processes which are “fair” in the sense that:
	+ (1) ***audi alteram partem*** “No one should be condemned un-heared” People affected by an administrative decision are empowered to participate in the process (e.g. right to notice, disclosure, argue, cross-examine, etc); and – but these are pointless unless:
	+ (2) ***nemo judex in sua causa***- “No one should be a judge in their own case” The decision maker is fair and impartial (rules regarding adjudicative independence and guarding against bias)
		- If not impartial, person has a complaint independent of the merit of the decision itself
* Fairness is on a spectrum now. There is a general duty of fairness that gets more or less demanding on the case at hand

How is it related to the rule of law:

* Procedural fairness has both “**instrumental**” and “**inherent value**”:
	+ (a) instrumental value= When public officials abide by the principles of procedural fairness, they are able to reach better conclusions. It allows the affected to be involved and give their side and point of view
	+ (b) Inherent value= It treats people with respect and dignity. It demonstrates respect for people who are affected by an administrative decision.
		- It may help people accept an adverse decision when they are treated with respect

Historical/terminological evolution

* Originally, the principles of natural justice applied only to the exercise of “judicial” or “quasi-judicial” powers, while “administrative powers” could be exercised without legal constraints
* Beginning in ***Nicholson****,* you see a transition away from abstract categories and conceptual distinctions
* ***Nicholson***also signals the broadening reach of the doctrine of fairness, as well as a more nuanced contextual framework

Different sources of Procedural Fairness

* **Being able to construct an argument regarding procedural fairness which is multi-pronged (common law, constitutional, statutory) is best.**
* **The Constitution Act, 1982**
	+ *Charter* (Particularly ss 7-14); and
	+ *S 35* (duty to consult)
* **The *Canadian Bill of Rights***
* **Enabling Legislation**
	+ General legislation concerning administrative process (eg. The Alberta *Administrative Procedures and Jurisdiction Act);*
	+ Regulations
	+ Official Guidelines
* **Common law doctrine**
	+ (*Cooper v Wandsworth Board of Works; Nicholson and Knight*);
	+ Legitimate expectations

Questions to consider when reading a case

1. Does this type of decision require a duty of fairness?
2. If it does, what sources of law are relevant under the circumstances?
	1. Can be a broad net: enabling legislation, Charter, the regulations, general procedural statutes, common law doctrine, ministerial guidelines, past practice (legitimate expectation)
3. What level or degree of procedural fairness is required under the circumstances?
	1. Some cases only require notice
4. Was this particular decision-making process fair?

***Cooper v Wandsworth Board of Works***

* **EARLY EXAMPLE OF WHAT PF REQUIRED (HAS EVOLVED SINCE)**
* **Facts:** Mr. C is building his house. Statute stipulated that anyone building a house had to give the Board of Works 7 days notice before starting to ensure proposed building would be up to code
* Mr. Cooper sends letter late (city never received it). City tears down house
* **Issue:** Should the city have given notice and a hearing before tearing down the house project?
* **Held:** has been said where the principle of not depriving property only applies to judicial hearings. BUT it should not be limited in that way. I think it has been applied to many exercises of power.
* Although the legislation doesn’t mention a right to fairness, judges can still imply it based on the common law – even if there are no positive words in a statute requiring a right to be heard, “the common law will supply the omission of the legislature.”
* Anytime someone exercises statutory delegated power they must do so in line with the common law duty of PF
* Court says: importance of property rights, fact this case concerns property right adds importance
	+ You should hear somebody before deciding to destroy their property
* **Ratio:** There is a duty to procedural fairness independent of statute – when statute is silent, courts entitled to imply a common law duty of fairness. Reflects historical protection of property rights

**Commentary:** Case demonstrates an important shift in the development of procedural fairness. Raises questions about the (ir)relevance of the analytical distinction between “judicial” and administrative functions.

* Argument for logical fairness but could also say judiciary is legislating, lack of certainty (how to know procedural guarantees if court can read them in)

**Modern Common Law Duty of Procedural Fairness**

***Nicholson v Haldimand Norfolk Regional Police Commissioners***

* **Facts**: Under *Police Act* regs, a police officer could be discharged without procedural protections if they had worked for under 18 months. Nicholson served as a constable for 15 months and was discharged by the police board without a hearing. He sought review
* **Issues**: Was Nicholson entitled to a hearing prior to his termination under PF?
* **Held**: Yes. Statute doesn’t explicitly entitle him to PF but there is legal onus on board to give him notice and a hearing grounded in CL
* Here: Consequences for N were very serious “He should be treated fairly and not arbitrarily” – requirement of notice makes board less likely to act in arbitrary fashion.
	+ N should have been given reasons why he was being fired and an opportunity, orally or written, to respond = fairness to N and the board
* There is no protection at all, no halfway house between the observance of natural justice aforesaid and arbitrary removal in the case of a constable who has held office for less than 18 months
	+ he cannot be denied any protection. He should be treated “fairly” and not arbitrarily...there is a general duty of fairness
* “to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, **regardless of the classification of the function in question”**
* **Ratio:** Canada’s Cooper: establishes the doctrine of PF in Canadian Law; Broadens procedural protection to encompass activities that fall outside of the judicial or quasi-judicial realm and lessens the importance of such classifications. After this case, see renaissance with PF being granted to people who never had it before, such as prisoners.
* **NOTE:** Court says that if you want to exclude PF, you have to explicitly exclude those rights.
* **Dissent:** The decision whichthe respondent made was that it did not wish to continue the appellant’s services as a constable. His status was that of a constable on probation. The very purpose of the probationary period was to enable the respondent to decide whether it wished to continue his services beyond the probationary period

***Knight v Indian Head School Division No***

* **Facts:** The appellant board of education dismissed the respondent director of education when he refused to accept a renewal of his contract for a shorter term than the original
* **Held:** The existence of a general duty to act fairly will depend on the consideration of three factors:
	+ **(i) the nature of the decision to be made by the administrative body;**
		- No longer a need to distinguish between judicial, quasi-judicial and administrative decisions
		- BUT not all administrative bodies are under a duty to act fairly. 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
	+ **(ii) the relationship existing between that body and the individual; and**
		- Employee/employer relationships can be categorized into 3 categories: (i) the master and servant, where there is no duty to act fairly; (ii) the office held at pleasure,; (iii) the office from which one cannot be removed except for cause where a duty exists.
		- BUT procedural fairness can still be required in the office held at pleasure AS ...Fairness dictates that the administrative body making the decision be cognizant of all relevant circumstances surrounding the employment and its termination
	+ **(iii) the effect of that decision on the individual’s rights**
		- There is a right to procedural fairness only if the decision is a significant one and has an important impact on the individual. The loss of employment against the office holders will is a significant decision that could justify imposing a duty to act fairly
* NOTICE: How the factors in this case were repeated and added upon in Baker

***Baker v Canada***

* **Facts:** Baker in Canada on a visitor’s permit during that time has 4 Canadian born children all under the age of 10; public officials learn she is not a permanent resident and start deportation proceedings
* Minister has power to allow someone to stay on humanitarian and compassionate grounds. and applied for an exemption based on this under s.114(2) of the Immigration Act. This application was supported by letters indicating concern about availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children.
* A immigration officer replied by letter stating that there were insufficient reasons to warrant processing the application in Canada. **This letter contained no reasons for the decision.**
* Counsel for the appellant, however requested and was provided with **the notes made by the investigating immigration officer** and used by the senior officer in making the decision.
* **Issues:** Were the principles of procedural fairness violated in this case? Was discretion improperly exercised because of the approach taken towards the interests of Ms. Baker’s Children?
	+ Were the participatory rights accorded consistent with the duty of procedural fairness?
	+ Did the failure of the immigration officer to provide reasons violate duty of procedural fairness?
	+ Was there a reasonable apprehension of bias in the making of this decision
* **Procedural Fairness**
* Ms. Baker was entitled to fairness, but she wasn’t entitled to the full range of procedural safeguards.
	+ But content will vary: **the concept of PF is eminently variable and its content is to be decided in the specific context of each case. All the circumstances must be considered in order to determine the content of the duty of PF – *Knight***
	+ underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of **procedural fairness is to ensure** that administrative decisions **are made using a fair and open procedure**, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker

**Baker Factors: Factors relevant to determining content of duty of PF but list is not exhaustive**

* **(1) nature of the decision being made and process followed making it**
	+ *Knight*: closeness of the admin process to the judicial process should indicate how much of those governing principles should be imported into the realm of admin decision-making
	+ The more the process provided for, function of tribunal, nature of the decision-making body, and the required determination of decision resemble judicial decision making **the more likely that procedural protection closer to the trial model will be required**
	+ Here: H&C very different than judicial decision because involves considerable discretion and requires consideration of multiple factors – suggests more relaxed requirement
* **(2) nature of statutory scheme and the terms of the statute pursuant to which body operates**
	+ Greater procedural protection when no appeal procedure provided or when decision is determinative of the issue and further requests cannot be submitted
	+ **Read the statute and regulations and determine what rights your client gets**
	+ Here: role of H&C decision within stat scheme is an exception to the general principles of Canadian immigration law – suggests more relaxed requirements – but also no appeal procedure, though judicial review available with leave of Fed Court
* **(3) the importance of the decision to the individual or individuals affected**
	+ The more important the decision is to the lives of those affected and greater the impact, the more stringent the procedural protections that will be mandated
	+ Significant factor affecting content of PF
		- High standard for employment, personal family, etc
* **(4) the legitimate expectation of the person challenging the decision**
	+ Does not create substantive rights (*Old St. Boniface)* but if claimant has legitimate expectation that a certain procedure will be followed, the procedure will be required by duty of PF
	+ Similarly if claimant has LE that certain result will be reached in their case, PF may dictate more extensive procedural rights than would otherwise be accorded
	+ Based on principle that circumstances affecting PF take into account the promise or regular practice of admin 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 w/o according significant procedural right
* **(5) the choices of procedure made by agency itself**
	+ Take into account and respect 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
	+ Here statute accords considerable flexibility to Minister to decide proper procedure and immigration officers as a matter of practice do not conduct interviews in all cases
* **NOTE: this is not an exhaustive list.**
* **Held:**
* Ms. Baker was entitled to fairness, but she wasn’t entitled to the full range of procedural safeguards
* **ORAL HEARING**
	+ She was not allowed an oral hearing. Written reasons were sufficient. She was able to present her case adequately without an oral hearing.
	+ Requiring an oral hearing in all these cases would be impractical. The immigration and refugee board has the largest case load of any administrative body. If we required an oral hearing in all these cases, the system would collapse. Fairness must be practically operations
* **WRITTEN REASONS**
	+ it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision.
	+ The profound importance of an H & C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided.
* **REASONABLE APPREHENSION OF BIAS**
	+ [T]hat test is “what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly
	+ In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz’s comments.
* **REVIEW OF DISCRETIONARY DECISION MAKER**
	+ though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

Procedural Fairness at common Law: A contextual framework (***Baker****)*

* **The nature of the decision and the process followed in making it.**
	+ “The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determination that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.”
	+ Administrative decisions which are made in an adversarial context culminating in a formal adjudication will normally require more extensive procedural rights.
* **The nature of the statutory scheme and the terms of the enabling statute.**
	+ A purposive understanding of the statutory scheme might suggest certain procedural rights.
	+ A detailed understanding about the statutory framework and why. What type of framework, and what are the policy reasons behind this.
	+ Is there an appeal mechanism? Or is this the end of the road. If there is an appeal, you may not get as much procedural fairness. By contrast, if the decision is final, subject to a privative clause (seeking to prevent people from challenging in court), The court will be more likely to apply more rigorous protections.
* **The importance of the decision to the individual or individuals affected.**
	+ Where the consequences of a decision are significant for an individual, the court will usually require a higher degree of procedural fairness.
	+ Build your case for procedural fairness by highlighting salient facts about your client’s interests in the outcome
	+ **Look for factors why that individual is particularly harmed by that (not how 100s or 1000s are also affected in the same way)**
* **The legitimate expectations of the person challenging the decision.**
	+ Where the decision-maker has given an express promise or past practice leads one to believe that certain procedural rights will be respected, it may lead the court to impose a duty of procedural fairness
	+ Or where they say that they will be quite favorable to one outcome and then not doing that.
* **Respect for the procedural choices made by the decision-maker.**
	+ Where the enabling legislation and the regulatory context suggest that a decision-maker has special expertise in administering public policy, courts should respect the process chosen by that decision-maker.
* The threshold questions are those that don’t even get the Baker framework off the ground

The *Baker Synthesis*

* The debate in *Knight*:
	+ L’Heureux-Dube: start with an overarching common law duty of fairness, and see if the statute specifically excludes them (see also *Cooper* and *Nicholson*)
	+ Sopinka: start with the statute to see if it grants a duty of procedural fairness
* Clarified in *Baker:* To determine what the doctrine of procedural fairness requires under the circumstances, consider:
* Start with: overarching values/principles
	+ Assume that duty of PF is broad but content is determined by context of the decision
	+ Purpose: to ensure that admin decisions are made using fair and open procedure with an opportunity for those affected by decision to put forward their views and evidence fully and have them considered by the decision maker (openness and sensitivity)

**Constitutional Principles of Fundamental Justice**

**Constitutional and Quasi Constitutional Sources of Procedures**

**Problem:** what can you do to defend a client’s right to PF when statute expressly excludes that right at CL or CL guarantee of PF is insufficient under the circumstances?

* Procedural rights also receive constitutional protection under the *Charter* and under quasi-constitutional instruments including the *Canadian Bill of Rights* and the Quebec *Charter of Rights and Freedoms*
* Resort to constitutional an quasi constitutional procedural sources becomes necessary in three may circumstances
	+ 1. The *Singh* Case: legislation may expressly deny certain procedural safeguards or provide a lower level of procedural safeguards, leaving no room for common law supplementation.
	+ 2. The constitutional provisions may establish procedural claims in circumstances where not existed previously at common law.
	+ 3. These provisions may mandate a higher level of procedural protections than would the application of common law procedural fairness to the challenges species of administrative decision making.
		- Ie you want an oral hearing, showing a violation of s 7 rights would be helpful
* Other options for PF:
* ***Canadian Bill of Rights***
	+ Federal statute, so it is confined to the federal domain. It has no relevance to provincial statutes or decision making under provincial jurisdiction.
	+ For the purposes of administrative law, the principal procedural protections of the *Bill of Rights* are found in ss 1(a) and 2(e)
		- **1(a)** The right of the individual to life, liberty, security of the person and **enjoyment of property**, and the right not to be deprived thereof except by due process of law
		- **2(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
* ***Canadian Charter of Rights and Freedoms***
	+ The main source of procedural protections in the *Charter* is s 7:
		- Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
	+ While liberty or security of the person interests are commonly engaged in certain decision making contexts, including refugee protection or correctional law, this is usually not the case in the sprawling domain of economic regulation.
* **The Charter: Who does it apply to?**
* 32. (1) This Charter applies
	+ (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
	+ (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
* ***McKinney v University of Guelph****—*university not a governmental institution for the purposes of the *Charter.* It operates independently from government. The minister of post-secondary does not administer employment policy. *Charter* does not apply here.
	+ **Today, this decision might be different.**
* ***Eldridge v British Columbia****—*provincial hospital boards are a governmental institution because they implement a specific legislative policy or program. They are responsible for implementing a specific government program.

Significant Charter Sections- Anatomy of a section 7 claim

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

1. *Does the Charter apply?* (*Eldridge*)
	1. There is confusion nowadays about the application of the Charter to administrative bodies. *McKinney 🡪* ***Blenco v Canada***
		1. **IF dealing with an administrative agency implementing legislative objectives, chances are that it is Charter applicable. Be prepared, however, that a court (or on an exam) that the court will not accept that and you will need alternative arguments (common law etc)**
2. *Threshold question*: “everyone” encompasses citizens and non-citizens. Broad application.
3. *Has the right to life, liberty, or security of the person been infringed*? Each is a distinct concept. No distinction between rights and privileges.
	1. *Liberty:* engaged where state compulsions or prohibitions affect important and fundamental life choices (*Blencoe*).Not confined to physical restraint, protects freedom of movement.
		1. Includes the right to choose where to work and to pursue a livelihood (*Wilson*)
		2. Includes the choice of where to establish one’s home (*Godbout*), the choice of where to work (*Wilson*), parental choices on how to raise your children (*JG*)
		3. DOES NOT include property or pure economic rights (*Wilson*)
	2. *Security of the person*: engaged where there is state interference with bodily integrity and serious state-imposed psychological stress (*Blencoe*)
		1. Includes freedom from the threat of physical punishment, as well as freedom from actual punishment itself (*Singh*)
		2. Ex: prohibiting assisted suicide, women’s right to terminate a pregnancy (*Blencoe*)
		3. Psychological harm must be (1) state-imposed; and (2) serious (*Blencoe*).
4. *Does this infringe the right in a manner inconsistent with the principles of fundamental justice*?
	1. Principles of fundamental justice include the notion of procedural fairness – this requires **different things in different contexts** (*Singh*)
	2. Where an applicant does not know the case to meet and credibility is a central issue fundamental justice requires an oral hearing (*Singh*)
	3. Key question is whether the principles of fundamental justice have been adhered to, not whether they strike the right balance – that is a question for s. 1 (*Charkaoui*)
	4. Consider the impact on the individual and the national, societal interest to determine what the principles of fundamental justice require (*Charkaoui*)
	5. **Basic requirements**: right to a hearing, before an independent and impartial magistrate, a decision by the magistrate on the facts and the law, and the right to know the case put against one, and the right to answer that case. How these requirements are met will vary with the context. (*Charkaoui*)
5. *Is the limit a reasonable one that is prescribed by law and demonstrably justified in a free and democratic society?*
	1. Charter guarantees will not be ignored on the basis of administrative convenience (*Singh*)
	2. Violations of the principles of fundamental justice (especially the right to a fair hearing) are difficult to justify under s. 1 (*Charkaoui*)
	3. Early decision: process should not be vague, arbitrary (*Wilson*)
	4. The s. 1 test: the *Oakes* test:
		1. Is there a pressing and substantial objective?
		2. Are the means proportional?
			1. Are the means rationally connected to the objective?
			2. Is there a minimal impairment of the right?
			3. Is there proportionality between the effects of the infringement and the importance of the objective?

***Singh v Canada***

* **1. Can non-citizens claim rights under s 7**
	+ Yes. “Everyone”
* **2. The fact that the legislation provided only a written appeal from an unfavourable decision infringed s 7 because:**
	+ (a) it engaged the claimant’s s 7 interests, namely right to “security of the person”; and
		- There would be immense psychological issues on Mr. Singh
	+ (b) it engaged the claimant’s right in a manner contrary to the principles of fundamental justice, by failing to allow him to participate in the appeal.
* **3. General claims about the need to have an efficient or cost-effective decision-making process do not suffice as a s 1 justification**
	+ Charter guarantees will not be ignored on the basis of administrative convenience – even if cost was a factor to be considered, the Minister has not demonstrated that the cost is prohibitive
* **4. Relevance of the *Bill of Rights***
	+ May be another way to argue PF. It is a valid piece of Leg. That applies to government agencies

***Blencoe v BC***

* **(1) Is the human rights commission part of “government for the purposes of s 32 of the Charter?**
	+ YES. Despite the fact that they are independent of government and there is no mandate from government
	+ Nevertheless, your actions in asserting a specific policy in putting forward provincial human rights leg make you subject to the Charter
* **(2) Court reaffirms the s 7 two step from *Singh*:**
	+ (a) does the law infringe a claimant’s right to life, liberty, or security of the person?
	+ (b) are the claimant’s rights engaged in a manner contrary to the principles of fundamental justice?
* **(3) Definition of “life, liberty, and security of the person”:**
	+ (a) Life: freedom from governmental threats to one’s existence.
	+ (b) Liberty: freedom from physical restraint + freedom from state compulsions regarding important or fundamental life choices (*Godbout v Longueil, Morgantaler)*
	+ (c) Security of the person: freedom from state inference with bodily integrity + freedom from serious state imposed psychological stress (*Rodriguez, ,Morgantaler,* etc)
* **(4) Section 1 analysis**:
	+ Later, SCC said once you establish that fundamental right to life liberty and security of person, it’s very difficult to show that this breach is justified.

***Charkaoui v Canada***

* **Facts:** 2 foreign nationals were each named in “certificates of inadmissibility” by the minister of public safety under *Immigration and Refugee Protection Act*
* allowed the RCMP to arrest and detain those who have been deemed a threat to national security
* Under the Act, a federal court judge would first review the certificate and determine whether it was reasonable (neither the refugee nor his lawyer is part of this process)
* Charkaoui had no opportunity to plead his case, no ability to know the case against him and decision could not be appealed. Individuals could then be subject to additional proceedings stripping them of refugee status and deporting them. C challenged constitutionality of security certificate process on the basis that the procedure to determine reasonableness of certificate **violated s.7 of charter**
* **Held McLachlin: Yes infringed s.7 and not saved by s.1. But given national security concerns, the court limits some information – it is filtered by the judge.**
* The principles of fundamental justice under s 7 of the Charter include a guarantee to procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security.
* Policy considerations influence PF. Usually, these concerns come up under s. 1 – court will look to see if section 7 rights infringed, then look to see if there is justification under s. 1. HERE, already under section 7 McLachlin uses policy to shape what’s require under fundamental justice. **Here, national security shapes understanding of what principles of fundamental justice require in a case like this.** In this case, there may be a serious risk to public safety in Canada
* The issue is whether the process is fundamentally unfair to the affected person. If so then the deprivation of LLS simply does not conform with s 7.
	+ The inquiry then shifts to s 1 of the Charter to determine whether it is justified.
	+ **Security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s. 7 stage but it may impose certain admin constraints that may be considered at s.1 stage**
* ***Relevant principles of Fundamental Justice***
	+ 1) Before the state can detain people for significant periods of time, it must accord them a fair judicial process
		- It comprises:
		- (1) the right to a hearing;
		- (2) the hearing must be before an independent and impartial magistrate;
		- **(3) the magistrate’s decision must be based on the facts and the law;**
		- **(4) the right to know the case put against one; and**
		- **(5) the right to answer that case**.
		- There was a hearing, but the second and third requirements are not met
	+ ***Is the CASE TO MEET principle satisfied ?***
		- Under the IRPA’s certificate scheme, the named person may be deprived of access to some or all of the information put against him or her, which would deny the person the ability to know the case to meet
		- The right to know the case to be met is not absolute. More particularly, the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual.
		- Where limited disclosure have been found to satisfy the principles of fundamental justice, the intrusion on liberty and security has typically been less serious than that effected by the IRPA
		- If s 7 is to be satisfied, either the person must be given the necessary information or a substantial substitute for that information must be found. Neither is the case here
		- In the IRPA, an attempt has been made to meet the requirements of fundamental justice essentially through one mechanism—the designated judge charged with reviewing the certificate of inadmissibility and the detention... this fails to assure the fair hearing of the Charter.
	+ ***Is the Limit justified under s 1 of the Charter***
		- Violations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s 1.
		- The test to be applied in determining whether a violation can be justified under s 1 known as the Oaks test- requires a pressing an substantial objective and proportionate means
		- The national security is pressing- The Court does not give you full stinchcombe disclosure. Here they justify this by stating that it is a matter of national security
		- NOPE not proportionate
* **Commentary:** following this decision, Parliament passed new legislation that provided for the appointment of a special advocate who could challenge government claims to evidence as well as its relevance, reliability, sufficiency, and weight, make submissions, cross-examine witnesses, and with permission exercise any other powers required to protect the interests of a named person.

***Re Harkat***

* **Facts:** Amended process for security certificate: Still have in camera, ex parte hearing. Information still shared with special advocate, info contains summaries of evidence and summaries of witness testimonies. Rules on how much special advocate can communicate with Harkat and Harkat’s lawyer
* *IPRA Process:*
	+ CSIS issues a report, ministers reviews it and forwards to the Federal court for review. If they find it to be reasonable, the person is detained and inadmissible.
* *The disclosure of summaries to the named person*
	+ The named person must be given summaries of the information and evidence which allow him to be reasonably informed of the case against him: ss. 77(2) and 83(1)(*e*), *IRPA*.  **The summaries must “not include anything that, in the judge’s opinion, would be injurious to national security or endanger the safety of any person if disclosed”**
* *Special Advocates*
	+ The judge must appoint one or more special advocates to protect the interests of the named person in closed hearings
	+ Special advocates are security-cleared lawyers whose role is to protect the interests of the named person and “to make up so far as possible for the [named person’s] own exclusion from the evidentiary process”
	+ No solicitor-client relationship exists between the special advocates and the named person: s. 85.1(3), *IRPA*.  However, solicitor-client privilege is deemed to apply to exchanges between the special advocates and the named person
* **Issue:** Does this violate s 7 rights? More specifically, this appeal asks whether the *IRPA* scheme gives Mr. Harkat a fair opportunity to defend himself against the allegations made by the ministers, despite the fact that national security considerations prevent him from seeing the entire record and from personally participating in all of the hearings.
* **Held: the *IRPA* scheme provides sufficient disclosure to the named person to be constitutionally compliant**
* *Charkaoui I*makes clear that there is an **incompressible minimum** amount of disclosure that the named person must receive in order for the scheme to comply with s. 7 of the *Charter*. He or she must receive sufficient disclosure to know and meet the case against him or her.
* At the very least, the named person must know the essence of the information and evidence supporting the allegations
* the 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.
* **the scheme mandates that the named person remain reasonably informed — i.e. that he be able to give meaningful instructions to his public counsel and meaningful guidance and information to his special advocates — throughout the proceedings. If the named person is not reasonably informed, the proceedings will not have been in compliance with the *IRPA* scheme and the judge cannot confirm the certificate’s reasonableness**
	+ **Court says:**
		- If the disclosure is insufficient an “incompressible minimum” then there is definitely a violation.
		- It is still murky about how much you get to see?

**Question after these two cases:**

**Should society’s interests be considered at the s. 7 stage, or is this issue best addressed under s. 1 of the Charter?**

* In *Charkaoui*, McLachlin concludes that we need to consider society’s interest at the s. 7 stage, to determine what the principles of fundamental justice require
	+ Also consider the impact on the individual
	+ This imports a contextual analysis into s. 7
* But – does this just give the government two chances to justify the action (one at s. 7, one at s. 1)?
	+ Limits individual rights to impose this requirement at the s. 7 stage

**Aboriginal Constitutional Rights and the Duty to Consult**

* The **duty to consult** and accommodate Aboriginal people has been recognized by the SCC. In *R v Sparrow* recognized this as a requirement if government wished to justify an infringement of aboriginal rights under s 35.
	+ In 2004 the decision from *Haida Nation* extended the obligation to **claimed** aboriginal rights as well as established ones
	+ In 2005 *Mikisew Cree First Nation* confirmed that the duty also applied to rights under historic Crown aboriginal treaties

***Haida Nation v British Columbia***

* **Facts:** In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited (“Weyerhaeuser”). The Haida people challenged these replacements and the transfer, which were made without their consent. The Haida had a pending land claim not yet recognized at law.
* **Analysis:**
* The government’s duty to consult with Aboriginal peoples and accommodate their interests is **grounded in the honour of the Crown**. It is not a mere incantation, but rather a core precept that finds its application in concrete practices
* ***When the Duty to Consult and Accommodate Arises***
	+ The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it
		- When you are dealing with treaty rights, the Crown would have constructive knowledge.
* ***The Scope and Content of the Duty to Consult and Accommodate***
	+ The Court’s seminal decision in *Delgamuukw* confirmed and expanded on the duty to consult, suggesting the content of **the duty varied with the circumstances**: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues.
		- At one end of the spectrum lie cases where the claim to title is weak, 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
		- At the other end of the spectrum lie cases where a **strong *prima facie* case** for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high.  In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required
	+ At all stages, good faith on both sides is required
	+ **however, there is no duty to agree; rather, the commitment is to a meaningful process of consultation.**
* ***What is the duty to consult?***
	+ Consultation is not just a process of exchanging information.  It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed
	+ This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim.  The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case.  Rather, what is required is a process of balancing interests, of give and take

The duty to consult Spectrum

* **Big Question: How to effect reconciliation between Crown and aboriginal interests?**
* If it is a weak claim, If the right is limited, or if the potential infringement is minor🡪 the DTC requires notice, disclosure and some discussion of aboriginal concerns
* If it is a stronger claim, the right is highly significant, and the risk on non- compensable damage is high🡪 then the DTC requires deep consultation and accommodation to find satisfactory interim solution
	+ Opportunity to make submissions
	+ Formal participation
	+ Provision of written reasons
* Depending on your analysis, you could say that the DTC is fairly weak and you might say that they just require a formal chance to be heard, disclosure etc.
* IF it is getting stronger, there must be an explanation about how the decision can be reconciled with the aboriginal claims

***Rio Tinto Alcan v Carrier Sekani Tribal Council***

* Slight changes, more or less the same DTC structure.
* **(1) The DTC is grounded in the honour of the Crown and seeks to reconcile assertions of Crown sovereignty with aboriginal interests**
	+ Not much debate here. It is constitutionally illegitimate for the government to act in a high handed manner over land where aboriginals have a s 35 right. No sharp dealing. Honour your fiduciary interest, putting their interests first.
* **(2) DTC arises when:**
	+ The Crown has knowledge, real or constructive, of a potential Aboriginal rights claim;
		- Who is the crown? The delegate of the crown who has embarked on a course of conduct.
	+ The Crown is contemplating a decision; and
	+ The contemplated decision might adversely affect Aboriginal rights.
* **(3) The content of the DTC varies with the circumstances (strength of claim, nature of the right, seriousness of impact).**
	+ Look at the particular facts. It is a contextual test.
	+ The link between the process and substance. Is the DTC merely procedural?
* **(4) Remedies for breach of DTC also varies with the circumstances, ranging from injunctive relief, to damages, to an order requiring the Crown to fulfill the DTC before proceeding.**
	+ What is the most appropriate conduct to fix it? Injunction to stop any action? Damages for minor breach. An order to go back and fulfill the duty to consult
* **(5) While the Crown can delegate the DTC, the court will require clear evidence that the DTC was delegated.**
* **Overall LOOK AT:**
	+ When did the Crown know, or when should they have known
	+ What types of government action will trigger that DTC
	+ What types of factors will increase that duty to consult
* **This framework hasn’t changed. It is just turning on the facts of the individual cases. Substantial case law still comes about the DTC means ‘on the ground’**

***Clyde River v Petroleum Geo-Services***

* **Facts:** In May 2011, the proponents applied to the NEB for an authorization under s. 5(1)(b) of *COGOA* to conduct seismic testing in Baffin Bay and Davis Strait
	+ The NEB launched an environmental assessment of the project
* Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them
* the proponents filed a 3,926-page document with the NEB, purporting to answer those questions. This document was posted on the NEB website and delivered to the hamlet offices. The vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.
* **Held:** the substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty
	+ Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty.
	+ The NEB has (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown’s duty to consult.
* **Did they satisfy the duty?**
* As a treaty right we must consider the damage of the action
	+ The rights infringed were more integral and were more requiring of deep consultation
	+ The Crown acknowledges that deep consultation was required in this case, and we agree
	+ Here, the appellants had *established treaty rights* to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being
* When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government
* while the NEB in *Clyde River* did impose conditions designed in part to address Clyde River’s concerns (including a requirement for an Inuit traditional knowledge study)...the SCC concluded that none of these conditions or the NEB’s reasons “gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as rights, rather than as an afterthought to the assessment of environmental concerns”
* there was no participant funding and no formal hearing process. The SCC commented that while formal hearings are characteristic of an adversarial process, they may be required for meaningful consultation
* **t**he SCC found that it was not made clear to the Aboriginal group that the Crown intended to rely on the processes of the NEB as fulfilling its duty to consult
* *Clyde River*, the Court cited detailed evidence of the proponents being unable to answer questions from community members (*Clyde River*, paras. 10-11). In addition, when the responses to questions were ultimately provided by the proponents, they were filed as part of a roughly 4,000-page document that was difficult to access and was largely untranslated. The SCC commented that this did not constitute “true consultation”
* **There needs to be a better practice on consultation. If you are advising on how to fulfill the DTC what would your advice be?**
	+ Understand the concerns, and then actually implementing things to address these concerns.
	+ Mitigating damages
	+ Having answers for the concerns
	+ Note: Consent is not necessarily required. You need to show that you satisfied the duty of deep consultation. Listening actively concerns, and going about actively imposing regulations, etc to address these concerns.

Legislation and General Procedural Statutes: *Administrative Procedures and Jurisdiction Act*

* While Baker provides the common law duty of procedural fairness, this may not be the only or even the most important source for procedural protections
	+ Parliament and provincial legislatures have prescribed detailed procedural requirements in statutes, or have delegated this task to cabinet
* **The enabling statute**
* To ascertain whether it is required by law to afford an affected individual procedures and, if so, which procedures, a public authority must first look to the terms of its enabling legislation
	+ For example in *Singh v Canada* the *Immigration Act* was examined to determine the procedures for determination of whether an individual was a convention refugee. These provisions superseded and displaced the Common law duty... “it cannot import into the duty of fairness procedural constraints incompatible with the decision making scheme set up by parliament”
* **Subordinate Legislation**
* Rather than prescribing specific procedures in an administrative board’s enabling statute, legislatures may choose to statutorily delegate to the executive the power to enact regulations of rules that establish procedural requirements – this is subordinate legislations
* It is binding on those parties subject to them. The main reason motivating this is expertise and efficiency as tribunals are more familiar with the decision making context, the impact of their decisions, etc.
* **Policies and Guidelines**
* Public authorities will frequently issue guidelines and policies, sometimes regarding the procedural aspects of decision making, which do no set down legally binding requirements
* While not strictly law, soft law instruments like guidelines play a dominant role in public authorities decision making

General Procedural Statutes- The ***APJA***

* **s 2** of the Act provides that the lieutenant governor in council may designate those authorities to which the Act applies and the extent to which its provisions apply
* Where the act applies, it provides for notice to affected parties in advance of the exercise of a statutory power.
* Where an authority proposes to act in a manner that adversely affects a party’s rights, the Act guarantees the party:
	+ An opportunity to provide evidence and make submissions;
	+ As well as a right to disclose of facts and allegations to allow the party to understand and respond to the case against it.
	+ It must also when acting in a manner adverse to a party’s rights, it must provide that party with written reasons, including its findings of fact
* **Under the regulations, the *APJA* applies to the following agencies:**
	+ the Land Compensation Board,
	+ the Surface Rights Board,
	+ the Alberta Transportations Safety Board, and
	+ the Natural Resources Conservation Board.
* **NOTE: the Act adds to, but does not exclude other legal entitlements to fairness (common law, constitution etc.)**
* Key Features:
* **Notice s3 :** When:
	+ (a) an application is made to an authority, or
	+ (b) an authority on its own initiative proposes
* To exercise a statutory power, the authority shall give to all parties **adequate** notice of the application that it has before it or of the power that it intends to exercise
	+ What constitutes adequate notice is a contextual assessment
* **Disclosure/Hearing (s.4)**: Before an authority, in the exercise of statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the Act guarantees the party an opportunity to provide relevant evidence and make submissions (though not necessarily in person)
	+ an authority “shall give the party a reasonable opportunity of furnishing relevant evidence”
	+ an authority “shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party”
		- To permit the party to understand the facts/allegations, and to afford the party a reasonable opportunity to furnish relevant to contradict or explain the facts/allegations
	+ an authority “shall give the party an adequate opportunity of making representations”
	+ **Disclosure:** a right to disclosure of facts and allegations in sufficient detail to allow the party to understand and respond to the case against it
* **Cross-examination(s.5):** the authority shall permit cross-examination where cross-examination is necessary to test relevant allegations
	+ Not a general right
* **Right to oral submissions and counsel(s.6)**: no general duty to allow oral representations or counsel if there is adequate opportunity to provide written submissions
	+ If party wants these rights must have a compelling case to make on PF grounds
* **Reasons (s.7):** where an authority’s decision adversely affects “the rights of a party”, it must provide the party with written reasons, including findings of fact and reasons for its decision
	+ Applies where a decision affects the rights of the parties (keeps the question about whether *rights* or *privileges* are being affected alive)
* **Rules of Evidence (s. 9):** Not required that any evidence/allegations of fact be made under oath or that any admin body needs to use the rules of evidence used in civil or criminal cases
* **Jurisdiction re: Constitutional issues (s.11):** no jurisdiction to determine questions of constitutional law, unless the power has specifically been granted to the administrative body
* SO the APJA is limited, but note, it gives you a good laundry list about things you could ask for the common law duty of fairness.

Modern Threshold considerations about Procedural Fairness- LIMITS ON PF

The modern Template:

* It went in the past from determining amount of procedural fairness by considering whether it was a judicial or administrative proceeding
	+ NOW it is a contextual Analysis (based on the impact of effect of the case)
	+ ***Martineau v Matsqui Institution****:* A duty to procedural fairness arises whenever an administrative decision affects the **“rights, privileges, and interests”** of a claimant (employment, prisoner’s rights, worker’s compensation benefits, etc.).
* **The Spectrum: “**Once it is clear that rights are being affected, it is necessary to determine the appropriate procedural standard that must be met by the statutory body. Above all, flexibility is required in this analysis. There is, as it were, a spectrum.” **(*Homex*)**
* Does the duty arise when an issue affects hundreds/thousands/millions of people?
	+ Did parliament intend for there to be a duty of fairness?
	+ Is the nature of the action more legislation/policy based than it is a individual impact
	+ Logistical problems: If we grant PF in this context, will it make administrative decisions in the future more difficult.

**NOTE:** There is no longer a need, except perhaps where the statute mandates it, to distinguish between judicial, quasi-judicial and administrative decisions.

* **HOWEVER: not all administrative bodies are under a duty to act fairly. There are basically 2 classes where procedural fairness are out of play**
	+ (1) “Decisions of a **legislative and general nature** can be distinguished in this respect from acts of a more administrative and specific nature, the former which do not entail such a duty. The finality of a decision will also be a factor to consider.
		- BUT: Having the broader view and issue spot, and argue both sides.
	+ (2) A decision of a preliminary nature will not in general trigger a duty to act fairly, whereas a decision of a more final nature may have such an effect.” (***Knight v Indian Head School Division No 19*)**

***Canada v Inuit Tapirisat of Canada­*­- LEGISLATIVE DECISIONS**

* **Facts:** The CRTC had power to regulate the rates of utilities under **s 64(1)** of the National Transportation Act. IN 1976 Bell made an application for approval of a rate increase.
* The Inuit Tapirisat intervened to oppose parts of the application – it wanted the CRTC to condition a rate increase on an obligation to provide better service to Northern communities
* Inuit Tapirisat was given the opportunity to make written submissions at the appeal. Cabinet meets, and refused the appeal. Intuit brings application for judicial review, saying it had a right to procedural fairness at common law
* **Issues**: was there a duty of **fairness incumbent on Cabinet** in dealing with the Inuit Tapirisat to entitle IT to a hearing?
* **Held:** No - this was a broad policy decision and would be impractical to allow a hearing.
* Review: There is a narrow band of decisions that do not attract PF (PF does not apply to legislative decisions)
* **(1)** nature of decision being made; character of decision maker – as you get closer to seat of power (ministers responsible to house) less PF required
* **(2)** effects of decision – this decision affects many people, not just one or two people like in prior cases – rate setting decision affects thousands, so how can those thousands affected by decision be given an opportunity to respond?)
* While it is true that a duty to observe procedural fairness need not be express, it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply
* **One issue: Estey**-“the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1)?” Do you think the duty of fairness is extinguished in this case or was there a duty with minimal content?
	+ Cooper said omission of legislature will be supplied by justice of common law, fact that nothing in section 64 mentioning procedural rights doesn’t mean cabinet can make any decision it wants, if you extend decision from Nicholson, they still have to act fairly and not arbitrarily, which means notice and opportunity to respond
* **Question:** Under what circumstances, if any, do you think a duty of fairness should be imposed on Cabinet decisions via the common law?
* Which of the following rationales best explain the result in *Inuit Tapirisat*:
	1. **the “legislative functions” rationale** - recourse through democratic process, lobbying government, holding them to account on house floor. Courts don’t get involved in this kind of thing
	2. **the character of the decision-maker rationale** – hierarchy of administrative law: low level government officials that review files (make decisions of who gets to stay in Canada, for example) up to Cabinet and Ministers, which has other checks about decisions so owe less PF (by virtue of fact their decisions are reviewed by Legislature, and not the courts)
	3. **The effects of the decision** – Practicality of giving notice to all parties, as Intuit wants, has some bearing on s. 64. Many subscribers to Bell, all who will be affected by decision, and all subscribers should arguably receive notice before decision is made…but this is impractical. Nature of interest affected is very diffuse, and category of affected parties is SO large, that if you impose procedural hurdles, it’ll make regulatory function impractical, inefficient, and unwieldy. Unrealistic to expect notice to everyone affected by this decision
	4. the “absence of individual rights or privileges” rationale.
* \*\*In the end: **the mere fact that the decision-maker is Cabinet does not automatically prevent the making of a claim to an entitlement to procedural fairness**
	+ **Where the decision is directed at a specific individual, the function will not be classified as legislative despite the political nature of the decision maker**

***Homex Realty v Wyoming*- Bylaws and rulemaking**

* **Facts:** Without giving notice to Homex (Developer), the municipality made a bylaw under the Planning Act designating the plan as a plan deemed not to be a register plan of a subdivision... the effect was tha the lots could not be conveyed unless a new plan was registered
* Homex applied for judicial review to quash the zoning bylaw. Argue that municipality acted unfairly, should have given Homex notice that it was considering this type of bylaw and given Homex opportunity to respond.
* **Issues**: Was there a duty of fairness owed to the property developer? Was it breached?
* **Held: Estey Majority-** the action taken by the village was not legislative, but was quasi-judicial in character, so a duty of fairness is owed. Agreed with Dickson that hearing requirement not satisfied
	+ **Criticism:** Estey here is using old terminology and the administrative/judicial distinction
* **BETTER DECISION- Dickson**: Before a public body can limit or abrogate the property rights of citizens it must first give the individuals concerned an opportunity to be heard ***(Cooper v Wandsworth).***
	+ Where statutory bodies seek to limit property rights, the Courts will imply a right to be heard unless there is an express declaration to the contrary.
	+ The right to a hearing results from the fact that the by law interferes in particular with the private property rights of one owner.
	+ **Here there is a bylaw that is aimed deliberately at limiting the rights of one individual, Homex. As such they are entitled to some procedural safeguards**.
	+ That does not mean that the municipality was under a duty to observe the procedures appropriate to a court of law. But at a minimum it was under a duty to give Homex notice of the proposed law and the opportunity to be heard.
	+ PERHAPS MUNICIPALITIES ARE TREATED DIFFERENTLY THAN PROVINCIAL AND FEDERAL LEGISLATIVE CHAMBERS
* **Arguments: in favor of municipality** are legislative function and it’s a legislative council, or it affects general welfare, so no PF the tax payer dollars should not be used .
* **In favour of Homex:** it really only affects Homex, and affects their property rights, so PF is triggered.
* **Why did the SCC deny relief in this case? Do you think the result was appropriate?**
	+ Court does not grant remedy, because Homex was acting inappropriately. This has deep roots in Admin law: judicial review of admin action at common law was seen to be a remedy that was granted at discretion of court. King’s court could intervene at their discretion. Not simply a case of establishing a breach of PF but must show court they should intervene on your behalf. Controversial idea today. Today: every right has a remedy. Homex had procedural rights, so at the very least, should have sent decision back to municipality
* **NOTE:** DON’T read Homex and Inuit as laying the total groundwork. Use them as an ability to argue for both sides.
	+ **On exam**: Flag that there is disputed authority, could go Homex or Inuit. Could go either way, and that is okay. Part of your job is risk management. Giving arguments on either side is your job

***Canadian Association of Importers v Canada*- POLICY DECISIONS**

* **Facts:** Minister changed the quota system for the importation of hatching eggs, which significantly affected historic importers.
* Importers challenged the change, arguing that they had not been consulted
* **Issue:** Can Minister of Agriculture change the number of the quote system without consulting existing license holders? Did the importers have a right to be consulted?
* **Held: Linden JA** This was a policy decision (legislative – Inuit Tapirisat), and the principles of natural justice do not apply to policy making. There was no requirement to give notice – no such process is contemplated under the legislation – no requirement for notice and opportunity to comment (different from what SCC said in Nicholson)
* **Reed-TRIAL COURT:** I am not convinced that the classifying of a decision as being of a policy nature necessarily immunizes it from judicial review. What is important is an assessment of the effect which actually follow from the decision
	+ The effect of the decision is to cause considerable economic harm to the applicants and others. There is surely an implied principle that Parliament intended that the statutory powers be exercised in this case would include notice to the applicants of what is being proposed and the opportunity to comment thereon
* **What is the difference between decisions which are “legislative” and “public policy” decisions? Under what circumstances should public policy decisions imply a duty of fairness?**
	+ **1 argument:** This is a leg decision that effects a group but it effects them significantly, so they should have a right to be heard.
* **2 argument:** This is a policy decision. While it does impact some groups negatively and positively

The ***Dunsmuir*** Exception

* In ***Dunsmuir v New Brunswick***, the SCC changed the law in relations to the application of procedural fairness to the dismissal of a public office holders as laid down in *Knight*.
* It held that where a **public office holder’s employment is governed by an employment contract**, disputes relating to his dismissal would be resolved according to the express or implied terms of the contract, or by any relevant statute, just like any other contractual employee.
	+ In other words, a public authority that dismisses an employee pursuant to an employment contract is not subject to additional public law duty of fairness
* (1) If the public employer breaches the employment contract, the employee is entitled to notice, salary in lieu of notice, and the opportunity to sue for wrongful dismissal.
* The court noted that a public law duty of fairness may still apply in 3 circumstances:
	+ 1. Public employee not protected by a contract (judges, ministers, officials who fulfill constitutionally defined state roles)
	+ 2. Where an office holder is expressly subject to summary dismissal;
	+ 3. where a duty of fairness flows by necessary implication from a statutory power governing the employment relationship, including for example, a statute that provides for notice to employees of a motion to dismiss.
* In ***Canada v Mavi,***the SCC emphasized the limited nature of the Dunsmuir exception... it is only for the specific context of dismissal from public employment

**Inspections and Recommendations/ Preliminary Hearing:**

* **TAKEAWAY:** Typically, once we’re passed the investigatory stage Procedural rights can be owed. Make a nuanced analysis. Does the argument have traction or not?
* **Traditional rule:** no right to fairness at the investigation/ recommendation stage, because nothing is being decided (*Guay v Lafleur*).
* **Canadian approach:** rules of natural justice should apply to recommendations where individual interests are significantly at stake (*Re Abel and Advisory Review Board*).
	+ But, does this establish a general duty of fairness at the recommendation stage, or just an exception to the general rule about preliminary decisions?
	+ **Key: focus on the type of interest engaged, not whether the decision should be characterized as preliminary.**
* **But, duty of fairness will not always arise at the investigative stage:** where the investigator has no ability to affect the rights of individuals.
	+ Can be a comparison made to the criminal investigation context – especially in the context of human rights investigations (*Dairy Producers’ Cooperative*)
	+ Fairness is a flexible concept, its content varies with the nature of the inquiry and the consequences for the individuals involved (*Irvine v Canada*)
	+ Courts should remain alert to the danger of unduly burdening and complicating the law enforcement investigative process (*Irvine v Canada*)

***Re Abel and Advisory Review Board***- **PRELIMINARY HEARING**

* **Facts**: Advisory Review Board was created under the *Mental Health Act* to review annually all mental patients confined in psych institutions after being found NCR
* every year there is an annual review of their case file. Brought before a review board and treating physician makes a recommendation if they are a threat
* Lawyer requested review documents in file of patient but this request was denied.
* The lawyer for the patient makes submissions. He did not get to see the file being compiled by the professionals within the hospital.
* **Issue:** Should the duty of fairness apply? As this is just a preliminary hearing
* A patient’s only hope of release, their right to liberty, lies in a favorable recommendation by the Board suggests large degree of PF, can’t be shut out from that process
* So how would you characterize the nature of the decision in this case? Legislative? Public policy? Judicial? Probably use Judicial, due to one person’s liberty is at stake. Therefore, PF, including access to file
* Functional test for discerning the exceptional cases where duty of PF will be triggered at preliminary state:
	+ **Look at degree of proximity between (1) the investigation and the decision AND (2) the investigation and the exposure of the investigated individual to harm**
		- Here: Proximity is great and acceptance of Board’s recommendation has significant impact on the freedom of the applicant
* **Does *Abel* establish a duty of fairness for all preliminary investigations or recommendations? Or does it merely establish an exception to the rule that fairness does not apply to preliminary investigations?**
	+ I would say it is narrower. It is a careful balancing of the society interest. Here it almost isn’t a preliminary hearing because it will then go to cabinet and it is unlikely that the decision will be changed because of the nature of the decision
	+ What is the practical effect?

***Dairy Producers’ Co-op v Saskatchewan (Human Rights Commission*)- INVESTIGATIVE STAGE**

* **Facts**: Complaint of workplace sexual harassment. Commission appointed an officer to investigate and provide a recommendation on whether a board of inquiry should be convened to adjudicate the complaints
* Concluded that there were probable grounds for the allegations.
* The employer wanted to hear all the evidence that was gathered against them.
* SO there is a tension between disclosure which may frustrate the investigation, may limit people coming out of the woodwork to talk about the abuse. BUT from the individual (the company) they have legitimate concerns- they have been accused of something pretty seeious
* Commission wanted to established a board, the employer sought to have it quashed on the ground that the commission failed to disclose the details of the case against them
* **Issue:** Was the company owed a duty of fairness **at the investigative stage**, was the company owed disclosure?
* **Held:** The commission, conducting an investigation was not obliged to comply with the laws of natural justice.
* The investigating officer had no power to affect the rights of the applicant – at most investigator could report that probable cause existed
	+ *Martineau:* person’s rights, interests, liberty being affected, duty of PF is triggered. In this case, investigator cannot affect any of these rights, just conducts investigation, therefore, duty of PF is not triggered.
* **Ratio:** PF not generally owed in investigative/preliminary stages – must consider context – no formal process in place and giving procedural rights to employer at this stage might have negative consequences. **There is a duty of PF at some point but not at this point**
* **How would you have decided this case? What reasons would you give for your decision**
	+ **How do we distinguish between this case and *Abel***
		- Abel- The preliminary inquiry was functionally dispositive (the end)
		- Here, the finding of fact of the investigators and commission is not determinative (it is just looking at whether there is sufficient evidence to see the light of day)
		- Recommendation of a decision to be made is not dispositive it is merely a recommendation that a further decision maker will review

Procedural fairness and Rights, Privileges and Interests

***Re Webb and Ontario Housing Corp***

* **Facts:** Webb was a tenant – her tenancy was terminated because of problems with her childrens’ behaviour. She was sent 2 warning letters and a formal warning, in addition to visits from OHC community relations worker.
* She made an application for judicial review of the decision on the basis she wasn’t given the opportunity to respond before the eviction notice was issued.
* **Issue:** Was Webb owed a duty of procedural fairness because her interest in the case is sufficient, and the right to participate?
* **Held:** She was entitled to PF, but she received it.
	+ She was given multiple notices. Even though she could not read or write, a community worker gave the news to them, sat down with her, explained the problem
* If no notice is given to a person who is in danger of losing an important benefit and no opportunity is afforded to answer the case against him, such a procedure would be unfair.
* So long as the person adversely affected is advised of the case against him and is permitted to give an answer through the servants or agents of the investigating body, that is sufficient
* **Ratio: Recognizes that holders of privileges (ie. state assistance) may be entitled to some measure of PF before those privileges are cut off or removed**.
	+ **KEY:** no longer precluded from making a claim of PF on the basis that benefits are a privilege not a right. But also acknowledges that duty of fairness can be satisfied in informal ways

***Cardinal v Kent***

* **Facts:** Inmates placed in segregation as per s 40
* The segregation of the appellants was reviewed once a month, in accordance with s. 40 of the Regulations, by the Segregation Review Board. The appellants appeared before the Board the Board recommended to the Director that the appellants be returned to normal association with the general prison population. The Director declined to follow this recommendation.
* The director did not inform them of his reasons for refusing to follow the recommendation of the Segregation Review Board , nor did he afford them the opportunity of a hearing before him as to whether they should be released.
* Cardinal seeks judicial review.
* **Held:** Because of the serious effect of the decision, PF required that he inform them of the reasons for the decisions and give an opportunity to be heard.
* Right, privileges or interests are effected by a decision= a duty of fairness is owed. They clearly thought this was an expansive duty as it was being extended to a decision regarding solitary confinement (which was never done before).

The Doctrine of Legitimate Expectations- Baker Factor #4

What is a legitimate expectation?

* “An expectation of a hearing arising out of express representations, a practice of holding such hearings [in the past] or a combination of the two.” Van Harten
* “May arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.” Lord Fraser (House of Lords), *Council for Civil Service Unions*
* ***Baker v Canada:***
	+ “[I]f a legitimate expectation is found to exist, this will affect the content of the duty of fairness... If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights... …. **Nevertheless the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain**.”
		- What does that last sentence mean: you get the right to notice and the opportunity to be heard, BUT you do not get the substantive right to an outcome.

***Reference re Canada Assistance Plan***

* **Facts**: Federal *Canada Assistance Plan* authorized the gov’t to enter into cost sharing agreements with the provinces re: social assistance programs, and provided that they would remain in force so long as the provincial law was in operation, **subject to termination by, mutual consent or on one year’s notice**
* As a result of a bill, there was a limited increase in its financial contribution to BC. -- No prior notice had been given
* **Issue:** Was the province precluded from introducing the bill by virtue of the legitimate expectations of BC
* **Held: No**
* There is no support in Canada for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable it can create a right to make representation or to be consulted.
	+ Furthermore the rules regarding procedural fairness do not apply to a body exercising a legislative function. Parliament does not have to comply with PF in making decisions and passing laws other than on constitutional grounds.
* Courts do not intervene in the legislative process. The formulation of a bill is part of the legislative process. The **doctrine of legitimate expectations does not apply** – **it would paralyze the parliamentary system**

***Apotex Inc v Canada (Attorney General)***

* **Facts:** Reg scheme under the Patent Act, which allows patent holder to apply to have generic drug production stopped.
* Apotex challenged the validity of the new regulations on several grounds, including that it had a legitimate expectation that there would be consultation.
	+ “rest assured that you will be consulted before any such regulation are established”
* **Issue:** Does the doctrine of procedural fairness apply?
	+ **NOTE:** If it is new legislation, NO it does not PF does not apply (Reference Canada Assistance)
	+ What if cabinet is changing regulations (not done through debate in the commons)
* **Held:** It is settled law in Canada that the duty of fairness does not apply to the exercise of powers of a legislative nature which would include the regulations impugned here
* **BUT: Evans**: Cabinet has the authority to pass regulations, not the minister. If Cabinet had expressed that they would be consulted, then there might be an argument about legitimate expectations. BUT it was the minister
* the cabinet enacts regulations in ignorance of an undertaking of consultation given by a minister it would not seem to me to have abused its statutory power.
* The ministers assurance did not create in the CDMA a legitimate expectation of consultation that if breached, would invalidate Regulations enacted by the Cabinet without promised consultation
* **Takeaway:** Maybe this gives you a strategic framework for knowing what to need to get legitimate expectations enforced.
	+ Engage cabinet, Don’t rely on one minister
	+ If you can get an assurance from cabinet as a whole (don’t know how you would do that) maybe you can lay the groundwork for legitimate expectations

***Canada (Attorney General) v Mavi***

* **Facts**: Sponsors argued that they were owed procedural fairness, in particular, notice of the government’s intention to collect on the debt and an opportunity to make representations on whether collection might be waived or delayed
* The contract says that the government “may” differ where the circumstances warrant deferral payment.
* **Held:** Where a government official makes representations within the scope about an administrative process, and the representations said to give rise to the legitimate expectation are clear, unambiguous and unqualified the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision makers statutory duty
	+ Proof of reliance is not a requisite…. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking.”
* **As it is a discretionary power,** The court reads in that there must first be an exchange of prior information between the parties. How would the government know that the circumstances warrant it unless they have gotten information.
* Given the legitimate expectations created by these undertaking, it is not open to the bureaucracy to proceed without notice and without permitting sponsors to make a case for deferral.

Legitimate expectations summary

* Helps bolster argument re: procedural fairness where the decision may be legislative or where there might be an argument that procedural fairness rights are limited
* Especially relevant where statement is made that an official will abide by specific policy/guideline
* **In Canada doctrine of LE limited to procedural rights = at most** when raised argument about LE, it give you a right to a hearing, right to notice but it won’t give you an entitlement to a particular outcome.

***THE BAKER FRAMEWORK FOR PROCEDURAL FAIRNESS- HOW TO GO ABOUT IT***

* Now we have got all the concepts in place for the procedural fairness doctrine.
* **The nature of the decision being made and the process followed in making it;**
	+ Raise exclusionary issues here (Legislative decision, *Dunsmuir Exception,* preliminary or investigative nature)
	+ Administrative decisions which are made in an adversarial context culminating in a formal adjudication will normally require more extensive procedural rights.
* **The nature of the statutory scheme and the terms of the enabling legislation;**
	+ Read the statute clearly. Are there procedural rights to be raised here. Look for provisions that this decision is final- no appeal.
		- The degree to which the decision is final, maybe more procedural protections
* **The importance of the decision to the individuals affected by the decision;**
	+ Flesh this out looking at contextual considerations
	+ Don’t assume that a court will pick up on the cues. You must put your best foot forward
* **The legitimate expectations of the person challenging the decision; and**
	+ Express or implied promises? Acts
* **Deference to the procedural choices made by the decision-maker.**
	+ Just because you get fairness, does not mean that you get full trial rights. What you get is a right to PF that is tailored to the specific context

PROCEDURAL FAIRNESS IN CONTEXT: NOTICE, DISCOVERY, DISCLOSURE, RIGHT TO HEARING, COUNSEL, CROSS-EXAMINATION AND REASONS,

**NOTICE:**

* Without notice, the other rights cannot be exercised effectively or at all.
* Problems with notice can be put into one or other of four groups:
	+ Problems with the form
	+ Problems with the manner of service
	+ Problems with the time
	+ Problems with the contents

***Canada (Attorney General) v Canada (Commission of Inquiry)***

* **Facts:** Ministers of Health at all levels convened an inquiry to examine the blood system following the HIV problem. Purpose was to determine what caused the contamination of the blood system in Canada
* Per **s. 13** of the ***Inquiries Act***, the Commissioner was required to give notice to parties against whom he intends to make findings of misconduct
* The notice being sent out stated that the commission may come to conclusion based on the evidence. The respondent would have the chance to respond (in 3 weeks).
* Some recipients brought applications for judicial review, arguing the notice was insufficient because there was no opportunity to respond.
* **Issue:** When should notice be given and what are the limits on its content and wording? Was the notice given by the commissioner reasonable from a PF perspective under the circumstances?
* **Statutory requirement:**
	+ *Inquiries Act s.13 “*no report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel”
* **Held: Notice was appropriate**
	+ There is not statutory requirement that the commissioner give notice as soon as he or she foresees the possibility of an allegation of misconduct. While I appreciate that it might be helpful for the parties to know in advance the findings, the nature of an inquiry will often make this impossible
* **Cory J.** You guys were in the hearing, had standing to participate. You knew which way the wind was blowing. Do you need more time, do you need more particulars? No not really

**DISCOVERY AND DISCLOSURE**

* Disclosure is vital as you cannot make a case for yourself if you have no idea of the case against you.
* Disclosure exists on a scale: What falls between no disclosure (or an incompressible minimum) and Stinchcombe disclosure (civil level)
	+ The question is in each individual case, how much disclosure is warranted.

Disclosure Problems:

* (1) An administrative agency may have information about an individual, which is relevant to the subject matter of the hearing;
* (2) An agency may have received information from third parties, **and the individual affected may want to know the identity of these informants or have them made available for cross-examination**;
* (3) An administrative agency may have sensitive information about an industry or business, to which third parties may want access for ulterior reasons;
* (4) An agency may have prepared its own reports or policy recommendations that the parties may want to access.

Disclosure at the Hearing stage:

* You are entitled at the hearing stage to know or receive evidence that effects the outcome of the decision
	+ ***Kane v. Board of Governors of UBC***: The tribunal or decision-maker must disclose the evidence to the interested party and give that party an opportunity to respond.

***Napoli v British Columbia (Workers’ Compensation Board***

* **Facts:** Workers compensation case. Mr Napoli suffered an injury at work. He only got 5% of his money. Cant afford to live etc
* The board of review has all of the medical records. Mr. Napoli is not given the original reports. Just summaries
* **The medical reports** stated that he was a bitch ass, this complaint was as much as about mental issue than it was physical
* **Issue:** Were the summaries presented to the board sufficient to comply with the rules of natural justice?
* In these circumstances a high standard of justice is required
* If the claimant is not told of the precise statement made against him and, when where and by whom they were made, how can he effectively answer it.

***CIBA-Geigy v Canada***

* **Facts:** under *Patent Act*, the Board scheduled a hearing to determine whether the drug marketed by CIBA-Geigy was being sold at an excessive price
* Part of what the Board considered was a document outlining the “guidelines” for market price. CIBA-Geigy sought disclosure of these documents. Board refused. CIBA-Geigy brought an application for judicial review.
* **Issue:** Is the Board required to give the discovery in advance?
* **Held:** No discovery required of the guidelines documents
* “The party to whom the hearing relates must be provided with a level of disclosure and production which ensures that the party is fully informed of the case to be made against it
* **No Stinchcombe/criminal analogy here:** yes serious economic consequence for an unsuccessful patentee at this hearing and possible effect to corporation’s reputation but this is not a criminal court – it is a regulatory tribunal.
* The administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings.
* Law and policy require that some leeway be given to an administrative tribunal with economic regulatory functions in pursuing its mandate.

Reconciling these two cases

* Perhaps the tipping factor is baker factor number 3:
	+ 1. In Napoli it was about a guy trying to live above the line of poverty
	+ 2. In CIBA Geigy- The court goes in a different direction. The board has interests to keep information confidential. It is not as important that CIBA is a major pharma company that makes big money.

Disclosure, access to information

* A party is entitled to both be allowed an adequate opportunity to respond and know what evidence and representations have been made.

**Alberta *Freedom of Information and Privacy Act***

* It is a legal tool which, at least on its face should be of administrative assistance. If you have a disclosure request, consider FOIPA.
	+ Won’t want to put all the eggs in one basket.
* Adds to, but does not subtract from, procedural protections at common law or under the *Charter* (s 3 FOIPA)*;*
	+ **Just because information is exempted from disclosure under freedom of information legislation does not necessarily mean that its disclosure will also be denied in proceedings to which the rules of natural justice or procedural fairness apply**
* (2) Applies to “all records in the custody or under the control of a public body” **except** information on a Court file, judicial records, personal correspondence between governmental officials, deliberative materials of governmental bodies, etc (s 4);
* (4) Applicant has a right of access to any record in the custody or control of a public body, including records containing personal information about the applicant (s 6);
* (5) Application can be refused if disclosure would:
	+ (a) reveal business secrets;
	+ (b) harm personal privacy interests;
	+ (c) harm individual or public safety;
	+ (d) disclose confidential evaluations
	+ (e) harm law enforcement interests;
	+ (f) harm intergovernmental relations;
	+ (g) breach the confidence of Cabinet communications;
	+ (h) reveal bureaucratic advice. (ss 16-29).
* So, FOIP is, while there can be a net gain for disclosure, be aware of the limits that the tool has in terms of the limits of it.

***Gallant v Canada (Deputy Commissioner, Correctional Service Canada)***

* **Facts:** Gallant was a prisoner who was suspected of extortion and drugs. The warden intended to transfer him to a maximum security facility, based on confidential information of other prisoners
* More specific information was not disclosed to the prisoner on the ground that it would “jeopardize the safety of the victims” of his actions
	+ Could not give more particulars without disclosing the identity of the 6 informants who would then be in danger of death or serious bodily hard,
* **Held**: Director of penal institution normally obliged before imposing administrative segregation on an inmate to give him a fair opportunity to be heard. However the director is relieved of that obligation when the decision to impose administrative segregation must be made quickly in an emergency
* **Rejects G’s argument for disclosure on a common law basis -** Parliament cannot have intended when it gave the commissioner the power to transfer the inmates, that he is not required to be bound by the rules of procedural fairness when the application of these rules would endanger the lives of other inmates.
* Uses legislative silence to indicate limit on PF-- Strange based on previous case law
	+ - ***Nicholson*** would have said that “unless parliament explicitly excluded the duty of fairness, it applies at common law)
* **S7 argument:**
	+ The principles of Fundamental justice are more stringent than the common law. While the right to be heard could fit under s 7 and the principles of fundamental justice.
	+ The decision to transfer him was not made in accordance with section 7, he was not given a real opportunity to respond to the case. However, it was justified under s 1.
	+ The *Penitentiary Act* gave discretionary power to the commissioner and his delegates to transfer the
		- There was no proportionality discussion though, this is flawed.
* **Desjardins (Dissent):**
* When confidential information is relied on by prison authorities so as to justify a disciplinary measure, the record must contain some underlying factual information from which the authorities can reasonably conclude that the informer was credible or the information reliable.
	+ Reliability may be demonstrated in a number of ways – by independent investigation or by corroborating information from independent sources

***Mission Institution v Khela***

* **Facts:** The Warden of Mission Institution decided to transfer a federal inmate (Khela) from the medium security Mission Institution to the maximum security Kent Institution on an emergency and involuntary basis.
* He claimed that his transfer to a higher security institution was both unreasonable and procedurally unfair.
* He received an assessment for decision that indicated that the primary reason for the transfer was a security intelligence report.
* The assessment did not contain detailed information with respect to the sources names what they said or why they might be considered reliable.
* **Held:** Inmates transferred on an emergency basis are entitled to all the information considered in the wardens decision making process or a summary thereof except in cases where 27(3) applies.
	+ **S 27(3)** allows for the commissioner on reasonable grounds to determine whether giving them the information would (a) jeopardize the safety of any person; (b) the security of a penitentiary; or (c) the conduct of a lawful investigation
* If 27(3) is invoked deference will be given to the authorities on whether there was a reasonable basis for the belief. Where it is not invoked however, it will not be given.
* Here, the withholding was not done under 27(3) as a result the disclosure did not meet the statutory requirements.
* To be lawful, a decision to transfer an inmate to a higher security penitentiary must, among the other requirements, be procedurally fair. To ensure that it is, the correctional authorities must beet the statutory disclosure requirements
* **How to tackle a PF argument:**
	+ **(1)** It looked like a trial, facts presented, legal conclusion. Draw an analogy to Cardinal where it was found PF was required.
	+ **(2)** The nature of the statutory scheme: s 29 Authorizes the transfer of inmates in emergency circumstances.
		- s 27(3) This provision allows for non-disclosure in certain circumstances. By outlining circumstances where you do not need to disclosure, parliament clearly required that disclosure be given in other circumstances
	+ **(3)** Importance: Like Gallant this is a residual interest for him as an inmate. The legislation might give a legitimate expectation of full disclosure unless there are very good reasons not to disclose.
		- Did they establish good enough reasons? Here, they didn’t even try to invoke section 27(3). They didn’t even notify the reasons why they were withholding them.
		- If you are going to withhold information, give advance notice etc.

**RIGHT TO HEARING AND TO COUNSEL**

* **(1) Oral Hearing**
* With the emergence of the procedural fairness doctrine the presumption in favour of oral hearings as the norm disappeared in the expanded common law procedural terrain
* An oral hearing is not necessarily a universal component of the principles of fundamental justice under s7 of the Charter...though it will be needed for such a procedure where serious issues of credibility are involved
* Claims to an oral hearing are also ones that are situation sensitive in the sense that their necessity may depend on the matters that are at issue in the particular proceedings as opposed to being a feature of all exercises of the relevant statutory power
	+ With the advent of a variable, contextual approach to procedural fairness, oral hearings are required only in special circumstances.

***Khan v University of Ottawa***

* **Facts:** Law student failed evidence so GPA dropped below the minimum, and had to take an additional semester. She appealed her grade, arguing that she had submitted a 4th answer booklet that wasn’t marked
* Committee met without providing her notice of the meeting or asking her to appear, and dismissed her appeal
* **Issue:** Was an oral hearing required in the circumstances?
* **Held**: Yes.
* **ONCA:** PF before the examinations committee in this case required an oral hearing because her credibility was critical issue on her appeal. The committee should have given Ms. Khan an opportunity to correct or contradict the three factors it relied on in its decision.
	+ How else could she have demonstrated that she handed in a fourth booklet except by pledging her word that she did?
* The committee disbelieved the explanation for fourth booklet without hearing from her. This amounted to a denial of procedural fairness which by itself fatally flawed the proceedings
* **Dissent**: Itis well established in law that an oral hearing is not required to satisfy the demands of natural justice.
	+ The legal rights involved and the consequences to the appellant do not merit the standard of justice she would dictate
* A decision affecting the right to continue one’s profession or employment may demand a higher standard, this is not the case here.

**(2) Right to counsel**

* The general rule is that there is no absolute right to counsel.
* But, where the matters are complex and involve questions of law, there may be a right to counsel with respect to the legal questions only
* **Countervailing policy considerations:**
	+ Introducing lawyers means less efficiency and effectiveness (per Arbitrator’s preliminary ruling in *Re Men’s Clothing Manufacturers)*
	+ Can complicate matters if one party doesn’t have adequate access to counsel, where a lawyer loses sight of the specialized nature of the hearing
* Additional time/costs – fear of increasing costs could prevent some issues from coming to arbitration altogether
* Section 6 of the Alberta *Administrative Procedures and Jurisdiction Act* does not require, but does not exclude, the right to counsel. Under what circumstances do you think the right to counsel should be required by law?
* **Factors to consider:**
	+ **Significance of the interest affected?**
		- Family interest? Proprietary?
	+ **Complex or difficult questions of law/fact/process?**
		- Are there interesting or difficult legal questions that might arise that a non-lawyer might have difficulty grappling with
		- Interesting questions of law: Whether it would be in the best interest of a child to be in the custody of the person, or the state. Would an unrepresented citizen be able to make submissions on this point.
		- Questions of fact
	+ **Capacity of the individual?**
		- Dealing with someone for example who is serving a term of imprisonment. Do they have the educational background to make their case
	+ **Legitimacy of the decision making process**

***Howard v Stony Mountain Institution***

* **Facts:** Inmate of prison was involved in an incident which resulted in 5 charges against him under the *Penitentiary Service Regulations*
* Mr. Howard arrives at the hearing with a lawyer. Up to the trial he had earned about 8 months of earned remission. They proceeded with the trial without the lawyer and he lost 70 days of remission in the trail. This is significant to him
* **Issue**: Did the prisoner have a right to counsel at the hearing? Is this right guaranteed by s. 7?
* **Held**: No absolute right to counsel but here he had a right to counsel at the hearing.
* S 7 does not create a new wave of rights that allows for a right to counsel. You can get a fair hearing without counsel in the room.
	+ It is possible to satisfy procedural fairness without a lawyer. BUT here there were interesting questions of law that might have warranted a lawyer
* What is required is an opportunity to present the case adequately and I do not think that it can be affirmed that in no case can such an opportunity be afforded without also as part of it affording the right to representation by counsel at the hearing...
	+ Once that position is reach it appears to me that whether or not the person has a right to representation by counsel will depend on the circumstance of the particular case:
		- Its nature and gravity,
		- Its complexity,
		- The capacity of the inmate himself to understand the case and present his defence

***New Brunswick v G(J)***

* **Facts:** mother was resisting an application by Child Welfare to renew an order placing her 3 children in custody of the state. She wished to be represented by counsel. A policy under the Legal Aid plan prohibited the granting of legal aid certificates in custody order renewal proceedings. She argues that this refusal violates her s.7 rights.
* **Issue:** Would the assistance of a lawyer been necessary to ensure that the appellant has her right to a fair hearing?
* **Held:** Yes. State-funded legal counsel is required to comply with s. 7 but not always – contextual analysis
	+ Just because s.7 rights are engaged doesn’t give an automatic right to a lawyer, even if this particular context where stakes are high – seriousness and complexity of the proceedings will tilt the scales towards allowing counsel and the capacity of the parents will inversely tilt the scales
* Separating someone from their children would cause psychological stress to the parents- this engages the parents s 7 right (liberty)
* **Consider:**
	+ The seriousness of the interests at stake
	+ Complexity of the proceedings
	+ Capacities of the Appellant
* Section 1 may, successfully come to the rescue of an otherwise violation of s 7 but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war and epidemics and the like
	+ In my view, a parents right to a fair hearing when the state seeks to suspend such a parents custody of his or her child outweighs the relatively modest sums, when considered in light of the government’s entire budget.

**(3) Right to cross-examine**

* Per *Alberta Administrative Procedures and Jurisdiction Act* – right to cross examine is not guaranteed by the legislation
	+ Right to cross-examination can be difficult to get
* **General rule:** must convince the court that the nature of the decision is such that you should be given an opportunity to cross examine

***Innisfil v Vespra***

* **Facts:** Municipality bringing a case before the board in Ontario, applying to annex lands that belong to another municipality
* Barrie Claimed that it needed the land to accommodate a proposed project. A letter from the minister of the treasury was introduced.
* **Issue at the SCC**: was whether the opposing counsel were entitled to cross-examine the official who presented the letter
* **Held:** The SCC ultimately holds that the witness should have been compelled to testify and face cross examination.
	+ We get a truth by testing competing claims of fact.

**Reasoning**

Baker factors:

1. **What is the nature of the decision in this case?** The jurisprudence tends to distinguish hearings with a formal trial type process (evidence tendered before a trier of fact), and administrative hearings or at the far end legislative functions like cabinet proceedings where the court is very reluctant to impose any kind of decision on them. Here, this is a provincial municipal board whose job it is to entertain applications for redrawing the boundaries of municipalities. There is a variety of different competing interests at stake, all of which are being weighed and considered by this admin body. This seems to be more administrative, a policy decision rather than individual rights
2. **Statutory framework –** the SCC doesn’t address this in depth. If you want a right to CE the first place you should look is the enabling legislation, or the general statute, APJA. The procedural format adopted by the admin tribunal must adhere to the statute of the board. The process of interpreting and applying statutory policy will be the predominant influence on the tribunal. This is the most important part of their decision – the enabling legislation and the general statute ground the right to CE.
3. **The nature of the interests affected** – the land won’t be expropriated from the landowners, although the market value of their land may be changed. However this doesn’t seem as serious as prisoner’s being transferred, or being subjected to security certificates.

***Djakovic v British Columbia (Workers’ Compensation Appeal Tribunal)***

* **Facts:** Djacovic claim compensation for a low back injury that allegedly occurred during a session of physical rehabilitation. Two staff members had witnessed the incident happened.
* His counsel indicated that he wished to have the two staff members attend the hearing to be cross-examined. The chair decided instead to elicit their evidence in writing
* Over the course of the correspondence the clinic gave three witness written statements they they did not recall any incidents
* **Issue:** Can Mr. D compel the board to compel the witness?
* **Held:** Central to the duty to be fair is the maxim *audi alteram partem*. This requirement has two separate components.
	+ (i) to know or understand the case that it has to meet;
	+ (ii) it is further entitled to respond to that case before the decision-maker reaches a decision...the nature of a hearing and the right to cross examination at a hearing is relevant to the second requirement.
* **Absent express exclusion, such choices of process are both informed and circumscribed by procedural fairness**
* In applying the baker factors the court found:
	+ 1) The processes of WCAT bear relatively strong similarity to courts. It deals with disclosure issues, the compellability of witnesses, oral evidence under oath, cross examination
	+ 2) WCAT within the statutory scheme supports need for fairness. There are no further appeals from WCAT provided for in the Act.
	+ 3) Decision is important to Mr. Djakovic
	+ 5) The fact that the Act and WCATs rules provide it with the ability to choose the procedures requires the court to give weight to this...deference

**The duty to give reasons**

* The Alberta Administrative Procedures and Jurisdiction act s7 requires decision makers coming within their purview to give reasons for their decisions. What about for other bodies?
* In ***Baker***, the SCC did not hold that all exercises of statutory power now involve the giving of reasons. In Baker itself it was obviously the importance of the interests at state that triggered the obligation.
	+ “…it is now appropriate to recognize that, **in certain circumstances**, the duty of procedural fairness will require the provision of a **written explanation for a decision**. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision **has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required**.”
* The question is where the threshold of sufficient importance lies.
	+ The tendency of the courts since Baker has been to require the provision of reasons. However, this has not been universally the case.
* **Support for the duty to give reasons:**
1. Fosters better decision making by ensuring that reasoning is well articulated and considered carefully;
	1. Instrumental justification: duty to give reasons gets better outcomes – giving public reasons means that the decision itself will be more thought out and better
2. The process of writing reasons may itself be a guarantee of a better decision;
	1. Helps ensure rule of law
3. Reasons allow the parties to verify that relevant issues have been addressed and enable them to exercise their rights to judicial review or appeal;
	1. Allows parties to challenge decision and give appellate body something to assess
4. Parties are more likely to feel they were treated fairly if reasons are given.
* **Countervailing policy considerations:**
	+ Too much burden on administrative officials
* ***The Content of the reasons?***
* How do we measure the adequacy of a tribunals reasons?
* In *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador Treasury Board* held that the quality of reasons was not a question of procedural fairness.
	+ “Where there are no reasons in circumstances where they are required, there is nothing to review. But, where, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis

***Newfoundland and Labrador Nurses’ Union v Newfoundland***

* “Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis.
* **A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion”.**
* “*Baker* stands for the proposition that “**in certain circumstances**”, the duty of procedural fairness will require “some form of reasons” for a decision. **It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness...**

***Wall v Independent Police Review Director***

* Wall was arrested in Toronto on the weekend of the 2010 G20 summit for wearing a disguise with intent and later released without charge.
* Wall files the complaint with the office of independent police review. In the course of the investigation, many of the officers were acting on orders. This was a systemic decision where subordinate officers were receiving orders to act this way.
* **Question**: Can Wall now lay this additional complaint against the superiors?
* **Note:** Under s 60(2) of the ***Police Services Act***, the director may decide not to deal with the complaint made by a member of the public if the complaint is made more than 6 months after the facts on which it is based
	+ In considering this is must consider whether the complainant is a minor or under a disability, whether the complainant is subject to criminal proceedings, and whether it was in the public interest to investigate
* The director dismissed the application.
* **Held:** A complete absence of reasons, **where such are required**, would constitute a breach of procedural fairness.
* Reasons are important. The art of crafting reasons can:
	+ Focus the decision maker and remind him or her of the relevant factors and evidence to be taken into account.
	+ Reasons also serve to reassure the individual involved that his or her concerns have been considered and the public generally that the legislative mandate at issue is being administered in a fair and transparent manner.
	+ Finally, reasons are necessary for there to be meaningful judicial review of the decision in question.
* Since the director is required by the legislation to take into account certain factors, providing reasons would serve to focus the director’s mind on those factors as well as reassure both the individual and the public that they have been taken into account.
* The director’s reasons were basically, “its been more than 6 months so I don’t have to consider this”
	+ The director failed to provide reasons for his decision in breach of s 60(7) of the PSA.
* Did the director apply his mind to this mandatory consideration? we have no way of telling.
* Is this sufficient reasons?
	+ Look at Baker
		- #2) Look at the statutory provisions. Requires director to consider certain things when accepting or rejecting a complaint
		- #3) Importance of the decision. Not just to the individual, but to the society more generally
		- #4) Nature of the decision. No appeal from this decision

THE PRINCIPLE OF IMPARTIALITY: REASONABLE APPREHENSION OF BIAS

* Historically speaking, the common law doctrine of natural justice is comprised of two ancient legal principles:
* *(1) Audi alteram partem:* “No one should be condemned unheard.”
	+ Right to notice, right to disclosure, the right to know the case against you, right to a hearing, right to be represented, right to cross-examine, duty to give reasons, etc.
* ***(2) Nemo judex in causa propria sua debet esse: “*No one ought to be a judge in his or her own cause.”**
	+ Decision-makers should be impartial, approach the issues with an open mind, should not have an interest in the outcome, etc.
* The general test for the determination of whether an adjudicator should be disqualified is that of a reasonable apprehension of bias
* Where can this arise?
* The principle of impartiality is offended when:
	+ (1) an administrative official has a pecuniary interest in the outcome or a previous relationship with one of the interested parties;
	+ (2) an administrative official sits on
		- (i) a hearing after being involved at the investigative stage,
		- (ii) a rehearing (after successful judicial review)
		- (iii) an appellate tribunal which is reviewing his or her previous decision.
	+ (3) an administrative official makes statements during a hearing that indicate he or she is biased as to the outcome;
	+ (4) an administrative official makes out-of-hearing statements that raise concerns that he or she is biased as to the outcome
	+ (5) administrative officials consult with colleagues who do not participate in the hearing.
* The Test for Reasonable Apprehension of Bias
* “[T]he apprehension of bias must be a reasonable one, held by reasonable and rightminded people, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that **test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.”**
	+ ***Committee for Justice and Liberty v National Energy Board,* de Grandpre J.**
* The test is **objective**, in the sense that it does not require a party to prove the decision-maker’s actual state of mind. We need to infer from the circumstances
* The application of the test is **contextual**, in the sense that a reviewing court will require a decision-maker to be more reserved in a trial-type process as opposed to a policy-making or legislative forum
* As with other aspects of procedural fairness, if there is a valid *Charter* claim a reviewing court might require a greater degree of impartiality on the part of the decision-maker.
* Policy underlying unbiased adjudication:
* The public is entitled to have confidence in the impartial resolution of disputes
	+ This confidence is undermined when the facts create an impression in the public mind that a decision maker is predisposed to a particular outcome
	+ “It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” (*R v Sussex Justices, ex parte McCarthy*)

Municipal Council Decisions

***Old St Boniface Residents Assn v Winnipeg***

* **Facts:** Developer wanted to buy up land in this area and build new townhouses with new amenities
* Winnipeg municipal councilor (Savoy) was involved from the beginning to get municipal approval for a re-zoning for development of Old St Boniface
* A resident’s association attempted to block the decision on the basis that a municipal councilor had been involved from the start in moving the proposal through the municipal approvals process
* **Issue:** Can they impugned this decision on the basis of RAB. Because this counsellor went on the record to lobby in favour of the project
* **Held:** In the course of such a progress, a councilor can and often does take a stand either for or against the development. This degree of prejudgment would run afoul of the ordinary rule which disqualifies a decision maker on the bias of RAB. **Accordingly it could not have been intended by the legislature that this rule apply to members of council with the same force** as in the case of other tribunals whose character and functions more closely resemble those of a court.
* The party alleging disqualifying bias must establish that:
	+ (i) the councilor has a personal interest in the project or
	+ (ii) there is a prejudgment of the matter, in fact, to the extent that any representation at variance with the view, which has been adopted, would be futile.
* Engages Baker factors 1, 2, and 3
	+ (1) Nature of the decision- legislative proceeding passing bylaws may be diminished PF
	+ (2) Legislative framework- Gives the councillors the right to affect such changes
	+ (3) The interests affected are vast as opposed to focused on a particular group
* **Ratio:** amendable persuasion test

 ***Seanic Canada Inc v St John’s (City)***

* **Facts:** My constituents are opposed to X, so I will not support it I will not change my mind.
	+ indicated at an earlier public meeting that he had made up his mind to oppose the application.
* **Held:** Applying the close minded standard it was clear that the councilor showed up to the hearing with a closed mind and had already made up his mind. Any other representations would have been futile.
* Osborn CJTD ***obiter****:*
	+ Amenable persuasion test is a stringent threshold, but it still requires an outcome which is the product of deliberation and debate.
* Seems odd that municipal decisions are subjected to more review than say legislative decisions.
	+ It seems like it allows the court to serve as a superior chamber that has final say over municipal decisions.

**NOTE:** In ***Save Richmond Farmland v. Richmond*** LaForest in obiter stated that the principle of RAB is ill suited to the situation of municipal council decisions. Would find that applicants are only entitled to notice and a hearing (unless the decision specifically targets individual interests)

* SCC: The principle doctrine of RAB applies as a broad spectrum. **But the way that they unpack this regarding municipal decisions that it does not have a lot of teeth in this area**.
	+ We want our municipal politicians to be transparent, and we will give them a broad license to say things that we may not otherwise accept.
* The standard from municipal decisions to more legislative ones doesn’t change it is just applied in more rigour. The test is always the same, its just that you can say things in municipal context that may be inappropriate in the judicial context.

Different Contexts:- Closer to judicial stage

***Newfoundland Telephone Co v Newfoundland***

* **Facts:** Board is responsible for the regulation of the Newfoundland Telephone Co, set the rates
* Regarding a rate increase to the NFLD telephone company.
* One commissioner had been an advocate for consumer rights. When appointed to the board he publicly stated that he intended to play an adversarial role as a champion of consumer rights.
* Before the hearing he was quoted publicly as making highly critical statements about Newfoundland Telephone.
* NFLD Telephone objected to Wells’ participation on the panel on the ground that his statements created an apprehension of bias.
* **Issue**: is there a RAB on the part of the commissioner.
* **Held:** The composition of board can, and often should reflect all aspects of society. There should not be undue concern that a board which draws its membership from a wide spectrum will act unfairly
* BUT The statements during the trial, taken together, give a clear indication that not only was there a reasonable apprehension of bias, but that Mr. Wells had demonstrated a closed mind.
* **Ratio**: The “open mind” or “amenable to persuasion” test applies at the investigative stage of the process. However, once the hearing has commenced, the parties are entitled to expect a greater degree of impartiality

***Pelletier v. Canada***

* Sponsorship scandal. Involving kickbacks to the Liberals in Quebec. To maintain federalism was to spend a lot of advertising in Quebec “what can Canada do for you” financing culture events, with liberal friendly PR firms getting a lot of business.
* Commission of Inquiry was struck (the “Gomery inquiry”).
* Gomery decided he had a public interest mandate, so while hearing evidence will act as interlocutory with the general public. Gomery granted several media interviews during the inquiry, while evidence was being introduced, during adjournments.
* he was coming to the same views as the Auditor General, saying the fund was run in a catastrophic way
* **Issue:** was there a RAB in the public statements of the judge?
* **Held:** Chretien and Pelletier were entitled to a high degree of procedural fairness given the potential to serious damage their reputations.
	+ The standard of impartiality expected of a decision maker is variable depending on the role and function of the decision maker involved.
* The comments indicate that he prejudge issues but also that he was not impartial toward the Applicant
* To conclude that the mismanagement was catastrophic before hearing all the evidence undermined the very purpose of the commission of inquiry, creating a sense that the proceedings were perfunctory in nature.
* I stress that even in public inquiries where the purpose of the proceedings to is educate and inform the public, it is not the role of decision makers to become active participants in the media. They must remain impartial
* **RAB=“what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.”**
* NOTE:
	+ **No need to necessarily use a Baker analysis. But in order to push back against the doctrine being less demanding maybe tapping into some of those Baker factors can be helpful. Showing how the decision is set out and its impacts.**
		- The nature of the decision, and legislative provisions, the nature of the comments and what they could do to the people being commented on.

Statutory Authorization

***Brosseau v Alberta***

* **Facts:** Allegations of fraud on Brosseau, lawyer who prepared a prospectus for a company
	+ Misrepresented facts in corporate prospectus, might induce people to buy shares under false pretenses (possibly fraud)
* Alberta Securities Commission did not initiate this themselves. Member of provincial cabinet told Alberta SEC that RCMP is investigating BROSSEAU for fraud
* **Question of RAB arises** that the Chair is involved in directing the investigation but then also sitting on the panel that hears the charge.
* **Held:** As with most principles, there are exceptions. One exception is where the overlap of functions which occurs has be authorized by statute
* **If a certain degree of overlapping of functions is authorized by statute then to the extent that it is authorized it will not generally be subject to the doctrine of reasonable apprehension of bias per se**...
* So long as the chairman did not act outside of his statutory authority and so long as there is no evidence to show involvement above and beyond the mere fact of the chairman’s fulfilling his statutory duties a RAB affecting the commission as a whole cannot be said to exist
* SO IF THE STATUTE ALLOWS FOR THE PROCESS, THEN THERE IS NO RAB
	+ The SCC says that the enabling legislation allows for this. So it is a defence to the charge of RAB.
* **On an exam, think of surrounding facts for both sides. So what about Brosseau’s counsel? Using Baker framework**

***2747-3174 Quebec v Quebec***

* **Facts:** This numbered company had their liquor permit taken away by the prov liquor commission
* They brought an application saying that the structure of the commission’s investigative and decision-making processes raised a RAB
* **Issue:** Does the fact that the commission use the same lawyers to argue the case and to advise the reasons for the decision create a RAB
* **Held:** Yes-
	+ Lawyers from the liquor board are responsible for investigating the issues and deciding to lay charge. The panel will then produce a draft decision, but they would send it to the lawyers to review
* NOTE: the act and regulations do not define the duties of the lawyers. The annual report shows that they are called upon to review files, prepare files draft notices of summons, present arguments to the directors and draft opinions. The annual report and the silence of the act leaves open the possibility of the same jurist performing these various functions in the same matter.
* The court finds that this is a problem. It gives rise to a RAB. A reasonable person, informed of how the agency operates would conclude that the commission is not impartial.

Independence

***Ocean Port Hotel Ltd v British Columbia***

* **Facts:** A police investigation and LCLC inquiry alleged that OPH committed five infractions under the *Liquor Control and Licensing Act*. The senior inspector of LCLC imposed a two-day suspension of OPH’s liquor license.
* **Issue:** The issue is whether members of the Liquor Appeal Board are sufficiently independent to render decisions on violations of the Act and impose the penalties it provides
	+ Administrative commissioners sitting on the commission without security of tenure, this raises a fairness concern
* **Discussion:** Judicial independence as a constitutional principle. If the enabling legislation does not included institutional independence was a constitutional problem.
* **Held:** The degree of independence required of tribunal members may be ousted by express statutory language or necessary implication.
* This principles reflects the fundamental distinction between administrative tribunals and courts. Superior courts by virtue of their role as courts of inherent jurisdiction are constitutionally required to possess objective guarantees of both individual and institutional independence.
* Administrative tribunals in contrast lack this constitutional distinction from the executive. They are created precisely for the purpose of implementing government policy. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of parliament or legislature.
* Such tribunals while the may possess adjudicative functions, they are ultimately part of the executive.
* The fairness provided to the judiciary regarding impartiality should not be extended to this administrative agency.
	+ Is this a blanket statement? What about in positions where s 7 interests are at stake.
	+ **Question:** What if there is a regime change, and a new government decides to change the nature of an administrative agency?
* **It seems possible to have a different board, such a labour relations board, which deals with some constitutional issue, is there some concern about maintaining the judicial independence of administrative boards**

Institutional consultations

* refers to a situation where an administrative decision-maker who is seized with a case consults with his or her peers in an administrative agency to discuss the policy implications of a decision
* **Fairness problem #1**: institutional consultation allows people who have not heard the evidence or the parties’ submissions can nevertheless influence the outcome. (*audi alteram partem* problem)
* **Fairness problem #2:** institutional consultations may consider evidence or submissions not raised at the initial hearing (*audi alteram partem* problem)
	+ It is like a disclosure problem, parties are not privy to the facts being included
* **Fairness problem #3**=institutional consultation raises a concern that people who have not heard the parties’ can undermine the independence of the decision-maker who is seized with the case. (*nemo judex* problem)
* Benefits/ Concerns with such consultations
* Benefits:
	+ Allows a tribunal to access collective expertise/experience/insights to evaluate the practical consequences of its decisions (*Consolidated Bathurst*)
	+ Facilitates understanding of policy developments
	+ Facilitates coherence and consistency in decision making (*Consolidated Bathurst*)
		- Especially a concern where there is no right to appeal (*Tremblay*)
	+ Ensures stability for litigants (*Tremblay*)
* Concerns:
	+ Coercion/compelled to change views, panel members might have opinions or view of evidence swayed if question of facts are being discussed in these consultations

***International Woodworkers v. Consolidated Bathurst***

* **Facts**: Labour relations case. Following hearing by a 3-member panel, the panel discussed the case with other members of the Board at a “full board” meeting as the Chair of the hearing felt it was a good policy issue to discuss with the full Board, and shared their draft decision
* any member of the panel contemplating making a policy decision may through the chairman request a full board meeting. These full meetings have been organized to facilitate maximum understanding and appreciation of policy developments. Purpose of meeting is to evaluate fully practical consequences of proposed policy changes.
	+ **Purpose of the meeting is not to decide the case but to enable panel to consult with other members as to their experience in previous cases or their opinions as to how certain policy decisions might play out in the future**
* **Issue:** Have the rules of procedural fairness been violated by this “institutional consultation” by violating either (a) he who decides must hear or (b) the right to know the case to meet?
* **Held (Gonthier): Ultimate question is whether the disadvantages of this consultation practice are sufficiently important to constitute a breach of the rules of natural justice.**
	+ **Benefits:** More fulsome airing of all the concerns and arguments. While there may be disagreements, it is likely to come to a better policy formula.
		- Greater consistency because people may understand why the policy was put in place.
		- Reason is more rationally articulated
		- Drawing on the experiences of other board members perspectives
	+ **Ultimately, the decision and the process was fair:**
		- It was initiated at the request of the panel not imposed
		- It was limited to questions of policy and law, not facts.
		- No vote, no minutes taken
* **Parties must be informed of any new grounds on which they have not made any representation and given reasonable opportunity to respond – may entail supplementary hearing**
	+ Re-open hearing and get parties’ submissions on those points
* **Dissent- Sopinka**: These types of consultations should be out of bounds.
	+ If we want to do this, there should be a legislative statute passing that this is permissible.
	+ If there are going to be concerns about this, there should be at least the ability to depose and cross examine board members. Who did you talk to? How did you reach this decision etc.

***Tremblay v. Quebec***

* **Facts:** Two member panel seized with decision, makes decision to reimburse Tremblay. But, couldn’t issue that decision on their own, must send decision to Commission’s legal counsel.
* President (who happens to be a judge) comes to a different decision and says that they should talk about it.
* At meeting, 1 panel member changes mind and sides with president. Because there was disagreement, the matter was decided by the President as a tie-breaker, who maintained his original viewpoint and sided against Tremblay
* Differences to Bathurst: (1) President imposes the meeting on the panel; (2) decision is already made and then it is changed; (3) Vote is taken by the end as per the minutes
* **Issue:** Is this a breach of PF **Held- Yes**
* **Ratio:** arrangements made for discussions within an agency with members who have not heard a case must not be so coercive as to raise a RAB that members’ ability to decide cases free from improper constraints has been undermined

***Ellis Don Ltd. v. Ontario (LRB)***

* **Facts:** Union is asked about the specific employers that it has exclusive bargaining rights. Forgets to mention Ellis Don.
* Ellis Don as a defence notices the clerical error. Says that they are no longer bound to deal with them as the exclusive bargaining.
* The panel engages institutional consultation. Panel changes their decision based on full meeting
* **Issue:** is this meeting a breach of the PF **Held- NO**
* **Discussion:** Case illustrates tension between the fairness of a process and the principle of deliberative secrecy (*Tremblay)*.
	+ Deliberative secrecy favours consistency by protecting a consultative process, but it causes difficulties for parties to prove inappropriate tampering

**Dissent (Binnie):**

* **Factual evidence was reweighed or reassessed at full board meeting:** runs counter to *Bathhurst* and must be dealt with properly if integrity in Board’s decision is to be maintained
* **the Board cannot have it both ways** – it cannot deny a party access to all relevant information, then rely on the absence of this information as a conclusive answer to any complaint about procedural fairness.

**PART 2: SUBSTANTIVE REVIEW**

What is it?

* review of an administrative decision on the basis of the actual outcome or decision that was made. Is the decision justifiable?
* Can be distinguished from a review of the administrative *process*
* There can be some overlap between substantive review and procedural fairness
* Ex: there is a procedural duty to give reasons that are at least intelligible, but those reasons become the focal point for substantive review
* **Purpose of substantive review:** to uphold the rule of law. Connected to fundamental constitutional values.
	+ Having judicial oversight of administrative decisions provides a check and balance, and ensures that there is an independent institution to scrutinize decisions and ensure they are legally defensible
	+ Ensures a degree of accountability and transparency on the part of administrative decision makers
	+ The function of judicial review is therefore to ensure the legality, reasonableness and fairness of the administrative process and its outcomes (*Dunsmuir)*

Historical Overview

* **(1)** Historically, judicial review of the substance of statutory decision making was very confined. Statutory authorities were left pretty much alone provided they did not act in bad faith or for purposes not contemplated by the empowering act.
* **(2) Pre-*Nicholson* and pre-*CUPE* (1979):** substantive review governed by CL doctrine of “jurisdictional error” (the “*ultra vires”* doctrine).
* Judges were entitled to quash an administrative decision whenever the judge disagreed with the administrator’s assessment of a “jurisdictional” issue or question of law
	+ If main issue in admin decision was jurisdictional issue, decisions made without legal authority, given the boundaries of the statute, courts could intervene.
	+ If not a jurisdictional issue, courts said it’s a political issue and wouldn’t intervene
	+ **Problem #1:** Judges never explained what constitutes a jurisdictional issue, so the ambit and intensity of judicial review seemed arbitrary
		- Problematic, controversial, inconsistent. But even more concerning, if they find a consistent definition, the fact that they have a monopoly on reviewing this can be seen as antidemocratic.
	+ **Problem #2:** The doctrine assumes that judges have a monopoly on interpreting the law, which raises concerns about the democratic legitimacy of judicial review and institutional expertise
		- How? Judges are assuming that they are in a better position to decide questions of labour arbitration for example, this seems like judicial overreach. Why would generalist judges know better than administrators or board members who have spent their lives working on these issues
	+ **Problem #3**: Judicial review in Canada was initially interventionist with respect to “new” forms of administrative law, like collective bargaining, worker’s compensation and human rights regimes
* (3) **Judicial deference:** In the modern approach of the SCC towards administrative decision makers, it is more respectful of the relative strengths of tribunals and other non-judicial actors and of legislative intentions regarding their expanded role.
	+ The SCC has instructed reviewing courts to assess their engagement with the administrative process from a pragmatic and functional perspective. This required respect of the legislature’s choice as to which decision maker should be the primary vehicle for carrying out a statutory mandate. It also called for greater attention to legislative signposts marking a need for judicial restraint. It is a cautious approach

***CUPE v New Brunswick Labour:***

* (1) IN cases where the meaning of the statute is ambiguous or unclear, administrative officials have a legitimate role in determining the meaning of the statute
* (2) Judges “should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so”
* (3) Judges should consider different reasons for deferring to administrative interpretations of law:
	+ (a) The legislature has designated the administrative official to be the primary decision maker;
	+ (b) Administrative officials have relevant expertise and experience interpreting and applying the enabling legislation, expertise which generalist judges do not possess
* (4) Judges can only overturn an administrative decisions where the decision is “so patently unreasonable that its construction cannot be rationally supported by the relevant legislations and demands intervention by the court” This is different than saying that judges can overturn an administrative decisions whenever they disagree with it.

***Pushpanathan v Canada***

* The standards of review:
	+ **(1) Correctness:** Judges are entitled to intervene whenever they disagree with an administrative decision on its merits
	+ **(2) Patent unreasonableness**: Judges can only intervene if the defect in the reasoning is “immediate or obvious” and “so flawed in terms of implementing legislative intent that no amount of curial deference” can justify letting the decision stand
	+ **(3) Reasonableness, simpliciter:** This lies somewhere between correctness and patent unreasonableness
		- Is there an obvious error, then it is patently, if it is more searching then it is something lesser

Modern Day

***Dunsmuir v New Brunswick***

* **Facts:** D was a lawyer working for the courts. Had a tumultuous period of employment. He was reprimanded for certain conduct.
* On the eve of his performance review, he is faxed a termination letter. He files a grievance and an arbitrator is assigned.
* Government relied on s.20 of *Civil Services Act* to support its act that it could dismiss D in this manner. However in order for his dismissal to fit under this section he could not have been terminated with cause
* D argued he was dismissed for cause and was therefore entitled to seek reinstatement
* **Issue:** Given the decision of the adjudicator, what was the appropriate standard of review?
* **Discussion:** Judicial review is intimately connected with the preservation of the rule of law. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiative of parliament and legislatures to create various administrative bodes and endow them with broad powers.
	+ The function of judicial review is therefore to ensure the legality, reasonableness and fairness of the administrative process and its outcomes.
* **Justice Cromwell stated**: The rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal’s authority;
	+ second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way;
	+ Third, legislative supremacy is affirmed and the court centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law.
* **Held:** Reaffirmed and renovated “pragmatic and functional approach” = standard of review analysis
	+ This **modern approach** is more respectful of the comparative strengths of tribunals and of legislative intentions re: their expanded role
* They try to trim down standard of review to 2: Correctness or reasonableness. They also try to make it less contextual, there should be more guidelines for this.
* TWO STEP PROCESS:
	+ (1) Courts ascertain whether jurisprudence (a line of precedent) has already determined satisfactory manner the standard degree of deference to be accorded with regard to a particular category of question
	+ (2) where first inquiry proves unfruitful, courts must proceed to analysis of the factors making it possible to identify the proper standard of review
* **(1)** **Jurisprudence:**
	+ Existing jurisprudence may be helpful in determining some of the questions that generally fall to be determined on a correctness standard, for example
		- **Constitutional issues involving division of powers**
		- **True questions of jurisdiction**
		- question at issues is one of general law “that is both of central importance to the legal system as a whole and outside of the adjudicators specialized area of expertise
	+ Jurisdiction meant in broadest sense whether or not tribunal had the authority to make the inquiry
	+ **Question to ask:** is there an authoritative decision from a respected appellate court in Canada that has decided standard of review for the same category of question?
		- **Probably still want to undertake contextual analysis just to check if SOR is right**
* **(2) Contextual analysis**
	+ If existing precedent is not determinative, then identify the appropriate standard of review by applying the standard of review analysis
		- **(a) The presence or absence of a privative clause (or statutory right of appeal**
		- These tell judges to exercise restrained (reasonableness standard)
		- **(b) A purposive understanding of the tribunal as set out in the enabling legislation;**
			* The fact that there is a specialized forum for administrative adjudication is often taken as an indication of a desire to have a different way to resolve disputes than the common law
			* purposive understanding of the legislative and the purpose of the tribunal
		- **(c) The nature of the question at issue (question of law, fact or mixed law and fact;**
		- Questions that generally attract a *correctness* standard:
			* General questions of law that are of central importance to the legal system
			* Questions of law outside the specialized area of expertise of the decision maker
			* Constitutional questions (e.g. division of powers), because of the unique role of s. 96 courts as guardians of the constitution (may also include Charter questions)
			* Questions re: the jurisdictional lines between 2 or more specialized tribunals
			* “True” questions of jurisdiction
		- Questions that generally attract a *reasonableness* standard:
			* Questions of fact, discretion, and policy
			* Questions of law about the enabling legislation itself
			* Questions of mixed law and fact
		- **(d) The expertise of the tribunal**
			* is more particular matters of the people on the panel. What sort of expertise do they bring to the table. Is it about the group? Or is it about the problem
* **Competing Methodology -Dissent**
	+ A very different methodology emerges from Deschamps. On questions of law, deference is warranted only where there is a privative clause and specifically not where there is a statutory right of appeal.
	+ The alternative approach thus diverges sharply from the majority in its ambition to revisit an earlier decision from the SCC that gave priority to deference where an administrative actor is found to have more expertise than the courts. **Deschamps and Rothstein rejected this prioritization for reasons of legislative intent**
		- Where the legislature believes than an administrative decision maker possesses a superior expertise on questions that are normally within the traditional bailiwick of courts it can express this by enacting a privative clause.

Lingering Questions after *Dunsmuir*

* **(1)** The rule of precedent. While it is clear that judges, lawyers and the parties should avoid allowing the standard of review to occupy a central role in litigations where the is a sufficiently clear record of past decisions that govern the issue. But, where the existing jurisprudence amounts to one or two decisions by a lower court or even an appellant court there is a residual case to be made for applying the standard of review analysis in full.
* **(2)** What to do about cases where a statute or the existing jurisprudence dictated a standard of review that was no longer available in the common law after Dunsmuir. Whether the standard of patent unreasonableness could live on under a statute despite the shift in Dunsmuir to a single deferential standard of reasonableness
	+ - Thus a pre-Dunsmuir standard of review may live on where it is preserved by the express statutory language...but its meaning will continue to evolves with the common law.
* **(3)** A third area of uncertainty after Dunsmuir concerned the role of the four factors in the standard of review analysis. To what extent is it necessary for a court to refer explicitly to several or all of the facts when explaining its reasoning.
* **(4)** Whether the majority’s approach will provide, as it aspires to do, a coherent and workable framework for the system of judicial review as a whole
* **(5)** Where there is tension in the factors, especially in the context of a privative clause, where does the balance of the factors lend to

Lewans comment on Standard of Review

* What we really care about in the standard of review is whether a decision is fact based/based on evidence.
* On an exam, the standard of review analysis is **important prelude to the actual analysis** of the case. You need to **get into the merits of the decision** at a higher degree of detail.
* The main problem of the standard of review is whether it should be correctness or reasonableness
	+ **Correctness**- Decision maker does not have to pay any mind to the previous decision. It is like a blank slate. A lot more leeway to decide what the outcome should be
	+ **Reasonableness**- Much more constrained. Judge cannot treat this as a blank decision and instead must take what is given from the administrative tribunal. They can only interfere with the decision on more constrained ground. They have to ask about whether it is unreasonable.
		- Didn’t listen to the evidence, didn’t apply the rules of law to the facts

**1(a) Privative Clauses**

* Regardless of whether the clause is extremely explicit, or less or the message is the same—judicial restraint.
	+ Statutory provisions meant to trim the scope of judicial review BUT they are not determinative
	+ ***Crevier v. Quebec***=s. 96 of the *Constitution Act, 1867* guarantees right to judicial review of administrative decisions. See also *Dunsmuir* at para. 31 (“judicial review is constitutionally guaranteed in Canada”).
	+ **Bottom line**: judges must respect privative clauses by adopting a more forgiving standard of review.
		- Look for the clause, mention it in the Dunsmuir analysis, perhaps mention whether it is more or less explicit, but that’s not the end

**1(b) Statutory Rights of appeal**

* Right of appeal suggests correctness
	+ Giving the right for an independent right of a court to look over the decisions of the court.
* Statutory provisions meant to provide judicial oversight of administrative decisions
* Since such provisions also serve purpose of the route that legislature intends judicial review application to follow, judicial deference signals given by a right of appeal are not as singular as those of a privative clause
	+ But judges must still respect administrative expertise and the fact that the administrative decision-maker has primary responsibility for the decision. [*Pezim* and *Southam*]
	+ **Bottom Line**: “…where a privative clause or a right of appeal (or both) are present in a statute, they will influence, but not determine outright, the standard of review.” **[p. 652 text]**

**2) The expertise of the decision maker**

* Relative expertise can arise from a number of sources... the composition of an administrative body might endow it with knowledge uniquely suited to the questions put before it and deference might therefore be called for
	+ Similarly an administrative body might be so habitually called upon to make findings of fact in a distinctive legislative context that it can be said to have gain a measure of relative institutional expertise.
* Expertise of the decision maker is measured by the court in light of the relevant statutory provisions, and relative to the court’s understanding of its own expertise
	+ The court must look for **explicit markers In the statute**, such as a **provision that states the type of expertise** that tribunal members must or should possess as a condition of their appointment. Or they can look to more general statements about the statute’s aim and purpose.
* The rationale: It recognizes the reality that in many instances those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime
* More deference will be awarded where:
	+ The tribunal is interpreting its own statute or statutes closely connected to its function
	+ The tribunal is dealing with an issue with which it will have particular familiarity, or where it has developed particular expertise in the application of a general common law rule in relation to the specific statutory context

***Pezim v British Columbia***

* **Facts:** A junior resource company that explores mine sites in interior BC. High energy, high risk investment
* Prior to making that information public, the board issues options to purchase shares to members of the board. Looks like insider trading. Using inside information to allow certain people to purchase shares. BC Securities Commission found Pezim failed to make appropriate disclosure of material change in company assets in regards to transaction with stock options, so suspended them from trading shares for 1 year.
* Appealed, as permitted under the Securities Act, to the CA, arguing that the commission erred in law in its interpretation of “material change” in the affairs of the reporting issuer of shares, CA allowed appeal
* **Issue**: What is the appropriate standard of review?
* **Held**: Even though there is a statutory right of appeal which suggests correctness, expertise supports deference and appropriate standard of review is reasonableness.
	+ there is a statutory right of appeal, but this is a highly specialized tribunal dealing with an issue at the core of its regulatory mandate and expertise –
	+ **Even where there is no privative clause and there is a statutory right of appeal, concept of specialization of duties requires that deference be shown to decisions of specialized tribunal**
		- the tribunal has more knowledge of what impact disclosure will have on the trading of securities across the whole market.
	+ If the purpose of the statute is to protect public from abuse should look at the expertise and need for this tribunal
* This case is groundbreaking because it established that courts should defer to an agency’s resolution of an issue of statutory interpretation even in the face of a broad right of appeal.

***Canada v Southam***

* **Facts:** Southam Inc. wanted to improve its share of the community newspaper market by purchasing more community newspapers. Respondent applied for order requiring S to divest itself of 3 strongest papers, alleging that concentration of all papers in one person hands lessened competition substantially.
* Key issue was whether the consolidation of newspapers was “substantially reducing” competition in the industry. There was a statutory right of appeal. And the director of investigation appealed the decision and S appealed the remedy.
* **Held: Reasonableness was the appropriate standard**
* **The nature of the problem:** is a question of mixed law and fact and suggest deference
	+ **Q of law** – Q about what the correct legal test is
		- Judges can interfere more
	+ **Q of fact** – Q about what actually took place between parties
		- Greater deference to admin board
	+ **Q of mixed law and fact** – whether the facts satisfy the legal test.
		- In-between Q of law and Q of fact in terms of deference to admin board
* Here, parliament granted such a broad, even unfettered right of appeal.
* BUT parliament created a specialized competition tribunal and invested it with responsibility for the administration of the civil part of the competition act
* The natural inference is that the purpose of the Act is better served by appellate deference to the tribunal’s decisions
	+ The expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal’s decision in the absence of a full privative clause

**3) Nature of the Question**

* *Pre-Dunsmuir:* most important factor in pragmatic and functional approach was expertise
* After *Dunsmuir*, the nature of the question became the focus of the standard of review analysis
	+ In some cases, the nature of the question will presumptively determine the standard of review
	+ But, the nature of the question is the most amenable to manipulation
* Conventionally, the courts distinguished the decisions of administrative actors based on whether they engaged questions of law, fact, or mixed law and fact.
* According to Dunsmuir, “where the question is one of fact, discretion or policy, deference will usually apply automatically. ...We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined and cannot be readily separated.”
	+ **Why**? It is the primary decision maker that has had first hand access to the information on which a factual assessment was based and to the regulatory context in which the decision was made. They are better position to evaluate and weigh the evidence in relation to the factual issues in dispute.
* So long as a decision maker arrived at its factual conclusions reasonably, by ensuring that there was evidence to support them and by considering the relevant evidence the courts will not interfere
* **The problem with the traditional approach:**
	+ Distinction between questions of law and questions of mixed law and fact is difficult

***Dunsmuir v New Brunswick***

* **Correctness Review:**
	+ constitutional questions;
	+ “true” questions of *vire (jurisdiction)s*;
	+ general questions of law which are “of central importance to the legal system as a whole and outside the adjudicator’s area of expertise”; and
	+ questions regarding the jurisdictional lines between two or more competing specialized tribunals.
* **Reasonableness Review**
	+ questions of fact;
	+ questions of law arising from interpretation of a regulator’s home statute or enabling legislation;
	+ questions involving the exercise of administrative discretion;
	+ public policy;
	+ mixed questions of law and fact.

Discretionary Questions- Reasonableness

* To identify discretionary question key is to look to relevant statute to determine whether it frames the decision maker’s authority in broad and general terms such that it requires choices to be made from wide variety of options
* Because of the discretionary nature of the legislation “the committee **may** grant special exemption” the SCC states that this will always require a reasonableness. IT is a signal from the legislation that we are to differ to the discretion

***Canada v Khosa***

* **Facts:** Khosa convicted of dangerous driving causing death. He was engaged in street racing. Hit a pedestrian and killed them. At trial there was much debate about the finding
* Government begins deportation proceedings
* If there are humanitarian and compassionate grounds they can find to keep him here
* Khosa applied unsuccessfully to the immigration appeal division to remain in Canada, notwithstanding his conviction. The majority did not accept that there was sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances
* **Issue:** What is the appropriate standard of review of the Immigration Appeal Division?
* **Held:** The appropriate standard of review was reasonableness – Fed CA erred in intervening to quash IAD decision
* Nature of the question – **mixed law and fact**
	+ Suggest SOR of reasonableness – deal with this statute more routinely, delegated decision making authority over these issues
* **At the time** there was a test to consider deportation.
	+ **(1)** Seriousness of the offence convicted
	+ **(2)** Possibility of rehabilitation
	+ **(3)** Length of time spent in Canada
	+ **(4)** Family and community support available
	+ **(5)** Dislocation with family ties that might ensue upon deportation
	+ **(6)** Degree of hardship faced by the individual
* He did not accept responsibility for his actions. They really focused on the first two factors, and didn’t go into the last 4 factors.
* Because of the discretionary nature of the legislation “the committee **may** grant special exemption” the SCC states that this will always require a reasonableness. IT is a signal from the legislation that we are to differ to the discretion
	+ Where you have a statute that allows for discretion from the tribunal this will be attracted towards the reasonableness review.

**Correctness Review:**

* *Dunsmuir* at para 50: “when applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question.
	+ The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct”
* **Correctness review on findings of fact:** the reviewing court is entitled to engage in *de novo* fact finding on the basis of the record
	+ Ex.) Witness credibility, whether or not you think there is corroborating evidence
	+ Bold form of correctness oversight 🡪 rare
* **Correctness review on questions of law:** the reviewing court is entitled to disregard the administrative decision and proceed directly to interpreting the enabling legislation, common law doctrine, *Charter* jurisprudence
	+ Interpretative exercise – the court can decide for itself

***Pushpanathan v Canada***

* **Facts:** Refugee board regarding whether a convicted criminal can remain in the country. When P got to Canada he claimed refugee status. After a while he relinquishes this claim and he qualifies as permanent residency.
* While on this status he is arrested for conspiracy to traffic in heroin and convicted to 8 years. After this, Canada begins deportation proceedings. He revives his refugee status
* Immigration and Refugee Board refused on the basis of a clause which stated that the provisions of the convention did not apply to a person **“who has been guilty of acts contrary to the purposes and principles of the UN,”** deeming that drug trafficking is contrary to the purposes and principles of the UN
* P seeks judicial review, asking court to look at decision on basis of procedural component (got fair hearing and disclosure, etc) BUT that the reasoning behind the decision is flawed. Wants substantive review.
* **Issue:** What is the appropriate standard of review of the Board’s decision?
* **Held: Correctness standard applies, Board made and error**
* **Discussion:** The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask: was the question which the provisions raises one that was intended by the legislators to be left to the exclusive decision of the board?
* A critical aspect in Pushpanathan was the Court conception of the question as one of general international law, thus putting it beyond the expertise of the board.
	+ The court says that this provision was meant to be much narrower. It was meant for people claiming refugee status for those who were war criminals etc.

**In his correctness review Bastarache J undertook to attempt to determine the meaning of article 1F(c) of the *Convention:***

* + Looks to the plain meaning
		- Hansard debates, materials for international articles
	+ The purposes and objectives of the Convention
		- Preamble of the treaty
* Do you think the IR Board’s decision hinged on questions of fact, law or mixed fact and law?
	+ The interpretation seems to be heavily law base
		- Lots of discrete questions about what the framers meant when creating this provision
		- How can we interpret this provision in a way that fulfills the purposes of this treaty?

**Correctness Review after *Dunsmuir***

* In *Dunsmuir,* the SCC suggests that the following issues attract correctness review:
	+ (1) Constitutional questions- OTHER THAN DORÉ CARVEOUT
		- *Loyola High School v Quebec,* 2015 SCC
	+ (2) “True” questions of *vires/*jurisdiction;
		- *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association,* 2011 SCC
		- *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission),* 2012 SCC
	+ (3) General questions of law which are “of central importance to the legal system as a whole and outside the adjudicator’s area of expertise”; and
		- *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals,* 2011 SCC
	+ (4) Questions regarding the jurisdictional lines between two or more competing specialized tribunals 🡪 concurrent authority
		- *British Columbia (Workers’ Compensation Board) v Figliola,* 2011 SCC

**Reasonableness Review**

* Reasonableness is a deferential standard. It imports respect for the decision making process of adjudicative bodies with regard to both the facts and the law.
* Certain questions that come before administrative tribunals do not lend themselves to one specific particular result. Instead they may give rise to a number of possible reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions
* “Deference as respect” requires of the courts “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”
	+ **Dicey’s model** on the other had requires judges to adopt a principle that is called submissive deference, since what is required of judges is that they submit to the intention of the legislature, on a positivist understanding of intention
* **Reasonableness review of findings of fact:** the court is only entitled to intervene where the conclusion cannot be supported by the evidence
	+ We have to explain why the decision cannot be maintained even on its own terms – that the decision fails on its own terms. Identify what the failure is and why it is unacceptable
	+ Equivocation is not enough 🡪 if the evidence is equivocal and an administrative decision maker says “it’s more likely than not” = not enough
* **Reasonableness review on questions of law:** the court is only entitled to intervene where the conclusion is unjustifiable in light of the enabling legislation, regulations, common law doctrine, *Charter* jurisprudence, departmental guidelines, international law, etc.
	+ Not about whether the decision maker got it right all things considered, but whether the decision is compatible with the legal principles that apply to the case

Practically speaking, how should judges assess whether an administrative decision is “reasonable”?

* **1)** “In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” – *Dunsmuir v New Brunswick*
	+ Difficult to be reasonable if you don’t give reasons or refuse to account for your decision
	+ **Transparent and intelligible**
* **2)** The decision must demonstrate that the decision-maker was “alert, alive and sensitive” to the relevant law (statutes, common law, regulations, guidelines, treaties, etc.). Examine the reasons and ask whether they articulate an adequate justification under the circumstances, in the sense they indicate appropriate regard for relevant law and do not ignore or discount important legal considerations – *Baker v Canada*
	+ **Alert, alive and sensitive**
* **3)** The decision does not have to include all the arguments, statutory provisions, jurisprudence or other details that a reviewing judge would have preferred. It just has to provide a reasonable justification for the outcome – *Newfoundland Nurses’ Union v Newfoundland and Labrador (Treasury Board)*
	+ **Decision doesn’t have to be perfect**
* **4)** Because reasonableness “takes it colour from the context”, consider whether the onus of reasonableness review becomes more demanding when the practical consequences of the decision become more significant for the individual affected by the decision – *Canada v Khosa*
	+ There is a sense that our expectations of what is reasonable becomes heightened when the stakes go up
	+ **Reasonableness review tends to shift in the same way as the duty of procedural fairness shifts**

***Dr Q v College of Physicians and Surgeons of BC***

* **Facts:** College committee found the doctor had taken physical and emotional advantage of a female patient
* Case turned on assessment of credibility of patient and doctor
* On appeal under the *Medical Practitioners Act*, the reviewing judge set aside the committee’s decision, disagreeing with findings of credibility
* **Issue:** The key question in this case is whether the reviewing judge should have interfered with the findings of credibility made by the committee
* The first erroneous assumption was the because the standard of evidence was that of clear and cogent evidence, the reviewing judge was required to revisit the committee’s findings of credibility and fact
	+ The standard of clear and cogent evidence does not permit the reviewing judge to enter into a re-evaluation of the evidence
* Regarding the nature of the problem, judicial decision of first instance on factual issues will only be interfered with where the appellate court can identify a palpable and overriding error or where the finding was “Clearly wrong”
* **This case stands for a high degree of deference on findings of fact.** The committee has the benefit of being in the same room as the witnesses, first hand in the evidence.
	+ **This is a self-regulating profession.** They are the ones who are best qualified to determine the standard.
* Lewans how would you assess the reasonableness of finding of fact
	+ Is this a logical narrative? Glaring inconsistencies?
	+ Are inferences reasonably supported by facts?
* **Here**: seems like College is actually making a reasonable assessment of evidence, paying attention to both direct and indirect evidence
* Examples of unreasonableness:
1. Decisions which are inconsistent with the purposes/principles of the enabling legislation, common law doctrine, statutory guidelines, regulations, international law;
* *Baker* – a situation in which the reasoning displayed is contradictory to the statutory principles and legal principles regarding these issues or questions
1. Decisions which are based on prejudice or *ad hominem* reasoning;
* Ex.) Trump’s travel ban – aligning religious beliefs with threats to public safety 🡪 Muslims = terrorists
1. Decisions based on an appeal to force, tradition, or popular opinion;
* Ex.) Tradition = “We’ve always done something this way” - does that make it reasonable?
1. Decisions which conflate correlation and causation;
2. Decisions based on visceral reaction or emotional appeal, instead of a rational assessment of facts and law;
3. Decisions which beg the question or are based on hasty generalizations;
4. “Box-ticking” or pro forma decisions;
* Did they actually consider the facts? Did they actually exercise their discretionary power in this particular case?
1. Disproportionate balancing of individual rights and policy objectives
* Did they consider less restrictive options?
* **Bottom line:** decisions that violate basic standards of evidentiary proof and/or legal argument are unreasonable

***Catalyst Paper Corp v North Cowichan (District)***

* **Facts:** Catalyst paper is the largest specialty paper and newsprint producer in western NA. Located in Cowichan
* As more people came to the Cowichan are, residential property values increased. The district was concerned that taxing residential property at a rate that reflected its actual value relative to the value of other classes of property in the district would result in unacceptable tax increases to the residents.
* Instead The district responded to the demographic shift by keeping residential property taxes low and increasing the relative tax rate on catalyst paper
	+ There is an agreement that the standard of review is reasonableness
* **Issue:** Is this decision to impose property tax reasonable?
* The answer lies in Dunsmuir recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors
	+ Reasonableness is a single standard that takes the colour from the context
* Review of municipal of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation
* In this context, reasonableness means courts must respect the responsibility of elected representatives
* Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonableness outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.
	+ Here, the relevant legislation gives broad and virtually unfettered legislative discretion to establish property tax rates

**Reasonableness Review after *Dunsmuir***

* Issues which are likely to be assessed on a **reasonableness** standard:
1. Questions of fact;
2. Questions of law arising from interpretation of the enabling legislation;
3. Questions involving the exercise of administrative discretion
4. Public policy
5. Mixed questions of law and fact

**ADMINISTRATIVE LAW AND THE CHARTER**

* Administrative tribunals should take the constitution into account.
* It is a principle of statutory interpretation that legislatures are presumed not to authorize or to requires unconstitutional conduct
* **Issue #1**=Do administrative decision-makers have the legal authority to determine whether their enabling legislation infringes *Charter* rights?
* **Issue #2**= Do administrative decision-makers have the authority to grant *Charter* remedies?

Jurisdiction and the Constitution

* **s. 52(1) *Charter:***“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.”
* **s. 24(1) *Charter:***If successful in challenging the validity of infringement “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

***Cooper v. Canada (Human Rights Commission)***

3 Different Approaches to constitutional review by administrative bodies

**(1) Lamer CJ: Parliamentary supremacy model**

* (1) Canada is a Parliamentary democracy in which the legislative branch is supreme and primarily accountable to the electorate for its decisions;
* (2) While legislation is also subject to judicial review under the *Charter*, that practice is inherently controversial because it gives unelected officials the power to strike down democratic decisions;
* (3) Therefore, the power of reviewing legislation for *Charter* compliance should be reserved exclusively for the judiciary, and one should not assume that administrative officials have this authority unless they have been **explicitly** empowered by legislation

**(2) LaForest J.:**

* (1) Administrative agencies do not have any “freestanding” jurisdiction to engage in *Charter* review of enabling legislation by virtue of s. 52;
* (2) Administrative agencies only have authority to engage in *Charter* review of enabling legislation **if the legislature has given them express or implied power to determine questions of law**;
* (3) In order to determine whether an administrative agency has implied authority to engage in *Charter* review, one should consider:
	+ **(a) the composition and structure of the tribunal (legal expertise/training);**
	+ **(b) the procedure before the tribunal (adjudicative vs policy making);**
	+ **(c) the appeal route, if any, from tribunal decisions; and**
	+ **(d) the expertise of the tribunal.**
* (4) While there may be some practical advantages for giving administrative agencies the power to engage in *Charter* review, the primary consideration remains whether the legislature intended to give this power to administrative officials.

**(3) McLachlin J. (dissenting):**

* (1) The majority approach disregards the constitutional significance of s. 52 of the *Charter*, makes it more difficult for the HRC to fulfill its function, and places additional burdens on victims of discrimination;
* (2) Every administrative tribunal which has the duty to decide questions of law has the concomitant power to review enabling legislation for *Charter* compliance unless the legislature expressly withholds that power;
* (3) “The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it.”

***Nova Scotia (WCB) v Martin & Laseur* (pp. 845-857) -don’t forget about the APJA as well CONSTITUTIONAL CHALLENEGE TO THE ENABLING LEGISLATION- DIFFERENT THAN DORE**

* **Facts:** Martin and Laseur try to claim comp for chronic pain syndrome. Boards across Canada have been trying to wrestle with this because people claiming comp for an injury that lasts longer than normal, pain they report seems to be disproportionate to trauma initially suffered, and the medical profession can’t identify the pathological source of this pain
* Nova Scotia capped the amount recoverable for chronic pain
* M and L claim for chronic pain, told claim is limited to rehab program (4 week cap) and say: not fair. If I broke my arm I would have gotten full amount (6 weeks). Not fair, offends s. 16 of the Charter
* **Issue:** Can the workers compensation tribunal decide this issue?
* **NOTE:** Here, the legislature states that the board “may determine all questions of fact and law arising pursuant to this part”
* **Held**: **Adopts the LaForest Test**
* First Under s 52(1) the CA, the constitution is the supreme law of Canada and any laws that are inconsistent with it are of no force or effect. Thus, the invalidity of a legislative provision inconsistent with the Charter does not arise from the fact of it being declared unconstitutional by a court, but from the operations of s 52(1)
	+ Canadians should be entitled to assert the rights and freedoms that the constitution guarantees them in the most accessible forum available
	+ AS SUCH: TRIBUNALS CAN CONSIDER CHARTER ISSUES IN TERMS OF WHETHER PROVISION X BREACHES THE CHARTER
* **The test to take away:**
	+ (1) The first question is 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 terms of the statutory grant of authority;
		- (2)(B) implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include:
			* the statutory mandate of the tribunal at issue and whether decision questions of law is necessary to fulfilling this mandate;
			* The interaction of the tribunal in question with other elements of the administrative system
			* Whether the tribunal is adjudicative in nature
			* Practical considerations (capacity of the tribunal) these considerations cannot override a clear implication from the statute itself
	+ (3) it 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
	+ (4) The party alleging that the tribunal lack jurisdiction to apply the charter may rebut the presumption by
		- (a) pointing to an explicit withdrawal of authority to consider the charter; or
		- (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the Charter.

***Administrative Procedures and Jurisdiction Act***

* **s 11:** Notwithstanding any other enactment, **a decision maker has no jurisdiction to determine a question of constitutional law** **unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so**.
* **NOTE**: This seems to contradict the constitutional supremacy clause. Why do we allow this? A charitable reading is Because we want judges to decide these issues.
	+ A less charitable reading would be that this makes it more difficult to bring up constitutional issues and have access to justice.

***APJA* regulations**

* **All questions of constitutional law:** Alberta Labour Relations Board, Alberta Energy and Utilities Board, Law Society, labour arbitrators, Alberta Securities Commission, Alberta Utilities Commission, Energy Resources Conservation Board
* **Division of powers issues:** Alberta Human Rights Tribunal, Workers’ Compensation Board.

***R v Conway***

* **Facts:** person committed to mental health facility, found NCR by reason of mental illness
	+ Raising for years a number of complaints regarding his treatment at facility and way in which review board has been determining whether he can be released
	+ Brings argument saying that institution treatment of him and province’s continued treatment of him violate a number of his Charter rights
* **Issue:** Is the Ontario review board a court of competent jurisdiction which can grant Charter remedies under s 24(1)?
* **Held:** If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s 52 of the Constitution Act, there is no reasons why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s 24(1) of the Charter.
	+ “If an arbitrator can find a law violative of the Charter, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the charter and likewise grant remedies”
* To make this determination the **first question** is whether the administrative tribunal has jurisdiction, explicit or implied to decide questions of law.
	+ Once the threshold question has been resolved in favour of Charter jurisdiction the remaining questions is whether the tribunal can grant the particular remedy sought given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. What will always be at issues here is whether the remedy is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal.
		- Consider the tribunal’s mandate, structure, and function
* So after this case it is unclear that s 24(1) really does. It appears that s 24(1) does not give any additional powers, but simply allows for the remedies that are allowed under the statute.
	+ This could be problematic given the wording of 24(1). Couldn’t you just apply the charter remedies that you normally apply in charter cases. If we take the supremacy clause seriously, not allowing any type of remedy could be an issue.
* Lewans take:
* The remedies must be allowed for in the legislation. THIS SEEMS WEIRD to Lewans. Why shouldn’t they be able to grant any remedy it seems fit ie the constitution- the supreme law of Canada.
* If it is a really bad decision it can go to judicial review.
* Why do we need special rules?

Section 1 of the Charter

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society

**Typically decided by the Oaks test**

* (1) Does the limit have a “pressing and substantial” objective?
	+ *Big M Drug Mart,* 1985 SCC
* (2) Are the limits reasonable and demonstrably justifiable? (Proportionality)
	+ (a) Are the limits rationally connected to the achievement of the state’s objective?
		- *Benner v Canada,* 1997 SCC
	+ (b) Do the limits “minimally impair” the claimant’s *Charter* rights?
		- From “as little as possible” to “as little as reasonably possible” to “margin of appreciation”
	+ (c) Do the positive benefits of the limits outweigh the negative impact on the claimant’s *Charter* rights?
		- *Dagenais:* “even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects…”

***Doré v Barreau du Québec* CONSTITUTIONAL CHALLENGE TO HOW LEGISLATION WAS INTERPRETED**

* **Facts:** Dore wrote a letter to a justice making several personal attacks.
* The complaint that followed alleged that Dore had violated article 2.03 of the Code of ethicswhich requires that “the conduct of an advocate must bear the stamp of objectivity moderation and dignity”
	+ Dore argued that the interpretation of section violated section 2(b) of the Charter. didn’t demonstrate adequate regard to value of freedom of speech
* **Issue:** Should Courts respect tribunals regarding charter balancing?
* **KEY:** Different issue than M and L or Conway
	+ - Not arguing that Law Society of Quebec Provisions are unconstitutional
		- Arguing that admin decision that found him guilty was unreasonable because it failed to demonstrate regard to his Charter rights
* **KEY:** On judicial review, courts applied different standards of review
	+ One court applied correctness, another used Oakes (because it’s a Charter question)
	+ SCC tried to simplify it: these types of decisions that involve Charter values should be given some degree of deference. The standard of review should be reasonableness
* **HELD: Yes they should differ.** BUT The notion of deference in administrative law should not more be a barrier to effective Charter protection than the margin of appreciation is when we apply a full s 1 analysis.
* While a **formalistic application of the Oakes test may not be workable** in the context of an adjudicated decision, distilling its essence work the same justificatory muscles: balance and proportionality
* In assessing whether an adjudicated decision violates the Charter we are balancing consideration, namely, has the decision maker disproportionately and therefore unreasonably limited a Charter right. We are looking for whether there is an appropriate balance between rights and objectives and the purpose of both exercises is to ensure that the rights at issues are not unreasonably limited.
* “When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference….”
	+ “An administrative decision-maker exercising a discretionary power under his or her home statute has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values.”
* **LEWANS:** (1) There are remains of oaks in the dore analysis. Directing mind to statutory scheme as a whole, that is loser way of expressing pressing and substantial. TWU maininting the public interest and confidence in the legislative framework, access to legal education is non discriminatory
* (2) The second part is about articulating the decision in a way that you explain you acknowledge that you are limiting a charter right, but doing so in the least intrusive way. Mninimal impairment consideration in a loser sense.
* **WHY should it be reasonableness:**
	+ There is an increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation.
		- By adopting a correctness review in every case that implicates the Charter values will essentially lead to courts “retying” a range of administrative decision that would otherwise be subjected to a reasonableness standard.
* **Ultimate question:** On judicial review the question is whether in assessing the impact of the relevant charter protection, and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play
* **Note: “**How does an administrative decision maker- Apply Charter values in the exercise of statutory discretion? He or she balances the Charter values with the statutory objectives. In effecting this balancing the decision maker should first consider the statutory objectives”
	+ Then the decision maker should ask how the Charter value at issue will be best protected in view of the statutory objectives. This is at the core of the proportionality exercise and requires the decision maker to balance the severity of the interference of the Charter protection with the statutory objectives.

Reasonableness Review and the *Charter*

* How to determine whether an administrative decision dealing with *Charter* values is “reasonable”?
1. The decision should outline an attempt to balance *Charter* values with statutory objectives
2. The decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives
* **Bottom line:** “the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play
	+ Did they consider other less infringing options?

***Trinity Western University v Law Society of British Columbia***

* **Facts:** TWU proposing a law school. The University has a mandatory covenant that prohibits sexual relations outside of the bounds of traditional marriage
	+ This type of covenant violates human rights codes but TWU has exempted from the BC human rights code
	+ When TWU proposed its law school, it’s curriculum was reviewed by the federation of law societies. A committee of the federation approved TWU’s curriculum
	+ This appeal concerns a decision of the LCBC not to recognize TWU’s proposed law school.
* **Issue:** the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values
	+ **Are the law society’s decisions constitutionally valid. Do the decision infringe on the freedom of religion? If yes, if the infringement justifiable under the Dore framework**
* **Held:** In *Doré* and *Loyola*, this Court held that where an administrative decision engages a *Charter* protection, the reviewing court should apply “a *robust* proportionality analysis consistent with administrative law principles” instead of “a literal s. 1 approach”
* deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance.
* **Enabling Legislation:** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
	+ (a) Preserving and protecting the rights and freedoms of all persons,
	+ (b) Ensuring the independence, integrity, honor and competence of lawyers
	+ (c) Establishing standards and programs for the education, professional responsibility and competence of lawyers and of applications for call and admission
	+ (d) Regulating the practice of law, and
	+ (e) Supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practice law in BC in fulfilling their duties in the practice of law
* In BC they had a referendum – sent ballots to practicing lawyers in the province 🡪 were going to bring themselves to this result. A majority of practicing lawyers voted to refuse accreditation, so the law society of BC refused accreditation
	+ Was this a sufficient step in balancing?
* “This Court has held that religious freedom can be limited where an individual’s religious beliefs or practices have the effect of “injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own”
* **Dissent- Cote and Brown:** In our view, the majority fails to appreciate that the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society.
* The LSBC decision was “capable of interfering with religious belief or practice” in a manner that was **not trivial or insubstantial**
* The denial of the benefit of LSBC approval in this case negatively impacts the TWU community’s **ability to practise its beliefs** through the Covenant at an approved law school
* while the majority refers to the LSBC’s “interpretation of its statutory mandate”, the decision-making process adopted by the LSBC did not, at the time of the decision, involve *any* delineation or articulation of any particular statutory objectives.
* the LSBC’s statutory objective in rendering an approval decision is to ensure that individual applicants are fit for licensing. And, as the fitness of future graduates of TWU’s proposed law school was not in dispute, this statutory objective cannot justify any limitations on the TWU community’s s. 2(*a*) rights
* In our view, even were the majority’s overbroad interpretation of the LSBC’s statutory mandate to apply, approving TWU’s proposed law school would not undermine the statutory objectives which the majority identifies as relevant to deciding whether or not to approve TWU’s proposed law school. Accommodating religious diversity *is* in “the public interest”, broadly understood, and approving the proposed law school does not condone discrimination against LGBTQ persons.

**REMEDIES**

* Assuming there are cogent procedural or substantive grounds for challenging an administrative decision, how should those defects be remedies?
* Consider the following issues:
	+ Request a reconsideration of case? This is a cheap option
	+ More systemic problem? Could request a legislative amendment or executive intervention
	+ Refer the matter to ombudsman?
		- Independent of government, role is to investigate allegations of wrongdoing and make recommendations on how to remedy it
		- Low cost – cost of investigating and coming up with a remedy is on Ombudsman
	+ Statutory right of appeal?
	+ Application for judicial review?
* NOTE: You will always want to preserve your client’s right to appeal so be wary of time limitations

Practical Considerations:

1. Some methods of challenging an administrative decision **are more expensive** than others;
2. Consider **which appellate tribunal or court has jurisdiction over the cas**e and what the legal grounds of your appeal/application for judicial review are;

If there is a statutory right of appeal, have to exhaust appeal rights before seeking judicial review

Otherwise, there may be a jurisdictional question

1. Even if you succeed, **an award of court costs is rare**;
2. The usual remedy for most defects is to quash the decision and remit it back to the original decision-maker for another determination;
3. If your client appears before an administrative tribunal frequently, you might also have to weigh other political factors regarding the continuing relationship with that agency.
* **Basic point**, consider all the options. Develop a thoughtful strategy for vindicating your clients interests by knowing their concerns. Be direct and forthright

Historical Overview of Remedies

* Superior court judges have access to ancient common law remedies which used to be known as “prerogative relief” or “prerogative writs”:
	+ **(1)** ***certiorari***=remedy used to quash, nullify, or set aside an administrative decision;
	+ **(2)** ***prohibition***=remedy used to order a tribunal not to proceed with a matter;
		- Pre-emptive strike. Stop what it’s doing, stopping an administrative process before it even gets off the ground.
	+ (3) ***mandamus***=remedy used to compel an administrative official to perform a public duty;
		- What the error was, and directing the court to apply the law as the courts have declared. In essence it is an order directing an administrative body to do something that they do not have any choice in the matter anymore.
	+ (4) ***habeas corpus***=a remedy used to compel an administrative official to justify a person’s detention or imprisonment.
		- Most commonly used in a prison cases, immigration cases
* **Problem #1=the common law relating to prerogative relief was both highly technical and discretionary.**
	+ Result=litigants begin exploring other forms of relief associated with private law remedies, especially applications for declaratory and injunctive relief.
* **Problem #2=sometimes government would contract out public functions in order to devolve cost and evade judicial oversight.**
	+ Result=courts begin extending judicial review to private bodies that exercise “public” functions through prerogative and declaratory relief.
	+ Question of whether, and to what extent private bodies are subject to judicial review

***Alberta Rules of Court-* For decisions made about provincial bodies**

* **3.15(1)** **An originating application (chambers app) must be filed** in the form of an originating application for judicial review **if the originating applicant seeks from the Court any one or more of the following remedies** against a person or body whose decision, act or omission is subject to judicial review:
	+ (a) an order in the nature of **mandamus, prohibition, certiorari, quo warranto or habeas corpus**;
	+ (b) **a declaration or injunction**.
* **(2)** Subject to rule 3.16, an originating application for judicial review to set aside a decision or act of a person or body **must be filed and served within 6 months after the date of the decision or act**, and rule 13.5 does not apply to this time period.
	+ Questions about when this clock starts are live issues. Is it the date the decision is rendered with reasons? Announced without reasons
* **BUT 3.16(1)** **An originating application for an order in the nature of habeas corpus may be filed at any time** and must be served under rule 3.15(3) as soon as practicable after filing.
* NOTICE REQUIREMENT
	+ 3.16(1) The Minister of Justice and Attorney General or the Attorney General for Canada, or both, as the case requires, is entitled as of right to be heard on an originating application for judicial review.
* 3.18(1) An originating applicant for judicial review who seeks an order to set aside a decision or act **must include with the originating application a notice in Form 8, addressed to the person or body who made or possesses the record of proceedings** on which the decision or act sought to be set aside is based, **to send the record of proceedings to the court clerk named in the notice.**
* (2) The notice must require the following to be sent or an explanation to be provided of why an item cannot be sent:
	+ (a) the written record, if any, of the decision or act that is the subject of the originating application for judicial review,
	+ (b) the reasons given for the decision or act, if any,
	+ (c) the document which started the proceeding,
	+ (d) the evidence and exhibits filed with the person or body, if any, and
	+ (e) anything else relevant to the decision or act in the possession of the person or body.
* (3) The Court may add to, dispense with or vary anything required to be sent to the court clerk under this rule.

**What can the court do**

* 3.23(1) The court may stay the operation of a decision or act sought to be set aside under an originating application for judicial review pending final determination of the originating application.
	+ (2) Despite subrule (1) no order to stay is to be made if in the court’s opinion, they stay would be detrimental either to the public interest or to public safety.
* 3.24(1) If an originating applicant is entitled to a declaration that a decision or act of a person or body is unauthorized or invalid, the Court may, instead of making a declaration, set aside the decision or act.
* (2) The Court may
	+ (a) direct a person or body to reconsider the whole or any part of a matter,
	+ (b) direct a person or body to reconsider the whole or any part of a decision if the Court has set aside the decision under subrule (1), and
	+ (c) give any other directions it considers necessary.
* (3) If the sole ground for a remedy is a defect in form or a technical irregularity, the Court may, if the Court finds that no substantial wrong or miscarriage of justice has occurred, despite the defect,
	+ (a) refuse a remedy, or
	+ (b) validate the decision made to have effect from a date and subject to any terms and conditions that the Court considers appropriate.

***Federal Courts Act-* for federal admin bodies, like Immigration Board. Don’t use provincial rules of court, bring application in Federal Court so must use Federal Courts Act**

* Again, don’t show up in wrong court. If it is a deportation order, go to Federal Court, not QB
* **2(1)** … “federal board, commission or other tribunal” means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament by or under an order made pursuant to a prerogative of the Crown….
	+ **This is important** as there are different time limitations depending on which court
* **18(1)** …the Federal Court has exclusive original jurisdiction:
	+ (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
	+ (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a)….
* **18.1(1)** An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
	+ **(2)** **An application for judicial review** in respect of a decision or order of a federal board, commission or other tribunal **shall be made within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal** to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, **or within such further time as a judge of the Federal Court may, either before or after the expiration of those thirty days, fix or allow.**
* **18.1(3)** On an application for judicial review, the Federal Court may
1. order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
2. declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
* **18.1(4)** The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission, or other tribunal
1. acted without jurisdiction…
2. failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
3. erred in law in making a decision or an order…
4. based its decision or order on an erroneous finding of fact…
5. acted, or failed to act, by reason of fraud or perjured evidence….
6. acted in any other way that was contrary to law.

***Air Canada v Toronto Port Authority***

* **Facts**: Deals with landing slots and the distribution of them at Toronto island airport. Having more landing slots gives you a greater market share in the industry.
* There is a bidding war between Air Canada and Porter Airlines
* This decision is being made by the Toronto port authority, not the minister of transport
* Porter Airlines are given priority by the Airport Authority
* **Issue:** Can Air Canada seek judicial review of this decision by the Port Authorities under the federal courts act?
	+ **AC** argues that the port authority is operating federal power under the Federal Courts Act
	+ **PA** argues that it is not. It is a commercial decision, and they should be given all powers over these decisions. They are the exercise of the powers of contract. Courts should stay out of it.
* **Held:** The court ultimately concludes that this is a private industry and not appropriate for judicial review.
	+ This seems problematic and largely contested. It is simply the latest iteration of the consideration
* **Factors considered:**
	+ The character of the decision being challenged;
	+ The nature of the decision-maker
	+ The extent to which the decision is governed by law or (conversely) private opinion
	+ The relationship between the decision-maker and other branches of government
	+ The extent to which the decision-maker falls under governmental control
	+ The suitability of public law remedies
	+ Whether the conduct has attained a serious public dimension
* **NOT SURE IF THIS REALLY DOES MUCH TO DIFFERENTIATE BETWEEN PUBLIC AND PRIVATE**
	+ Justice ultimately finds that the decision to do this is commercial and therefore private, courts shouldn’t be meddling in this

***Highwood Congregation v Wall***

* **Facts:** Member of a congregation of Jehovah witnesses. Wall’s daughter is shunned from the community. Family members are told to not maintain contact with daughter. He doesn’t do this and he is punished.
* He succeeds at the court of appeal.
	+ There is a strong dissent though. Judges should have no place deciding these highly private
* **Issue:** Should common law principles of procedural fairness apply to voluntary associations? Where is the line between “public” and “private” law?
* Justice Rowe makes some very broad and serious statements:
	+ (1) Judicial review is reserved for state action -**questionable**
	+ (2) There is no “free-standing” right to procedural fairness-**fair to say. You do always need some conceptual factor (some statutory delegation of power)**
	+ (3) Even when judicial review is available, the court will only consider justiciable issues (matters of religious belief and discipline are non-justiciable).
* **Question:** should members of religious community have a right to seek judicial review where they feel discipline is unjust.
* **Para 20**: “In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker’s exercise of power.”

**Stays of proceedings**

* Assuming that you have a viable application for judicial review, can you get a stay of proceedings while that application is pending
* The burden will be on the applicant to show why a stay would be in the public interest

**Stay of Proceedings: *Alberta Rules of Court***

* 3.23(1) The Court may stay the operation of a decision or act sought to be set aside under an originating application for judicial review pending final determination of the originating application.
	+ (2) Despite subrule (1), no order to stay is to be made if, in the Court’s opinion, the stay would be detrimental either to the public interest or to public safety.
* **This power is discretionary, you need to convince the court that it is appropriate in the circumstances.**

**Stay of Proceedings: *The Federal Courts Act***

* S 18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

***Manitoba (Attorney General) v. Metropolitan Stores***

* **Facts:** Unionizing drive in Manitoba. It was an early charter case. Employer challenging the constitutionally of legislation that allows the labour board to impose the first collective agreement.
* The relationship between employer and the union broke down so that they don’t even want to talk to eachother. Imposing this first agreement allows the parties to get on with their contract etc.
* **Charter argument:** Employer argues that by imposing this first agreement it breach the charter rights by freedom of expression and association and s 7 (freedom of contract liberty)
	+ By forcing contract you are forcing to agree to things we don’t believe in.
* **Question**: Can there be a stay of proceedings to pause the labour relations board from enforcing that contract while the charter challenge is going on.
* **Held: There is a 3 part test in determining whether a stay should be granted: (1) Is there a serious question to be tried; (2) would the litigant asking for stay suffer irreparable harm if the stay is not granted; (3) balance of (in) convenience test.**
* Serious issue to be tried:
	+ We won’t enforce the stay of proceedings unless the complainant is arguing a case that has merit.
		- There are 2 strengths of cases: (1) Prima facie case; (2) or “serious issue to be tried” to be heard
	+ The court adopts the lower threshold of “serious issue to be tried.” Prima facie the case shows that the facts make it feasible that the case is made out on a interlocutory motion.
		- By lowering the threshold, you don’t need to make the case out on the facts, but you need to show you’re not wasting the courts time, not being a vexatious litigant.
* Irreparable harm?
	+ You need to show that failing to grant a stay of proceedings would expose one of the litigants to irreparable harm. Harm that cannot be compensated by an award of damages
	+ **Why?**
	+ It is clear here that the employer wants to keep this a non-unionized workplace. How do you quantify the harm to the employer by keeping this so.
	+ Tough to show
* **Balance of (in)convenience:**
	+ Determination of which of the two parties will suffer the greater of the harm of the granting or refusal of a stay of proceedings
		- You try to determine who would suffer the greater harm. Will it do more harm than good?
	+ We have to look why the labour relations board granted this power in the first place. Having labour relations devolve is bad for the public.
	+ The court says that while this may not be the ideal situation, we have given government agencies the power to do this
* **At the end of the analysis where we look at the public interests, on a whole it would be more harmful than not to grant a stay of proceedings**.
	+ Result in job losses
* The balance of convenience is where cases will be won or lost. You need to be able to make and argument as to why is it in the public interest as well as your client’s interest. You may need to get creative.

***RJR MacDonald Ltd. v. Canada (Attorney General)*- LAYS OUT THE 3 PART TEST WELL**

* **Facts:** Changing cigarette packaging. It infringes freedom of expression
* While the litigation is ongoing they apply for a stay of proceedings. To prevent parliament to stop this decision from coming in.
* Having to change this will cause irreparable harm. They need to show it is in the public interest
* There is a reaffirmation of the 3 prongs **Requirements for a stay of proceedings in cases involving constitutional challenges to enabling legislation:**
	1. Applicant must establish that the constitutional challenge “is not frivolous or vexatious; in other words, that there is a serious question to be tried”;
	2. Applicant must establish that failure to grant a stay of proceedings will result in “irreparable harm”, which cannot be compensated by money damages;
	3. Applicant must establish that the balance of convenience, which includes consideration of the public interest, weighs in favour of a stay of proceedings.
* “Public interest” includes both the concerns of society generally and the particular interests of identifiable groups.
	+ “The test [for demonstrating irreparable harm to the public interest] will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.”
* **You really need to be able to show how granting a stay of proceedings would be in the public interest.**
	+ Would the public interest be furthered by granting a stay of proceedings

**Injunctions in Aid of administrative process**

* Problem=What happens if the enabling legislation does not empower an administrative agency to grant interim remedies or rulings while an application is pending before it?
* Solution=Apply for interim order from a court which has inherent jurisdiction to grant interim relief (QB).

***Brotherhood of Maintenance v. Canadian Pacific Ltd.***

* **Facts:** Unionized workplace. CA expires. While there is a grievance outstanding under the previous under the previous CA, employer moves to have a new work schedule to be put in place.
* **Issue:** Does the superior court have jurisdiction to award an interlocutory injunction to restrain an employer from implementing a change to work schedules pending the outcome of the arbitration ?
* Union goes to BCSC to issue injunction on employer from imposing the proposed changes.
* The governing principle on the issues is that notwithstanding the existence of a comprehensive code for settling labour disputes, where “no adequate alternative remedy exists” the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the courts”
	+ **S 36 Law and Equity act BC:** Court has power to grant injunction where it is convenient or just to do so.
* There are similar cases in the federal court granting an injunction in the *Liberty Net* case.

***Canada (Human Rights Commission) v Canadian Liberty Net***

* *Federal Courts Act*, s 44
* **44.** In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just
* These cases give you the ability to apply to an ability of a Canadian superior court (queens bench, of federal court if it is federal statute) for an interim injunction

**STANDING**

* Interesting issue in the modern context. There are a variety of non-governmental groups getting involved in these sorts of cases where they weren’t in the past.
* **The question is:** Can these groups, who do not have property rights in the matter, but are interested in the regulatory processes, have standing to bring judicial review?
* **The traditional test:** Was only individuals who had been **personally affected by an administrative decision could challenge that decision via judicial review.**
	+ Historically speaking, private citizens were not entitled to initiate judicial review proceedings.
* Over the past 30 years, **Canadian law regarding standing has been relaxed to enable a broader role for citizens and public interest groups in holding administrative officials to account for their decisions through judicial review**

Standing in Canadian Constitutional Law

* ***Thorson v Canada (AG):***taxpayer has standing to challenge the constitutional validity of the *Official Languages Act,* because no other person is directly impacted by the legislation and the Attorney General refuses to be added to the lawsuit.
* ***Nova Scotia Board of Censors v McNeil*:** a concerned citizen has standing to challenge the constitutionality of legislation because there was a serious issue to be tried, there was no other prospect of challenging the legislation when the Attorney General refused to take action, and members of the public are directly affected by the Board’s decision.
* ***Canada (Minister of Justice) v Borowski***: member of the public has standing to challenge the constitutionality of *Criminal Code* provisions, because he has established:
	+ **(1) there is a serious issue of constitutional validity;**
	+ **(2) he is directly affected by the legislation or has a genuine interest as a citizen in testing the constitutionality of the legislation; and**
		- **You have a direct interest in this. You can just be wasting the Court’s time.**
	+ **(3) there is no other reasonable or effective manner in which he can bring the issue before the Court.**

Introduction to Standing

* Is a liberal approach to standing a good thing?
	+ From one perspective, a liberal approach to standing enhances public accountability through judicial review;
	+ From another perspective, it imposes additional burdens on superior courts, favors those parties who have superior resources to launch court actions, and makes the administration of public programs less efficient and cost-effective.
* Is more always better? Having a more diverse group of voices a good thing? Does it enhance the prospect of public accountability
* On the other hand, not everyone is in the position to have the assets to hire a lawyer to take a case to the supreme court. So perhaps this only allows for the well off to be able to take cases to the end.

***Finlay v Canada (Minister of Finance)***

* **Facts:** Welfare recipient. Alleging that the province of MB is not complying with federal the legislation that sets the baseline for welfare.
	+ At some point the MB agency responsible for delivering those payments start clawing back benefits. Claiming that he received an overpayment. Finlay disputes this.
* He brings an **application for judicial review**. Saying that the program is inconsistent with the baseline set by the Federal legislation.
* **Discussion:** under the traditional line of standing, F would need to show that he has a personal interest in the case. Personal damage or prejudice. Government action affects his legal rights.
	+ A private individual may not sue for declaratory or injunctive relief unless he can show what amounts to a sufficient private or personal interest in the subject matter of the proceedings.
* F argues that he has standing as the government is taking away his money. BUT he isn’t bringing it against the agency. He is saying that the province is not complying with the federal statute.
	+ He is suing the federal government to enforce their own legislative requirements on the province of MB.
	+ BUT **under the Canada assistance plan he has no legal rights**. It is a legislative framework for the federal government to redistribute money to the provinces.
	+ CAN he bring this application as of right that he has suffered special damages that ensue from federal government’s failure to enforce its framework
* **HELD**: Does not have **private interest standing**, but does have PUBLIC interest standing.
	+ He was denied because the federal legislation did not provide Mr. F with welfare benefits, this was done under the provincial acts. So he had no special standing under the federal act.
* (1) He argues that he has private standing in that he has a special interest as his welfare benefits have diminished as a result of the failure to comply with federal statute. It is a causation argument. Cause is the failure of the federal government to enforce the terms of the Canada assistance plan.
	+ Court rejects this. The causal relationship was too indirect. He couldn’t establish that he suffered any special direct damage. Although there was difficulty with this, the relationship between the prejudice caused and the alleged invalidity of the legislation is too indirect.
* (2) Public interest standing: Is this one of those cases where an interested member of the public can sue in order to ensure that governmental institutions are fulfilling their obligations.
	+ The court attempts to outline some general guidelines: Consider:
		- problems associated with scarce federal resources,
		- vexatious litigants

**Test for Public Interest Standing from Finlay**

1. **Does the applicant raise a serious, justiciable issue regarding the legality of administrative action?**
	1. Doesn’t need to be a prima facie case. But there must be some issue: Procedural fairness, unconstitutionality, does it appear that an administrator was biased, etc.
	2. You cannot just say “I am genuinely concerned”
2. **Does the applicant have a genuine interest in the outcome or are they a “mere busybody”?**
	1. This concerns vexatious litigation. Although Mr. F may not be able to show that he has private interest standing, he has sufficient grounds to show that he has actual interest in ensuring that provincial assistance schemes are according with the federal statute.
3. **Is there another reasonable and effective manner to bring this issue before the court? Is the Attorney General or another interested party likely to bring an application for judicial review?**
	1. Is there another litigant that might be better placed to bring this action. As part of this analysis, courts really **like to see that the AG has been apprised** of the situation and has refused to take action.
	2. NOTE THIS WAS ALTERED A BIT IN CANADA V DOWNTON SEX WORKERS

***Canada (Attorney General) v Downtown Eastside Sex Workers***

* **Dealt with the 3rd factor:** Same framework, but they say not necessarily that is this the best way for this case to be brought about, but, “is this a reasonable way that this case should be brought about”
	+ It is not whether there are no other means that this action could be brought about. But whether allowing this action to be brought would let the court deal with the legal issues effectively
	+ Does the body have the ability to litigate this issue.
	+ Are there realistic alternative means that might be more efficient or effective?
* What you’re seeing is an increasing liberalization in the law of standing. It is easier than it once was to have standing.
	+ That said there is still some tension about public interest standing. It is giving lower courts some factors to consider in whether a party should be given standing