

ADMINISTRATIVE LAW CANS

Fall 2018 – Sjolie & Kellgren



Table of Contents

[**Chapter 2: The Role of Judicial Review** 4](#_Toc531858788)

[1. JUDICIAL REVIEW 4](#_Toc531858789)

[2. STATUTORY APPEAL 4](#_Toc531858790)

[GROUNDS FOR JUDICIAL REVIEW 4](#_Toc531858791)

[1. Procedural impropriety 4](#_Toc531858792)

[2. Illegality 4](#_Toc531858793)

[3. Unreasonableness: 4](#_Toc531858794)

[4. Unconstitutionality 4](#_Toc531858795)

[**Chapter 3: Fairness – Sources and Thresholds** 6](#_Toc531858796)

[SOURCES OF PROCEDURAL PROTECTIONS/REQUIREMENTS 6](#_Toc531858797)

[1. Common Law - Procedures 6](#_Toc531858798)

[2. Legislation 7](#_Toc531858799)

[3. Subordinate Legislation 7](#_Toc531858800)

[4. Policies and Guidelines 7](#_Toc531858801)

[5. Constitutional and Quasi-Constitutional Sources 8](#_Toc531858802)

[THRESHOLD TEST – WHAT KINDS OF DECISIONS LEAD TO PROCEDURAL FAIRNESS 8](#_Toc531858803)

[1. Common Law Threshold 8](#_Toc531858804)

[2. Executive Policy Making Government Decision Making – Cabinet and Cabinet Appeals 9](#_Toc531858805)

[3. Bylaws and Rulemaking Threshold 9](#_Toc531858806)

[4. Policy Making Threshold 9](#_Toc531858807)

[5. Inspections and Recommendations Threshold 10](#_Toc531858808)

[6. Threshold for Emergencies 11](#_Toc531858809)

[7. Threshold for Legitimate Expectations 11](#_Toc531858810)

[8. Constitutional and Quasi-Constitutional Threshold 12](#_Toc531858811)

[9. Alberta’s Administrative Procedures and Jurisdiction Act - Threshold 13](#_Toc531858812)

[IS A DUTY OF FAIRNESS OWED? 13](#_Toc531858813)

[APPROPRIATE CONTENT OF “PROCEDURAL FAIRNESS” 14](#_Toc531858814)

[5 factors from *Baker:* 14](#_Toc531858815)

[ALBERTA’S ADMINISTRATIVE PROCEDURES AND JURISDICTION ACT 15](#_Toc531858816)

[THE PROCESS (PRE-HEARING/HEARING/POST-HEARING) 15](#_Toc531858817)

[PREHEARING 15](#_Toc531858818)

[1. Pre-hearing Issue: Notice 15](#_Toc531858819)

[2. Pre-hearing Issues: Discovery/Disclosure 16](#_Toc531858820)

[3. Pre-hearing Issue: Delay 17](#_Toc531858821)

[HEARING 18](#_Toc531858822)

[1. Hearing issue: Oral versus Written 18](#_Toc531858823)

[2. Hearing Issue: Open Hearings 18](#_Toc531858824)

[3. Hearing Issue: Right to Counsel 19](#_Toc531858825)

[4. Hearing Issue: Disclosure at Hearing Stage 19](#_Toc531858826)

[5. Hearing Issue: Right to Cross-Examine 21](#_Toc531858827)

[POST-HEARING 22](#_Toc531858828)

[**There is a duty to give reasons where the decision (*Baker*):** 22](#_Toc531858829)

[BIAS AND LACK OF INDEPENDENCE 23](#_Toc531858830)

[(1) CLOSED MIND 23](#_Toc531858831)

[(2) REASONABLE APPREHENSION OF BIAS 23](#_Toc531858832)

[1. Antagonism 23](#_Toc531858833)

[2. Bias by Association 23](#_Toc531858834)

[3. Involvement by a Decision-Maker in Preliminary Stage 23](#_Toc531858835)

[4. Attitudinal Bias 24](#_Toc531858836)

[5. Pecuniary Interest (having monetary interest in the matter) 25](#_Toc531858837)

[6. Statutory Authorized Bias 25](#_Toc531858838)

[**Chapter 10: Standard of Review** 27](#_Toc531858839)

[INTRODUCTION 27](#_Toc531858840)

[WHAT IS THE STANDARD OF REVIEW? 27](#_Toc531858841)

[STANDARD OF REVIEW PRE-*DUNSMUIR* 28](#_Toc531858842)

[3 Standards of Review Prior to *Dunsmuir* 28](#_Toc531858843)

[WHAT IS REASONABLENESS? 29](#_Toc531858844)

[Presumption of Reasonableness 29](#_Toc531858845)

[Where does correctness apply? 29](#_Toc531858846)

[POST-*DUNSMUIR* ANALYSIS -- 2.5 STEP PROCESS 30](#_Toc531858847)

[Cases Decided Post-*Dunsmuir* 30](#_Toc531858848)

[PRIVATIVE CLAUSES AND STATUTORY RIGHTS OF APPEAL 31](#_Toc531858849)

[1. Privative Clauses 31](#_Toc531858850)

[Reasons for privative clauses: 31](#_Toc531858851)

[2. Statutory Appeals 31](#_Toc531858852)

[Recap 32](#_Toc531858853)

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| **Chapter 2: The Role of Judicial Review** |

**2 legal processes in court to review a decision:** (1) CL Judicial Review & (2) Statutory Appeal

## JUDICIAL REVIEW

* CL remedy of legal review pursuant to *Judicature Act*. Superior court intervening in a decision
* Perogative writs you can ask for under judicial review:
  + *Certiorari:* quashing decision and sending it back to decision-maker to be reheard and redecided
  + *Mandamus*: compelling an action by a decision-maker (uncommon)
  + *Prohibition*: bringing application to prevent them from doing something
  + *Habeas Corpus*: freeing someone from unlawful detention or incarceration
  + *Quo Warranto*: removing someone from public office

Function of Judicial Review:

1. Reasonableness and fairness of the administrative process
2. Reasonableness and fairness of the outcome

From Judicial Review perspective, admin law has 2 concerns:

1. Procedural: the process by which a decision is reached
2. Substantive: the merits of that decision

## STATUTORY APPEAL

* Superior Court/QB, CA (prov or federal)
* Often limited by words in a statute (e.g. questions of law or jurisdiction)
* Look to the statute! (No two tribunals are the same)
  + may be direct appeal to superior court, w/ or w/o leave
* Judicial review of certain decisions prohibited by statute

\*Common to try and bring both concurrently to maximize power of review.

\*Courts have absolute power to review administrative decision making

## GROUNDS FOR JUDICIAL REVIEW

### Procedural impropriety

* 1. Administrative agency has duty to act in procedurally fair manner (varies on circumstances)
  2. Fundamental protections that courts want to make sure you get

### Illegality

* 1. Administrative agency can only do what it is empowered by law to do, pursuant to statute. If the statute doesn’t authorize it 🡪 arguably illegal
  2. Public decision-maker is the creation of the statute (statute being its legal authority
  3. Difference between illegality and jurisdiction:
     1. Jurisdiction: what it has legal authority to decide
     2. Illegality: illegal for admin tribunal to make decision about your home based on your religion – it’s bias and an irrelevant consideration. Can’t make a decision that way

### Unreasonableness:

* 1. Administrative agency has a legal duty not to exercise its power unreasonably
  2. Duty to make decisions that are reasonable in the sense that it’s a rational decision on its face
  3. Maybe decision is reasonable but the way in which they went about it was unreasonable

### Unconstitutionality

* 1. Administrative action may be impugned in court on the ground that it breaches the Constitution
     1. Must be a Constitutionally entrenched right that is being breached (i.e. s.7) life, etc.)

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| *Baker v Canada (Minister of Citizenship and Immigration)* – seminal case for procedural fairness – ON EXAM!!!\*\* | |
| Facts | Jamaican citizen living in CA. Ordered to be deported in ’92 and she applied for an exemption for the requirement to apply for permanent residence outside Canada based on humanitarian and compassionate considerations. |
| Issue | Is there sufficient humanitarian or compassionate considerations to not require her to leave the country to apply for status? |
| Holding | SCC: unreasonable to not give her an exemption humanitarian and compassionate grounds |
| Analysis | * If she doesn’t have H&C grounds, then who does? * Look to circumstances 🡪 in CA for 19 years, 4 kids, no connection/support in Jamaica, MI   Were the principles of procedural fairness violated?   * Officer Caden’s failure to provide reasons didn’t violate procedural fairness – didn’t have a duty to give reasons b/c of statute 🡪 wide breadth of authority given to him * Discretion was improperly exercised because there should have been consideration for the interests of Ms. Baker’s children. Need to look at the impact on them. |
| Ratio | Procedural fairness comes into play whenever you have an admin decision that affects the rights, privileges and interests of an individual.  Factors relevant to determining what is required by CL duty of procedural fairness:   1. **Nature of the decision**: (how close is the admin process to the judicial process?    1. The more judicial-like, the more likely procedural protections closer to the trial/judicial model will be required 2. **Nature of the statutory scheme:** role of the decision within the legislative scheme. Greater protection where decision is final 3. **Importance of the decision to the individual(s) affected\*\*:** the greater the impact, the more stringent procedural protections required    1. This was Baker’s strongest factor for getting greater procedural fairness – should have been lots there 4. **Legitimate expectations of the person challenging the decision**    1. ONLY PROCEDURAL – can’t plead on substantive grounds    2. The bigger the impact, the higher the burden to meet that expectation    3. Generally unfair for admin decision-maker to act contrary to representations it has made as to procedure or to backtrack on substantive promises w/o according significant procedural rights    4. Legitimate expectations only go to expectations of the procedure (doesn’t extend further i.e. the result of the decision). (I.e. procedural rights 🡪 right to a hearing, etc.) 5. **Choice of procedure made by the administrative agency/institutional constraints**    1. Officers to look at case and make recommendation    2. Considerable flexibility in the legislation allowing them to do that |

**PROCEDURAL FAIRNESS NOTE:** TEST: “would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude that it is more likely than not that the decision-maker. Whether consciously or unconsciously, decided this matter fairly?” AKA 🡪 “Is it reasonable in the circumstances for a reasonable person to believe that the decision-maker was acting in an unbiased (fair) manner?) *Baker*

Legislative function or act (public decision) 🡪 no need to provide procedural fairness – no hearing for regulation to pass

* Threshold for procedural fairness almost 0 but everything else a litte bit (cabinet, ministers, etc.)

Public consultation is a big thing 🡪 AB wants new act so send it out for public consultation, gives you the right to be heard

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| **Chapter 3: Fairness – Sources and Thresholds** |

Hard to define but easy to recognize

Consider:

* Irrelevant considerations?
* Does the applicant know the case to be met?
* Any reasons provided? Sufficiently intelligible?
* Reasonable result?

## SOURCES OF PROCEDURAL PROTECTIONS/REQUIREMENTS

1. CL
2. Legislation
3. Subordinate legislation
4. Policies and guidelines
5. Constitutional and quasi-Constitutional sources

### Common Law - Procedures

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| *Cooper v Board of Works for Wandsworth District* (1863) | |
| Facts | Had to give notice to municipality if he was going to build. Started building two days early and municipality tore his house down (he was in contravention of the Act) but they didn’t give notice that they would tear his house down. Property rights of the individual are important! |
| Holding | Unfair that he didn’t get notice that his house was going to be torn down  Concerns property rights - importance |
| Ratio | Initial CL case in which the courts rallied against the failure of those in authority to provide a hearing before making a decision affecting the rights of a specific citizen |

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| *Nicholson v Haldimand-Norfolk Regional Police Commissioners* [1979] | |
| Facts | Served as constable for 15 months and discharged w/o being given opportunity to make submissions. |
| Holding | Board should have provided notice and allowed him to be heard |
| Ratio |  |

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| *Cardinal v Director of Kent Institution –* right to be heard case | |
| Facts | Appellant inmates involved in hostage-taking incident in prison. Placed in segregation by warden’s oral direction even after Board said to release them. |
| Issue | Were the appellants denied procedural fairness in the imposition and continuation of their segregation? |
| Holding | The appellants had a right to be heard. It’s directly affecting their rights in a major way – owed procedural fairness! |
| Ratio | There is a duty of procedural fairness on a public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.  \*There is, as a general common law principle, a duty of procedural fairness lying in every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual” 🡪 if it’s legislative (act of Parliament or legislature), that might not be something you’ll get procedural fairness on. |

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| *Knight v Indian Head School Division No 19* [1990] 1 SCR 653 | |
| Holding | Procedural fairness was due, but met |
| Ratio | Sets out the threshold – existence of general duty to act fairly depends on consideration of 3 factors:   * + - 1. Nature of the decision to be made by the administrative body       2. The relationship existing between that body and the individual; and       3. The effect of that decision on the individual’s rights   “The concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case…” (*Baker*)  “…not all administrative tribunals are under a duty to act fairly…decisions of a legislative and general nature can be distinguished in this respect from acts of a more administrative and specific nature, which do not entail such duty. The finality of the decision will also be a factor to consider…” |

### Legislation

* **ENABLING STATUTE** 🡪 always look here first!
  + Statute law > CL (CL fills in gaps of procedural fairness but where statute prescribed procedural fairness, statute governs)
  + Different process available 🡪 public hearing vs court-like
  + Bottom line: procedural fairness is contextual, variable in that every statute and decision maker will be slightly different. Need to know what the statute provides re procedural fairness and follow the process. Courts will defer in large measure to procedural requirements under the legislation
  + Tribunal is NOT A COURT

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| *Singh v Canada (Minister of Employment and Immigration)* | |
| Facts | Two individuals claiming refugee status (making application), denied status w/o hearing. Arguing they were denied fair process and procedural fairness b/c they didn’t get a hearing. |
| Holding | Procedures in the *Act* are incompatible w/ s.7 of the Charter 🡪 not a reasonable limit within the meaning of s.1 |
| Analysis | * Appellants entitled to s.7 of the *Charter* * Courts can’t import into the duty of fairness procedural constraints on the Committee’s operation which are incompatible with the decision-making scheme set up by Parliament |
| Ratio | *Charter* trumps statute! If the statute is against you and you’re not being afforded the same level of procedural fairness protecting rights as you think it should be 🡪 go to Charter.  In cases where legislation expressly denies certain procedural safeguards or provides a lower level of procedural safeguards and there is no room for CL supplementation, only constitutional or quasi-constitutional norms may override the statute and mandate more significant procedural protections |

* CL right to fairness, notice, opportunity to be heard, ability to meet the case against you, right to reasons, right to written decision. As CL develops, it’s incorporated into statutes then they become entrenched in statute law and trump CL.
* Go to tribunal’s statutes to see what level of procedural fairness they have
* Where it’s lacking, you may be able to add to it with CL
* If you’re denied procedural fairness under the statute, what remedies are available?
  + Statutory remedies
  + JR (if you have it)
  + If you don’t have any of the above, left only with *Charter* challenge (tough to make out)
* **ADMINISTRATIVE PROCEDURES AND JURISDICTION ACT**
  + VERY FEW MADE SUBJECT TO THIS *Act* but it exists and can be imported into particular tribunal
  + If there’s nothing in the statute, look for a separate procedures act that might set the rules of procedure for that tribunal (most have their own within regulation/guideline/procedural set of rules)
  + Procedures contained in subordinate legislation and policy

### Subordinate Legislation

* Legislation authorized under statute to be enacted either by regulation or delegated authority for the board itself to set up its own procedural rules or processes/guidelines
* Regulations/rules enacted by lieutenant governor in council, minister responsible or the agency itself 🡪 have regard for that and understand what the rules are
* *Baker* guidelines 🡪 not binding on court but they’re mindful of them, taking them into consideration when reviewing whether fairness was extended
* Many agencies address procedural matter in a rule/set of rules (e.g. AUC Rule 001: *Rules of Practice*)

### Policies and Guidelines

* Public authorities may issue guidelines and authorities
* Guidelines that support a reasonable decision-making analysis or rationale to support the reasonableness of the decision: not legally binding by play role in agency’s decision-making
* *Baker:* ministerial guidelines “as a useful indicator” of what constitutes reasonable interpretation of the minister’s power
* Example: MGB’s Rules (Annexation Rules, Subdivision Rules, Intermunicipal Dispute Rules, etc.)
* Not as persuasive but they can be relevant (used in *Baker*)

### Constitutional and Quasi-Constitutional Sources

* Last resort!
* *Canadian Bill of Rights (*and *Quebec Charter of Human Rights and Freedoms*)
* *Canadian Charter of Rights and Freedoms*
* In cases where legislation expressly denies certain procedural safeguards or provides a lower level of procedural safeguards and there is no room for CL supplementation, only constitutional or quasi-constitutional norms may override the statute and mandate more significant procedural protections *(Singh)*

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| *Amarantunga v Northwest Atlantic Fisheries Organization* | |
| Facts | NAFO – intl org w/ immunity (immune from certain laws within the CA legal system. Fired one of its employees and was sued for wrongful dismissal.  A brings claim for breach of contract for wrongful dismissal and lack of fair hearing relating to their claim |
| Holding | SCC: NAFO immune from breach of contract action and from fairness concept around right to hearing, right to reasons, to know case against you, etc. Courts to enforce them to adhere to own internal process |
| Analysis | * NAFO had internal process giving employees right of disputing their termination   + Able to gain fairness through admin procedure NAFO had put in places themselves |
| Ratio | When dealing with an international entity with immunity (and thus not subject to procedural fairness rights), look to the internal documents, rules and processes of the organization. |

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| *Reference re BC Motor Vehicle Act,* [1985] | |
| Facts | BC Motor Act challenged constitutionally on the basis that their establishing a min imprisonment for an absolute liability offence was contrary to s.7 Charter rights. |
| Holding | Act inconsistent with s.7 |
| Analysis | When you couple a complete liability offence (once you prove it’s fact, you’re liable – no defences) with imprisonment, you’ve fundamentally breached the rules of FJ under the *Charter.* |
| Ratio | Extreme case where the Charter can be used as a last resort.  PFJs under the *Charter* DO NOT equal procedural fairness |

## THRESHOLD TEST – WHAT KINDS OF DECISIONS LEAD TO PROCEDURAL FAIRNESS

### Common Law Threshold

* Courts won’t result to CL rules to read in hearing requirements unless the decision-maker was exercising a “judicial” or “quasi-judicial” function
* Court-like system has lots of procedural fairness built in (admin not so much). If judicial or quasi-judicial (making decision like a court), then at least at CL, there will be a threshold criteria that courts will look at in deciding whether or not you had procedural fairness

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| *R v Legislative Committee of the Church Assembly,* [1928] 1 KB 411 | |
| Ratio | Final decision, bearing on rights (not ‘mere privileges’) and judicial in nature – no fairness |

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| *Martineau v Matsqui Inmate Disciplinary Board* [1980] 1 SCR 602 \* | |
| Facts | Disciplinary decision on inmate. Appealing to disciplinary board – not allowed to present in front of them, give evidence or hear evidence against him being given to the board as to why he was being convicted, |
| Issue | Was he entitled to a degree of procedural fairness in front of the disciplinary board? |
| Ratio | Any public body exercising powers over subjects amenable to judicial supervision, the individual interests involved is a factor to be considered in resolving whether judicial review is appropriate for that particular administrative body. |

\*\*Recall *Cardinal v Director of Kent Institution* and *Knight v Indian Head School Division No 19*

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| *Wells v Newfoundland* [1999] 3 SCR 199 | |
| Facts | Wells (commissioner) appointed to Public Utilities Board, lost his position (position erased as a result of board restructuring under new legislation). Wells argued he had a right to fairness in the decision leading to the loss of his decision |
| Analysis | * Government decision to restructure the board (decision legislative in nature) and not subject ot duty of fairness. * As long as they’re acting constitutionally and not offending the Charter, there’s no procedural fairness |
| Ratio | Legislative in nature = NO PROCEDURAL FAIRNESS! |

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### Executive Policy Making Government Decision Making – Cabinet and Cabinet Appeals

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| *Bell v CRTC??* | |
| Facts | * Bell CA applying for rate increase * Inuit Tapirisat intervened and asked CRTC to condition rate increase on an obligation for Bell to provide better service to the remote communities 🡪 CRTC said no * Inuit Tapirisat appealed decision to Governor in Council * Department of Communications received submissions from CRTC and Bell (IT only given Bell’s) * At cabinet meeting, Minister of Communications made recommendation to dismiss appeal (accepted) |
| Issue | Was the Governor in Council required to give the Inuit Tapirisat a hearing? |
| Holding | No |
| Analysis | * While CRTC must operate within a certain framework, the legislation didn’t burden the executive branch with any standards or guidelines in its review. |
| Ratio | No hearing is required in legislative cases! // *Maxim audi alteram partem* not implied in every case  Note \* had it been appealed to the CRTC and not the Cabinet, it would have warranted procedural fairness  Cabinet more legislative and thus doesn’t warrant procedural fairness |

Note on *TransMountain Pipeline:* JR didn’t lie for the recommendation decision of the NEB – weren’t making a decision, they were only making a recommendation (per Federal Court of Appeal).

* Although fair in process (not subject to JR so why talk about procedural fairness?), they made a critical error in the hearing they conducted 🡪 didn’t consider impact of ships coming into port on killer whale populations.
* Note re duty to consult: you need a person of authority that can make (quasi) binding deals with the indigenous people – have to see real two-way negotiations, accommodations with people charged with authority to do that. High standard of consultation!

### Bylaws and Rulemaking Threshold

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| *Homex Realty v Wyoming,* [1980] 2 SCR 1011 | |
| Facts | Municipal case – Municipality and Homes (developer) disagreed about installation of services in subdivision in which Homex owned lots. Municipality passed bylaw which had effect of preventing the developer from selling lots in the development w/o registered a new plan of subdivision or obtaining consent from the municipality.  \*Legislation didn’t require notice prior to passing bylaw  \*Homex brought application for JR seeking to quash bylaw |
| Issue | Was Homex owed a discretional remedy based on the duty of procedural fairness? |
| Holding | Homex not entitled to remedy (no clean hands) – court recognized that duty of fairness was breached |
| Analysis | * JR and cearsaroari are prerogative writs at CL 🡪 they’re discretionary (not a right) and to get them you need clean hands. * In this case 🡪 went behind the backs of the municipality |
| Ratio | If you are seeking a discretionary remedy, such as judicial review, you need clean hands in front of the court |

### Policy Making Threshold

* If it’s policy 🡪 close to legislative so it’ll be a difficult threshold to get fairness within and to get JR

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| *Vanderkloet v Leeds & Grenville (County Board of Education)* | |
| Facts | School board decided to reorganize 3 elementary schools. Group of ratepayors challenged decision |
| Issue | Do the principles of procedural fairness apply to a board of education? |
| Holding | They do not apply to a board of education who, in good faith and within the jurisdiction assigned to it by the legislature, resolved to reallocate the student body within its district. |
| Analysis | Within their jurisdiction assigned to it by the legislature to reallocate student body within its district |
| Ratio | Procedural fairness rules will not apply to a board exercising authority assigned to them by the legislature, in good faith. |

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| *Bezaire v Windsor Roman Catholic Separate School Board* | |
| Facts | School board decided to close 9 schools. Contrary to ministerial guidelines and its own policy on school closings, parents and students weren’t given opportunity to provide input before the decision was made |
| Holding | Community entitled to be consulted before the decision to close the schools was made |
| Analysis | Even though the guidelines weren’t legislation (not binding), they had rules that set out the procedure and they didn’t follow them. Not technically subordinate leg as it wasn’t binding, but it resulted in the applicability of procedural fairness. |
| Ratio | Where there are rules that set out the procedure and one doesn’t follow them, it will likely result in the applicability of procedural fairness. NEED TO FOLLOW THEM |

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| *Canadian Association of Regulated Importers v Canada (AG)* [1994] | |
| Facts | Decision of Minister for International Trade allocating import quotas for hatching eggs and chicks  Legislative policy making |
| Holding | Decision quashed by trial judge |
| Analysis | Minister was exercising a statutory power which had been delegated to him |
| Ratio | Even if exercising a statutory power which has been delegated to you, there is an implied principle of procedural fairness, which includes that notice should have been provided and an opportunity for those potentially affected to comment. |

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| *Webb v OHC?* | |
| Facts | Webb and children became tenants 3 years later, property management company recommended termination of their lease to the ON Housing Corporation based on Webb’s children. Webb applied for review of the OHC decision, application dismissed and she appealed |
| Issue | Was the OHC required to treat Webb fairly? |
| Holding | They were required to treat Webb fairly but they satisfied the requirement of fair treatment |
| Analysis | By depriving Webb of the benefit of the lease, OHC was required to treat her fairly by telling her of the complaint(s) or case against her and give her an opportunity to answer  BUT 🡪 they provided various notices and warning, in addition to in-person visits from community relations worker  Webb knew of the complaints and had an opportunity to remedy or answer them |
| Ratio | Where steps are taken to satisfy the requirement of fair treatment, the duty will be considered completed.\* |

### Inspections and Recommendations Threshold

* Historically, no hearings were required for inspections/recommendations because the functions were “non-judicial”
* Doctrine changed in England during the 1970s with Lord Denning (*Re Pergamon Press* [1971])

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| *Guay v Lafleur* | |
| Facts | Lafleur investigated Guay pursuant to his authority under the *Income Tax Act.* G requested to be allowed to be present while L examined witnesses and to be represented by counsel during examinations. L refused. |
| Holding | Was Guay denied procedural fairness by being denied a hearing? |
| Ratio | Where the function is “purely administrative’, there will be no right to a hearing. |

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| *Re Pergamon Press* [1971]\* | |
| Facts | Board’s function to annually consider the case of every patient in psyc facility detained either as NCRMD or as person serving sentence in correctional institute and is insane. Lawyers tried seeing the files of their clients in preparation for the hearings and access was refused. Further request to chairman of the Board was refused. |
| Holding |  |
| Analysis |  |
| Ratio |  |

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| *Dairy Producers’ Co-operative Ltd v Sask (Human Rights Commission)\** | |
| Facts | HRC appointed officer to investigate complaint of sexual harassment. Company informed of complaint but unsuccessfully sought further and better particulars. |
| Holding | No duty of fairness was owed by the investigator |
| Analysis | CA dismissed appeal and said that duty of fairness was met?\* |
| Ratio | Where the individual has no power to affect the rights of the applicant, there will be no duty of fairness. |

### Threshold for Emergencies

* Must be circumstances where procedural fairness requirements (notice, hearing, etc.) are relaxed or not required 🡪 genuine emergency! In most cases, the action is interim only and subject to subsequent review
* Examples:
  + *Cardinal v Director of Kent Institution:* court didn’t take issue with director’s initial decision to place inmates in segregation “because of the apparently urgent or emergency nature of the decision to impose segregation *in the particular circumstances of the case*, there could be no requirement of prior notice and an opportunity to be heard before the decision”
  + *The Queen v Randolph,* [1996] SCR 260: SCC held that no prior notice or hearing was required for an interim order suspending mail service on the basis that the mail was being used for criminal purposes

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| *Reference re Canada Assistance Plan (BC)* | |
| Facts | Federal statute authorized CA gov to enter into agreements w/ provinces for sharing costs of social assistance and welfare programs, provided these agreements would continue in force as long as the relevant provincial law was in place, subject to termination by consent or unilaterally by either party on 1 year notice.   * CA gov introduced bill that limited its contributions to BC, AB, ON and didn’t provide notice |
| Holding | Government okay to do it – legitimate expectation doesn’t apply to introduction of bill into Parliament |
| Analysis | Arguing legitimate expectation that the federal government wouldn’t act without consulting BC |
| Ratio | Doctrine of legitimate expectation doesn’t apply to the introduction of a bill by government into Parliament  “Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied ot prevent the government from introducing legislation in Parliament…” |

### Threshold for Legitimate Expectations

* Won’t push you over the threshold 🡪 goes to content.
  + I.e. *Baker* and how much procedural fairness is expected – that’s where legitimate expectations come into play.
  + Might create certain substantive rights and increased content of procedural fairness required. Not going to make a situation where no procedural fairness is required and bump it over the threshold.

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| *Canada (AG) v Mavi* | |
| Facts | Mavi and others sponsored relatives for permanent residency in CA. Sponsors required to sign undertakings that require them to reimburse the government for the cost of every benefit provided as social assistance to the sponsored family member during the term of the undertaking.  Applicable provision in the legislation contemplated that any amount required to be paid *may* be recovered   * ONT gov started proceedings to recover costs of social assistance provided to sponsored relatives * Mavi argued they were owed procedural fairness – wanted notice of gov’s intent to collect and opportunity to address whether collection might be waived or delayed due to financial circumstances |
| Holding |  |
| Analysis | Legitimate expectations   * Wording of undertaking confirmed government could defer sponsorship debt (could exercise discretion in enforcement) * Proof of reliance not required * It was a breach of procedural fairness for the bureaucracy to proceed w/o notice and w/o permitting sponsors to make a case for deferral |
| Ratio | Content of the duty of procedural fairness doesn’t require an elaborate adjudicative process  Legitimate expectations can lead to a duty of fairness owed |

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| *Agraira v Canada* | |
| Facts | A found inadmissible to CA because he had once been a member of the LNSF (terrorist org). Minister of Public Safety and Emergency Preparedness can make exception if person satisfies that their presence wouldn’t be detrimental to the “national interest”.  Request for relief denied, focusing on A’s involvement in the LNSF – A sought JR |
| Holding | There is a legitimate expectation, but it is met |
| Analysis | * Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate expectation that the framework would be followed * ISSUE 🡪 A didn’t demonstrate that his application was not dealt with in accordance to the process |
| Ratio | Legitimate expectation does not create a substantive right!!!  If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practise in the past in making such a decision, the scope of the duty of fairness will be broader than it otherwise would have been.  Procedural fairness arises from the conduct of the decision-maker (or relative actor) |

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| *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services* | |
| Facts | Hospital had been operation for many years in violation of its license. Hospital and minister agreed that if the hospital was relocated, its licence would be “regularized”. The hospital relocated and when it sought to haeve the licence updated, it was a different Minister who refused to issue the revised licence |
| Holding | Found for hospital on grounds other than legitimate expectations  Minority: public law arguments, including legitimate expectations – refused to extent legit ex. to substantive relied |
| Analysis | Hospital entitled to renew permit as soon as it moved. **By moving**, the hospital was meeting the precondition and the minister had no authority to overturn a pre-existing commitment. |
| Ratio |  |

### Constitutional and Quasi-Constitutional Threshold

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| *Authorson v Canada (AG),* 2003 SCC 39 | |
| Facts | A was representative plaintiff for a class of veterans whose pensions and other benefits received from the Crown were administered by the Department of Veteran Affairs. The department did not invest or pay interest on the money until 1990.   * Parliament enacted legislation to limit the Crown’s liability for past interest * Vets claimed that the statutory bar was inoperative b/c it breached their rights under the *Bill of Rights* |
| Holding | Didn’t actually have a hearing so can’t be entitled to a fair hearing |
| Analysis | * *Bill of Rights* guarantees notice and some opportunity to contest a government deprivation of property rights in the context of an adjudication of a person’s right before a court or tribunal * Notice and an opportunity to make a defense are not, however, required where the government legislates to completely eliminate benefits * Nor does the *Bill of Rights* impose upon Parliament the requirement to provide a hearing before enacting legislation (a guarantee to a fair hearing is operative only in the application of law to individual circumstances in a proceeding before a court, tribunal or similar body)   + Federal law, broad enough to likely encompass decisions and actions taken bvy those deriving their powers from federallaw   + CRTC, NEB * Charter 🡪 federal, provincial and territorial governments, doesn’t protect property rights!!   + *McKinney v University of Guelph* – universities are not government – Charter doesn’t apply where university imposed mandatory retirement at age 65   + Eldridge v British Columbia: decision of BC hospital board on whether to provide translation facilities for hearing-impaired patients subject to Charter |
| Ratio | You are only entitled to a fair hearing when you actually have a hearing |

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| *Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9* | |
| Facts | Minister of Public Safety and Emergency Preparedness issues “security certificates” which deemed C and 2 others to be threat to CA’s national security   * Individuals detained pending completion of proceedings for their removal * Legislation required these proceedings to commence with a review by a Federal Court Judge * At the Minister’s request, the review was conducted *in camera* and *ex parte* (confidential & w/o notice)   Reviewing judge required to disclose summary of the case against the individual and the decision was final (no right of appeal) |
| Holding | Violated s.1 and not saved under s.1 – other processes the court could have used that would be more fair |
| Analysis | * S.7 requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake   Security concerns can’t be used to excuse procedures that don’t conform to natural justice @ s.7 stage |
| Ratio | \*\*The right to know the case to be met is not absolute, but hearing from both sides is only to be departed from in the most exceptional circumstances.  For s.7 to be satisfied, either the person must be given the necessary info, or a substantial substitute for that info must be found |

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| *Blencoe v British Columbia (Human Rights Commission)* 2000 SCC 44 | |
| Facts | B was minister in BC government and was accused by one of his assistants of sexual harassment. He was removed from Cabinet and dismissed from caucus.   * 2 subsequent complaints filed against him with BC Human Rights Commission (hearings scheduled 30 months after initial complaints filed) * Following allegations, media attention was intense. B suffered depression and considered himself unemployable, didn’t seek re-election   Brought application to have Human Rights complaints stayed and that they had lost jurisdiction b/c of unreasonable delay – abuse of process and denial of s.7 (natural justice) |
| Holding | HRC subject to the Charter – clear government quality to its functions |
| Analysis |  |
| Ratio |  |

### Alberta’s Administrative Procedures and Jurisdiction Act - Threshold

Question: is it designated under the associated regulation?? Probably not 🡪 look elsewhere for applicable procedural fairness

# IS A DUTY OF FAIRNESS OWED?

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| *Green v Law Society of Manitoba,* 2017 SCC 20 | |
| Facts | Mr. Green challenged impugned rules of Law Society. He didn’t listen to them so they suspended him.  NOTE: he challenged the rules themselves and not the decision to suspend him |
| Ratio | Duty of fairness only engaged if the Law Society makes a decision that affects the ‘rights, privileges or interests of an individual” (i.e. suspending him and not when it acts in legislative capacity to make rules of general application in the public interest.  Mr. Green didn’t challenge the decision that actually barred him (affected his rights) 🡪 threshold NOT engaged! |

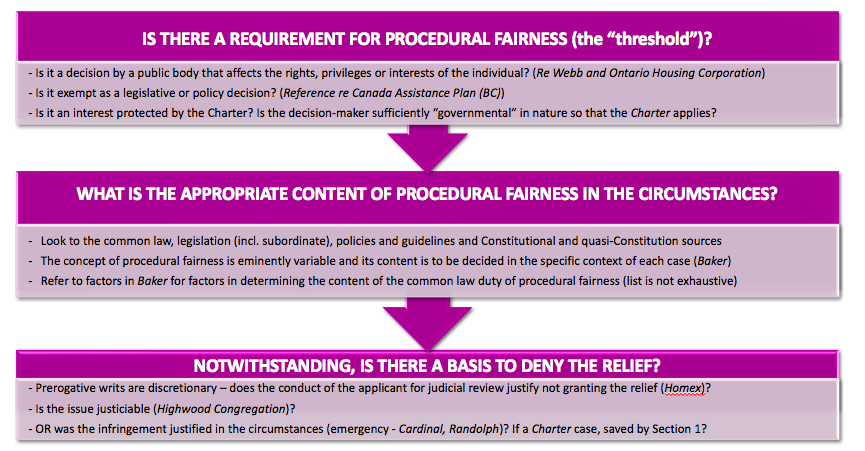
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| *O’Connell, as the Registrar of Motor Vehicles for the Province of NB v Maxwell,* 2016 NBCA 37 | |
| Facts | Registrar alleges application judge erred in finding the Registrar had failed to provide adequate procedural protection. Interest at stake 🡪 plates which Respondent possessed and renewed annually for 6 years. |
| Holding | Threshold made out |
| Analysis | Privileges such as there are connected to fundamental rights enshrined in the *Charter* under freedom of expression. Has substantial personal value to Maxwell. Although the right is not absolute, the threshold is made out |
| Ratio | A duty to act fairly will exist when an administrative decision affects the rights, privileges, or interests of an individual. |

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| *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall* | |
| Facts | Congregation = association of Jehovah’s witnesses (unincorporated, 0 articles of association/bylaws/0 statutory foundation)   * Wall was disfellowshipped and sought to appeal judicial committee’s decision to elders of neighbouring congregations, to the Watch Tower Bible and Tract Society of Canada * Disfellowship: can attend congregation but can only speak to immediate family and talk only about non-spiritual matters |
| Holding | No state action and judicial review is only for state action! |
| Ratio | No free-standing right to procedural fairness  Even when review is available, the courts will only consider those issues that are justiciable  **\*\***Courts don’t have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness! |

NOTE: avoid preliminary types processes and decisions that aren’t really the end decision.

NOTES:

* Public decision makers have considerable power which must be exercised fairly (failure may make decision vulnerable to review (JR – prerogative remedies & appeals – admin and to the courts)
* Government establishes administrative agencies (agencies, boards, commissions) to operate in particular sphere or address a specific problem/set of problems – has the authority delegated to it by government (through legislation)
* Courts – their role in admin law is to ensure legality, fairness and reasonableness of the administrative **process (procedural) and its outcomes (substantive)**

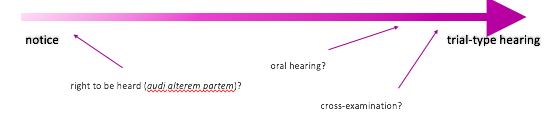


## APPROPRIATE CONTENT OF “PROCEDURAL FAIRNESS”

## 5 factors from *Baker:*

1. The nature of the decision and the process followed in making it
2. The nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates
3. The importance of the decision to the individual
4. The legitimate expectations of the person challenging the decision
5. The choices of procedure made by the agency itself

If you don’t have clean hands, even if there was a lack of procedural fairness, the courts may deny a remedy



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| *Goldberg v Kelly (US case)* | |
| Facts | Procedures for terminating welfare payments |
| Holding |  |
| Analysis | * Near trial-like procedures (notice, opportunity to submit evidence, cross examination of witnesses, statement of reasons, etc.) * Costs and time associated w/ trial-like procedures are often excessive, and not all issues are suited to an adversarial approach, especially for individuals |
| Ratio |  |

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| *Suresh v Canada (Minister of Citizenship and Immigration),* 2002 SCC 1 | |
| Facts | Suresh came to CA as refugee in 1991 and applied for landed immigrant status. He was the leader of the “World Tamil Movement” (alleged terrorist org.) Minister issues certificate indicating Suresh was a danger to the security of CA. Certificate led to his deportation  Suresh had change to make written submissions and file material with the Minister before the certificate was issued but he didn’t have a copy of the immigration officer’s report (which the certificate was issues on)  \*No oral hearing |
| Holding | SCC heard appeal and made decision post 9/11. World Tamil Movement put back on CA’s list of terrorist orgs in 2008 and he was deported again in 2015 |
| Analysis | Look at CL approach to procedural fairness (5 factors from *Baker*)   * Procedural protections required by s.7 don’t extend to requiring an oral hearing or complete judicial process (written submissions would have been adequate) BUT a person facing deportation or torture must be informed of the case to be met. * Suresh and lawyer had no knowledge of the factors they specifically needed to address, nor a chance to correct any factual inaccuracies or mischaracterizations |
| Ratio | Where a Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present submissions and evidence on the value of such assurances. |

## ALBERTA’S ADMINISTRATIVE PROCEDURES AND JURISDICTION ACT

* Only a few tribunals expressly provided for under this Act

Where the Act applies:

1. Provides for notice to affected parties in advance of exercise of power
2. Guarantees a potentially adversely affected party an opportunity to provide evidence and make submissions (not necessarily in person) 🡪 \*\*not necessarily the right to an oral hearing
3. Provides for a right to disclosure of facts and allegations in sufficient detail to allow the party to understand and respond to the case against them
4. Requires written reasons

## THE PROCESS (PRE-HEARING/HEARING/POST-HEARING)

Pre-hearing

Hearing

Post-hearing

## PREHEARING

Pre-hearing procedural fairness is primarily concerned with **the person who is affected understanding the case against him/her (also referred to as understanding the case to be met)**

* Did the person whose rights, interests or privileges are impacted by the decision receive notice of the decision to be made and an opportunity to understand the case to be met before the decision maker?
* What will be adequate notice in the circumstances is itself contectual 🡪 does it affect an important right of an individual? If so, personal service on that individual may be required.
* Applications should not be subject to undue delay

### Pre-hearing Issue: Notice

* + fundamental starting point
  + Whatever other rights a person may be entitled to, notice is always required (once an entitlement to some level of procedural fairness is established)
  + Without notice, no other rights can be exercised effectively or at all
  + Certain aspects of notice may be specified in the legislation – written/oral, nature of the detail of the notice, how is it delivered?

Common problems with notice:

* Form 🡪 written, oral (consider *Webb* and written notice served on an illiterate person)
* Manner of service 🡪 personal service (likely required when individual’s legal rights are being affected by a particular decision), electronic, publication in newspaper
* Adequate notice 🡪 make sure you’re thorough and prepared to meet the case (*Baker*)
* Being given enough notice as a lawyer – extenuating circumstances (out of your control that would absolutely deny fundamental fairness OR the decision would be challenged later on) that allows you to push your deadline
* *Public Inquiries Act*

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| *Canada (AG) v Canada (Commission of Inquiry on the Blood System),* [1997] 2 SCR 440 [the Krever Inquiry] | |
| Facts | In the 80s, many Canadians infected with HIV and Hepatitis from blood and blood products. 25 interested parties granted standing in public inquiry. The other parties didn’t seek standing, but subsequently participated by providing documents and witnesses   * Rules of procedure adopted and agreed to by all parties (included right to counsel, right to cross-examine, call witnesses, introduce documentary evidence, receive copies of all documents entered into evidence, public hearings) * Assured that the inquiry would not be concerned with criminal or civil liability, but would seek to determine the cause of contamination in the blood system in CA   Commission counsel delivered memo to parties asking them to inform Commission of the findings of misconduct that should be made. Confidential notices were sent out naming individuals, corporations and governments, containing allegations and advising that the Commission may reach a conclusion based on evidence before it and provided an opportunity to respond.   * Many recipients brought applications for JR |
| Holding | Notice was sufficient and reasonable 🡪 Appellants given adequate opportunity to respond to the notices and to adduce addition evidence if they deemed it necessary |
| Analysis | Findings of fact and conclusions of the Commissioner may damage the reputation of witnesses and therefore it was essential that procedural fairness be demonstrated!  Notice required 🡪 gave sufficient opportunity to respond to notices, add evidence, etc. |
| Ratio | Where sufficient opportunity to respond to notice, add evidence, etc., it will likely be found that notice was sufficient.  Although notices of potential findings of misconduct should be given ASAP, it is unreasonable to expect that notice of misconduct must always be given early 🡪 timing of notice always depends on the circumstances |

### Pre-hearing Issues: Discovery/Disclosure

* + Discovery/Disclosure (knowing the case to be met) information you can get from the tribunal in advance of the tribunal – investigation, documentation/evidence that will be used by the administrative body – have the right to know or challenge the decision on that basis
  + Understanding case to be met (evidentiary basis, what documents are being relied upon) so that your participation is meaningful/informed
  + Length of pre-hearing process matters – if too long and unnecessarily delayed 🡪 long, cumbersome, unfair

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| *May v Ferndale Institution,* 2005 SCC 82 | |
| Facts | Inmates serving life sentence each involuntarily transferred to a min-med security institution (higher level of incarceration) based on computerized reclassification scale.   * Correctional Services Canada **didn’t make full disclosure of info relied on the reclassification** that would justify the move. |
| Holding | Unfair – could not participate as they lacked information, leading to significant impact on the inmates |
| Analysis | *Stinchcombe* disclosure standard didn’t apply\*\*\* |
| Ratio | Disclosure requirements to be assessed contextually in ever circumstance |

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| *Ontario (Human Rights Commission) v Ontario (Board of Inquiry into Northwestern General Hospital)* (1993) Ont Div Ct | |
| Facts | Board of Inquiry struck under *HR Code* to hear complaint of racial discrimination made by 10 nurses employed by the hospital. They ordered the investigator to provide the hospital with **all witness statements and other documents related to the Commission investigation – which would form the basis of the charges against the hospital.**   * Commission applied for judicial review |
| Holding | Application for JR dismissed |
| Analysis | Disclosure appropriate in the circumstances – required so that the hospital would know allegations against it and which individuals were involved.   * Would have put nurses under stress but the courts thought this was “Fair” |
| Ratio | Look to the circumstances to determine disclosure that is needed.  The right to disclosure can be implied by the CL and found in statute |

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| *Ciba-Geigy Canada Ltd v Canada (Patented Medicine Prices Review Board),* [1994] 3 FD 425 | |
| Facts | Under *Patent Act*, the Board scheduled a hearing to determine whether the drugs marketed by CIBA-Geigy were being sold at an excessive price. The Board considered internally produced document outlining the “guidelines” for market price. CIBA requested disclosure and production of all documents related to the matter, including the internal documents and “all fruits of the investigation.” Board declined   * CIBA applied for JR of Board’s order dismissing disclosure request |
| Holding | Applicant entitled to know case against them BUT that doesn’t mean it is permitted to obtain all evidence obtained by Board in carrying out its regulatory/investigatory function |
| Analysis | This isn’t a criminal court, it’s a regulatory tribunal (matters when dealing with evidence and procedure with that) |
| Ratio | Where you are dealing with a regulatory tribunal, the Applicant entitled to know case against them BUT that doesn’t mean it is permitted to obtain all evidence obtained by Board in carrying out its regulatory/investigatory function   * Some leeway to be given to and admin tribunal with economic regulatory functions |

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| *Clifford v Ontario (AG)* (2008), 90 OR (3d) 742 | |
| Facts | ON municipal employees’ retirement system determined that Mrs. Campbell was the CL spouse of the deceased and that she, rather than the former spouse and named beneficiary Mrs. Clifford, was entitled to his pension death benefits.   * Clifford applied for JR on the basis that the tribunal breached procedural fairness by failing to order full oral discovery of witnesses under oath |
| Holding | Oral discovery not essential – gave witness statements and that was enough disclosure of issues and evidence |
| Analysis | * Parties exchanged witness statements prior to hearing – ample disclosure of the issues and evidence in advance of the hearing! |
| Ratio | Oral discovery is not an essential ingredient for a fair hearing/to support the evidence. There is no legitimate expectation on any representation of the proceedings or prior. |

### Pre-hearing Issue: Delay

* Courts look at “fairness” of a process if the pre-hearing is too long (i.e. years) or the delay is the administrative body’s inefficiency in a reasonable way – this in and of itself can become an unfairness which can give rise to quashing a decision. NOTE 🡪 \*\*not likely with administrative tribunals
* Recall *Blencoe* 🡪 difficult to obtain a stay of administrative proceedings on basis of delay

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| *Saskatchewan Human Rights Commission v Kodellas* (1989), 60 DLR (4th) 142 (Sask CA) | |
| Facts | HR complaint filed by BW against Kodellas and “Three Stars Restaurant” alleging that she was discriminated against because of her sex. There was also an alleged unreasonable delay – didn’t get there for over 4 years. |
| Holding | S.11(b) of *Charter* doesn’t apply here – not a criminal case |
| Analysis | s.11(b) of the *Charter* doesn’t apply to an assessment of unreasonable delay in remedial proceedings under HR legislations – 11(b) is designed for a criminal case. |
| Ratio | Factors to consider for the purposes of determining a “unreasonable delay’ in the context of s.7 of the *Charter* in relation to a remedial proceeding under the *Human Rights Code:*   1. Whether the delay complained of is *prima facie* unreasonable in light of time requirements inherent in such proceedings 2. Reasons or responsibility for the delay 3. Prejudice or impairment caused   \*Courts determine whose conduct is responsible for the delay  \*Clean hands assessment |

## HEARING

Key issues to consider about fairness during the ‘actual hearing’:

1. Written hearing
2. Oral hearing – NO ABSOLUTE RIGHT TO IT, NO PRESUMPTION OF IT
   1. Process/evidence
   2. Whether the rule of evidence applies, and what they are
   3. Most admin tribunals don’t have a legal requirement to follow the strict rules of evidence of the court
3. Combo
4. Representation of counsel
5. Cross-examination of the witness (or are you limited to simply present your own evidence)

### Hearing issue: Oral versus Written

* “Hearing” doesn’t mean oral hearing, nor does it require trial-type procedures – any setting in which an affected person presents arguments to the decision-maker
* No presumption in favour of oral hearings!
  + Oral hearings may be required in special circumstances (e.g. credibility at issue, conflicting evidence)
  + Agencies gives significant discretion in the types of procedures they can adopt, including the form of the hearing
  + Legislation may address the form of hearing required in the circumstances, or it may provide the agency with discretion
    - E.g. AUC Act s.9(2)
* Courts will provide deference to the procedural choices of many decision-makers

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| *Masters v Ontario* (1994), 18 OR (3d) 551 (Div Ct) | |
| Facts | M was ON agent general in NY (appointed by premier). Allegations of sexual harassment and M was suspended at beginning of inquiry. Report produced concluding M had sexually harassed 7 women – M had chance to respond to the report. Premier determined M should no longer be agent general, but be reassigned. M didn’t accept reassignment, he resigned and accepted financial settlement.  M applying for JR of report on grounds of alleged procedural fairness |
| Holding | No oral hearing required |
| Analysis | M given opportunity to respond, disclosure of the substance of the accusations (vs providing witness statements) sufficient. |
| Ratio | Where the nature of the decision is discretionary (such as the premier’s prerogative power in this case), less procedural protection will be afforded  When a decision make is fulfilling an investigative mandate, rather than a determinative one, the affected party will be awarded less procedural fairness |

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| *Khan v University of Ottawa* (1997), 34 OR (3d) 335 (CA) | |
| Facts | K failed evidence exam, GPA dipped below faculty min and she was required to do an extra semester. K appealed grade to Faculty Examinations Committee (had submitted 4th answer booklet that had not been graded). Committee met w/o giving K notice or asking her to appear. After meeting, committee dismissed the appeal. Subsequent unsuccessful appeal to Uni Senate Committee.  K applied for JR of decision denying her appeal |
| Holding | Committee denied K procedural fairness by failing to give her an oral hearing |
| Analysis | K not given any opportunity to correct/contradict the factor the committee relied on in its decision  Not necessary to demonstrate actual prejudice |
| Ratio | University student threatened with the loss of an academic year is entitled to a high standard of justice – effect of a failed year may be very serious  Where the creditability is at issue, oral hearings may be warranted |

### Hearing Issue: Open Hearings

* General presumption in favour of open hearings
  + May be contexts in which the legislation provides for closed hearings (e.g. refugee hearings under *Immigration Refugee Protection Act*)
  + Many decision makers will have discretion to determine whether to hold hearings, or portions of hearings, *in camera*
  + There may be countervailing factors that may lead a decision maker to adopt a closed hearing process
* Some tribunals (e.g. the AUC) have adopted the “open court principle” for the purposes of their proceedings
  + “*quis custodiet ipsos custodes* – who will guard the guards themselves?”

### Hearing Issue: Right to Counsel

* Right to counsel often assumed in hearing situations (may be provided for in legislation)
* No absolute right to be represented by counsel
  + Where matters are complex and involve questions of law, person may have a right tocounsel with respect to the legal questions

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| *Re Men’s Clothing Manufacturers Association of Ontario and Toronto Joint Board, Amalgamated Clothing and Textile Worker’s Union* (1979), 22 LAC (2d) 328, quashed 104 DLOR (3d) 441 (Ont Div Ct) | |
| Facts | Arbitration under collective agreement in garment industry (between union and association of employers). Arbitrations had historically been done w/o lawyer, but association wanted counsel in arbitration (union objected). Arbitrator denied counsel full rights of participation in the hearing on the merits |
| Holding | Court overturned arbitrator’s decision – given the importance of the controversy and the complexity of issues, nature justice required applicants be represented by legal counsel. |
| Analysis | A party entitled to be represented by an agent before a tribunal can’t be restricted in the choice of agent   * No party was a natural person, each could only appear by natural person acting as its agent * Ruling limited to parties in their choice of agents * Arbitrator had no authority to limit the rights of persons who were entitled to appear before him as agents * Not to say a tribunal can’t exclude persons who have misconducted themselves or are otherwise clearly inappropriate   Issues were of considerable complexity and involved questions of law |
| Ratio | A party entitled to be represented by an agent before a tribunal can’t be restricted in the choice of agent |

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| *Howard v Stony Mountain Institution* (1985), 19 DLR (4th) 504 (FCA) | |
| Facts | H was inmate charged under penitentiary regulations for incidents (pleaded not guilty). Appeared before disciplinary committee w/ counsel, hearing adjourned. H’s request to be represented by counsel denied, D applied for prohibition |
| Holding | Refusal was a denial of H’s opportunity to adequately present his defence |
| Analysis | Considered the potential results of the charges (solitary confinement, forfeiting earned credit, etc.) |
| Ratio | s.7 of the Charter doesn’t create an absolute right to counsel in all proceedings where the person’s life, liberty or security is at stake.   * What is required 🡪 person have opportunity to present case as fully and as adequately as possible * Depends on circumstances of the case (incl. nature, gravity, complexity, capacity of inmate to understand care and present defence – not exhaustive) |

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| *NB (Minister of Health and Community Services) v G(J) [JG] [1999] 3 SCR 46* | |
| Facts | J(G)’s children apprehended for 6 month period by Minister. Minister sought to extend the order granting custody for a further 6 months. J(G) requested legal counsel, but was indigent. |
| Holding | J(G) needed to be represented by counsel for there to be a fair determination of the children’s interests |
| Analysis | Considered: the seriousness of the interests at stake, the complexity of proceedings, J(G)’s capacity  Without the benefit of counsel, J(G) would not have been able to participate effectively in the hearing (threatening both her and the children’s s.7 right to security of the person) |
| Ratio |  |

### Hearing Issue: Disclosure at Hearing Stage

* Party entitled to know evidence and representations that have been given to the decision maker (disclosure), and is entitled to an adequate opportunity to respond – what evidence will DM be relying on in making its decision?
* Official notice – extent to which a DM can rely on materials that is not introduced in evidence
* Commercially sensitive info may be another basis upon which to limit disclosure
* Access to info statutes
  + Freedom of info and privacy legislation
  + There are limitations on what public bodies are required to disclose (public interest privilege, cabinet privilege, CL privileges

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| *Napoli v BC (Workers Comp Board)* [1999] 3 SCR 46 | |
| Facts | N suffered disability and applied to WCB for compensation. N appealed amount awarded. N’s counsel provided with 4 page summary of the case. Board heard N’s appeal, did not disclose the medical reports on this file |
| Holding | High standard of justice required in these circumstances – provision of summaries not sufficiently compliant with the rules of nature justice |
| Analysis | To effectively challenge damaging statements made in the medical reports, the original reports would need to be produced – content of reports contained serious allegations |
| Ratio | Where reports contain serious allegations and damaging statements, the original reports must be produced. |
| *Charkaoui v Canada* | |
| Facts | Counsel for minister failed to disclose to C a summary of 2 interviews he had with CSIS before initial arrest. C requested complete notes of these interviews (nots had been destroyed per CSIS policy). |
| Holding | Destruction of the notes was a breach of the requirement to disclose evidence |
| Ratio | Full disclosure and preservation of evidence required where the consequences are serious |

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| *Canada (Citizenship & Immigration) v Harkat,* 2014 SCC 37 | |
| Ratio | * “reasonably informed” = sufficient disclosure to be able to give meaningful instructions to counsel * Where there is an irreconcilable tension between the requirement that the named person be “reasonable informed” and imperative that sensitive information not be disclosed, the Minister must withdraw the information or evidence whose non-disclosure prevents the named person from being reasonably informed |

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| *Gallant v Canada (Deputy Commissioner, Correctional Service Canada* (1989), 36 Admin LR 261 (FCA) | |
| Facts | G was prisoner at max security penitentiary. He was advised he was suspected of involvement in extortion of drugs, and that the warden had intended to seek his transfer to another max security facility. Notification explained that info had been received indicating that he was involved in extortion of money and personal property from inmantes, importation of drugs, etc. More specific info not disclosed on the basis that it would ‘jeopardize the safety of the victims’ |
| Holding | s.7 engaged but saved under s.1 |
| Analysis | * Warden couldn’t give more particulars without disclosing identity of individuals who would then be in danger of death or serious bodily injury * s.7 engaged – transferring to institution where freedom will be more severely restricted deprives of liberty and he was not given any real opportunity to answer the allegations against him. BUT it was saved under s.1 – it is reasonable, perhaps necessary, to confer with wide discretion the legislation did on penitentiary authorities |
| Ratio | It is reasonable, perhaps necessary, to confer with wide discretion the legislation did on penitentiary authorities |

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| *Mission Institution v Khela,* 2014 SCC 24 | |
| Facts | K was inmate at penitentiary, serving life sentence for murder. Warden reassessed K’s security classification on the basis of info that K hired 2 other inmates to carry out stabbing of another. Involuntary and immediate transfer of K from med to max security on the basis of the reclassification. K asked for copy of the scoring matrix to determine his classification along with security report and info on why the sources should be considered reliable (denied). K applied for writ of *habeas corpus* |
| Holding | Transfer decision was unlawful – procedurally unfair. Inmate should have been given all info considered in the taking of the decision or a summary of that info. 🡪 statutory requirements that Commissioner disclose “all info” to be considered in making the decision now followed. |
| Analysis | * Legislation provided that info could be withheld if Commissioner had reasonable grounds to believe that the info may threaten the security of the prison, the safety of a person or the conduct of an investigation   + In this case – info was withheld without invoking that provision of the legislation, so no deference! |
| Ratio | Disclosure must be made within reasonable time before decision is made |

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| *Qikiqtaaluk Corporation v Nunavut (Commissioner),* 2009 NUCJ 6 | |
| Facts | Nunavut land claims agreement authorized gov to implement preferential procurement policies, procedures and approaches for Inuit businesses. QC was unsuccessful bidder for the provision of medical boarding services in Iqaluit. QC appealed decision to Contracting Appeals Board. QC sought disclosure of all info and docs which was used by the contracting authority in evaluating the bids (board refused). |
| Holding | QC should have access to info and docs generated by contracting authority as it related to QC’s own big |
| Analysis | Business process must be confidential to protect business interests and competitive edge of proponents BUT some disclosure of info relied on gov in DM process is required to permit aggrieved party to have opportunity to substantiate the review before the appeals board (otherwise ineffective appeal process). |
| Ratio | If a proponent files an appeal, it can request disclosure of the ratings of their proposal (subject to any necessary redaction to protect sensitive business data) |

### Hearing Issue: Right to Cross-Examine

* Not guaranteed by legislation
* If credibility is a central issue and the impact of the decision on the individual is pressing, cross-examination may be required
* Cross-examination may be the most effective way to test the merits of a case (*RE Toronto Newspaper Guild and Globe Printing*)

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| *Huerto v College of Physicians and Surgeons* [1994] SJ No 390 (QB) | |
| Facts | H was physician being reviewed by Discipline Committee. Reasons for decision included discussion of members of the Committee using his/her own medical knowledge in judging the case - reasons conveyed impression that committee believed it was entitled to use its medical knowledge beyond simply assessing the evidence before it |
| Holding | Counts quashed |
| Analysis | Able to cross-examine but there may have been parts of unknown evidence ‘emanating from the committee’ which he was unable to validate. Uncertainty engendered by incorrect application of the committee’s medical knowledge “sullies the process” |
| Ratio |  |

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| *Innisfil Township v Vespra Township* (1981) 2 SCR 145 | |
| Facts | Other side made application to cross-examine someone from the ministry on the letter saying that it would be unfair if denied. It was a Municipal Board hearing revolving around issue of projected population for area annexation   * Neighbouring town relied on the letter from the Minister in its application |
| Issue | Were the municipalities entitled to cross-examine the official of the ministry who had presented the letter? |
| Ratio | Cross-examination is a vital element of the adversarial system  Decision to exercise a right to cross-examine is for the holder of that right, not the court. |

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| *Re County of Strathcona No 20 v MacLab Enterprises* (1971), 20 DLR (3d) 200 (Alta SCAD) | |
| Facts | * Prov Planning Board directed that agricultural lands owned by developed be rezoned to residential * Decision appealed by group that felt area was unsuitable for residential housing * Group said in their appeal in the first instance on the basis that it had not been given an opportunity to test all of the evidence via cross-examination |
| Analysis | There were other effective ways to address the evidence  It’s about having a fair opportunity to correct/controvert any relevant statement brought forward to the person’s prejudice |
| Ratio | No right to cross-examination.  Failure to afford right to cross-examine may not always render process procedurally unfair – if person is afforded an equally effective method of answer the case against him/her |

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| *Re B and Catholic Children’s Aid Society of Metropolitan Toronto* (1987), 38 DLR (4th) 106 (Ont Div Ct)\* | |
| Facts | Appellant placed on child abuse register following investigation by social worker. While social worker was with the police, the police felt there wasn’t enough evidence to charge appellant criminally and no charges were laid.   * Appellant brought application to have name expunged from register * Social worker = only witness at hearing and her evidence included replaying convo w/ victim * Victim had not been called to testify because she had “changed her story” |
| Holding | Admission of hearsay evidence in these circumstances amounted to a denial of natural justice |
| Analysis | * Appellant had no means to test evidence through cross-examination * Witness alleging allegations not there – hearsay evidence of social worker the only evidence being adduced * No right to cross-examine person making allegations (and allegations later recanted) |
| Ratio | In certain circumstances, the admission of hearsay evidence can amount to a denial of natural justice. |

## 

## POST-HEARING

Issues:

* Giving reasons
  + *Baker* was the first time the court held there was a CL duty to give reasons. Not a CL right in every case but there is a CL right to reasons
  + Statutory duty to give reasons – s.7 – recognition of the right by certain Tribunals that the statute applies to. We’re talking about findings of fact (evidence relied upon by Tribunal in coming to their decision)
    - Only applies to provincial bodies under the Act – reasons given in 3 boards:
      1. LCB
      2. SRB
      3. MGB (municipal gov board)
  + Pros: better decision making, makes appeal or judicial review effective (know if you have grounds for appeal), treats people fairly
    - *Baker –* relied on notes of officer and they found he was biased through the reasons given, giving rise to good appellate ground.
  + Cons (policy considerations): too burdensome on administrative officials – must be supported by findings of fact (bog down system, unreasonable to have to come up with reasons every time)
  + Reasonableness to be determined on case by case basis (allows individuals to know “why” in determining if appeal exists)

## **There is a duty to give reasons where the decision (*Baker*):**

1. Significant effect on the individual
2. Statutory right of appeal (reasons inform grounds for appeal and give rise to meaningful appeal)
3. Focus on impact on individual – the greater the impact, the greater the importance of the decision given to the individual, the greater the importance to give decisions.
   1. Looking to inform why decision was made – making sure everything is supporting in findings of fact and statutory regime requirements that the public official is operating under
   2. *Baker* 🡪 bias 🡪 decision maker wasn’t following statute in the sense of not making decision based on humanitarian and compassionate grounds

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| *2127423 Manitoba Ltd v Unicity Taxi Ltd,* (2012) MBCA 75 | |
| Facts | Taxi Commission being asked to grant taxi licences. Taxi Companies filed opposition on the basis that they hadn’t ben fairly given reasons. The opponents given summary information re application for licences. There was no written reasons issues upon approval of taxi licences but they got a summary |
| Holding | Summary was sufficient in these circumstances |
| Analysis | Court looking to ensure that on the face of the proceedings, the parties are reasonably informed as to what the case they have to meet is, what the evidence is, and what evidence was relied upon by the Commission to make the decision. |
| Ratio | If the reasons can be gleamed from the record, a lack of formal “reasons for decision” doesn’t mean anything. |

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| *Wall v Independent Police Review Director* | |
| Facts | Individual arrested and released without charged (roughed up by police). He made a complaint about the treatment and brought charges against the officers. He made a further complaint against the Police Chief.  The Board ruled complaint was more than 6 months so decided not to proceed |
| Holding | Not absolute prohibition and doesn’t answer “why” – sent back down to Commission to consider |
| Analysis | Director didn’t deal w/ complaint b/c s.60 of *Police Act*: “may decide not to proceed if beyond 6 months”   * No absolute prohibition or limitation period “may” * Director decided not to hear complaint against chief – wasn’t enough to cite s.60 (not an adequate reason) |
| Ratio | Simply stating a statutory provision may not answer “why” which is the fundamental purpose of the reasons. |

## BIAS AND LACK OF INDEPENDENCE

Having an unbiased, impartial, independent decision maker is fundamental 🡪 entitled to them to give legality, fairness to process

**2 tests: look to context to determine which one it is!!**

## CLOSED MIND

* Legislative decision/executive decisions 🡪 LEGISLATIVE AND POLICY ROLE!!!
* Test: closed mind 🡪 They’ve already made up their mind before you speak or considered your case
* High standard 🡪 legislative or executive decision
* Hard to prove 🡪 can’t get in their head. If you have direct evidence (parole), then you have good evidence

## REASONABLE APPREHENSION OF BIAS

* + Quasi judicial/administrative decisions (making determination on your rights, you’re not opposing anyone – i.e. *Baker*)
  + Test: would an informed person viewing the matter realistically/practically and having thought the matter through (consideration), conclude that there was unreasonableness
    1. Subjective, the reasonably informed person
    2. Flexible! Less stringent for board dealing with policy matter than for an adjudicative board (lower threshold)
    3. Categories:
       1. Antagonism during hearing by decision-maker toward party (or their counsel/witness) – picking sides
       2. Association between one of the parties and the decision-maker
       3. Involvement by a decision-maker in preliminary state
       4. Attitude of a decision-maker toward outcome (*e.g. Baker*)

### Antagonism

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| *Canadian College of Business & Computers Inc v ON (Private Career Colleges)* | |
| Facts | Adjudicator asked Applicant (president) who wanted to renew licence for a college and he was asked irrelevant questions about whether he was Tamil Tiger – adjudicator asserted president was misleading the tribunal |
| Holding | Antagonistic bias to the reasonable person |
| Analysis | * Being accused of being a terrorist and of lying by the Tribunal Chair and the adjudicator – antagonistic bias to the reasonable person * Reasonable person would conclude that the adjudicator prejudged the president’s credibility |
| Ratio | An aggressive attack can give a reasonable apprehension of bias against you |

### Bias by Association

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| *United Enterprises Ltd. v Sask (Liquor & Gaming Licensing Commission),* 1996 CarswellSask 799, S.J. No 787 | |
| Facts | Procecuting lawyer admitted into hearing room prior to applicant coming in. Lawyer hanging out in front of the bench chatting up decision-maker on first name basis talking about going to a BBQ (friends and had relationship/association the appellants didn’t have) |
| Holding | This was sufficient evidence of bias by association 🡪 application for JR granted |
| Analysis | Reasonably informed bystander would perceive bias by association – established special connection and personal relationship |
| Ratio | Where a special connection and personal relationship are established, it may be sufficient to establish bias by association. |

### Involvement by a Decision-Maker in Preliminary Stage

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| *New Brunswick v Comeau,* 2013 NBCA, 2013 CarswellNB 342 | |
| Facts | Employees working at adult residential facility had complaints against them and an investigation ensued. The investigator was also the decision-maker. He was appointed under statute that regulated these types of residential facilities. BUT the statute didn’t contemplate the investigator also being the decision-maker\*\* |
| Holding | Judicial review granted |
| Analysis | May have been okay if investigation can be appealed, but not if decision if final  No opportunity given for employees to respond to investigation report  Broad consequences to the rights of the employees warranting a high degree of fairness |
| Ratio | Where an individual is both an investigator and the decision-maker, they are unable to make decisions without giving the opportunity to respond to the report and give the decision to someone else who is unbiased  Note: *Baker* 🡪 the more impact on the individuals, the higher the degree of fairness! |

Learning of bias after doesn’t matter, you can still bring it.

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| *Vespa (Township) v Ontario Municipal Board,* 1983 CarsWellOnt 588, 15 OMBR 407 | |
| Facts | Ont Municipal Board decision regarding annexation. Didn’t allow cross examination and wouldn’t hear evidence of government policy. |
| Holding | JR granted – decision not quashed but sent back to same panel to hear new evidence on gov policy ordered by court |
| Analysis | Panel wasn’t following court order. Court went out of its way to ensure that it didn’t just go back to the same biased decision-maker. |
| Ratio | If it’s what is required to get an unbiased decision maker, the courts may go so far as to get a new panel |

### Attitudinal Bias

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| *Paine v U of T* | |
| Facts | Professor denied tenure (one of the referees that attached the tenure didn’t like the professor) but didn’t object to the hostile referee. |
| Holding | Bias waived – no JR |
| Analysis | If you feel hostility to the point where you’re not getting a fair hearing 🡪 object there!! |
| Ratio | Failure to object results in waiving bias  Going against someone hostile isn’t necessary biased if you don’t object to it (probs not going to get JR if you don’t) |

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| *Large v Stratford (City) Police Department* | |
| Facts | Board of Inquiry under ONT HR Commission found mandatory retirement at age 60 established by employer for Police Officers was not a bone fide occupational requirement.   * Objection 🡪 claimant had taken public stand on the issue of retirement. Out there advocating against it while sitting on the tribunal. Saying it gave rise to attitudinal bias |
| Holding | Appeal dismissed |
| Ratio | Taking a public position on the issue at hand may not/doesn’t necessarily lead to a conclusion of bias (attitudinal in this case) |

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| *Great Atlantic & Pacific Co of Canada v ON (HR Commission)* (1993) | |
| Facts |  |
| Holding |  |
| Analysis |  |
| Ratio |  |

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| *Pelletier v Canada* | |
| Facts | Retired judge appointed as commissioner of politically contentious inquiry (misuse of gov funds). Mid inquiry, he gave a press conference saying politicians were guilty. |
| Holding | Reasonable apprehension of bias established |
| Analysis | Comments viewed cumulatively (prejudged issues and wasn’t impartial to Appellant. |
| Ratio | Where the cumulative assessment of a decision maker’s vocalization of comments regarding the issue at hand is viewed to meet the threshold, attitudinal bias will be established. |

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| *Old St. Boniface Residents Association Inc v Winnipeg (City)* – seminal case for attitudinal bias | |
| Facts | Municipal councillor involved to get municipal approval for development – participated on municipal development committee that approved the development and sat on the Council that approved the rezoning bylaw.  Community Assn argued attitudinal bias on the part of Council b/c of councillor’s involvement |
| Holding | No bias even though he had been an advocate for the development. |
| Analysis | Duty of fairness is contextual – nature of statute, function, decision  Bylaws are legislative function – not a matter of reasonable apprehension of bias, it’s close minded test! |
| Ratio | Bylaws/policy decisions are of a legislative function so it’s a close minded test for bias!  Amendable to persuasion test  Some pre-judgment on the part of council is both necessary and allowable. Bias will only exist when it is clear that the councilor has made up their mind irrevocably. |

### Pecuniary Interest (having monetary interest in the matter)

Hallmark for bias!! Involves individuals who, at the date of the hearing, had some direct relationship with the beneficiary of the decision (even if miniscule) (*Energy Probe v Canada (Atomic Energy Control Board*)

* Non-direct interest may still be relevant

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| *Covenant of The Sacred Heart v Armstrong’s Point Association* | |
| Holding | Zoning decision by municipal board of MB revoked b/c member of Board was co-owner of a residence in the area that was originally enhance or protected by the decision. |

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| *Hawrelak v Edmonton* | |
| Facts | Approved annexation where he owned land that was enhanced by value |

### Statutory Authorized Bias

* A statute may be sufficiently clear and direct to oust CL bias in procedural fairness for impartiality or independence
* Where an overlap of functions is authorized by statute, and the statute contemplates the involvement of a decision maker at several stages of the proceedings (i.e. investigator/decision maker) won’t create a reasonable apprehension of bias or actual bias (assuming the statute is constitutionally valid)
* A closed-mind is required to disentitle a councillor from a legislative/policy decision – standard of bias is high

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| *Pearlman v MB Law Society Judicial Committee* | |
| Holding | Pearlman appearing in front of lawyer on disbarment matter who practiced in same area. Saying they had pecuniary interest in disbarring him be/c he wouldn’t be around to compete with him for clients |
| Ratio | Every statute recognizes that lawyer will be sitting on these matters 🡪 statutory authorization = authorized bias IF there is bias. |

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| *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities,* [1992] 1 SCR 623\* | |
| Facts | Board member publicly declared “champion of consumer rights” and executive pay and pension ludicrous. Made statements during pre-hearing and hearing. |
| Holding |  |
| Analysis | Comments during hearing subject to higher reasonable apprehension of bias standard |
| Ratio | Reasonable apprehension of bias must be flexible as the standard of bias can change as you move through the different processes (i.e. preh-hearing/hearing/post-hearing) |

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| *Saave Richmond Farm Society v Richmond (Township)* | |
| Facts | Councillor campaigned in favour of rezoning bylaw and voted in favour. After first reason, gave press conferred that he’d “never change his mind.”  JR sought to prohibit councillor from participating in final vote on bylaw |
| Holding | No bias!! |
| Analysis | Strongly held view but not a bias  A councillor can have a “closed mind” so long as it’s not “corrupt”?? |
| Ratio | A strongly held view isn’t necessarily a bias |

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| *Seanic Canada Inc v St John’s (City)* | |
| Facts | Councillor took part in decision of Council indicated at earlier public hearing that he had made up his mind to oppose application for seniros assisted living residence. |
| Holding | Closed mind! He was biased and not legally capable of making this decision |
| Analysis | Closed mind standard applies – mind closed and any representation to the contrary = futile |
| Ratio | Where you can establish a link between the decision and the opinion of the people who elected, you are likely able to find bias  Closed mind test is standard for legislative decision (i.e. zoning bylaw)\*\* |

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| *Brosseau v AB Securities Commission* | |
| Facts | Allegations of fraud and misrep made against P (corporate solicitor involved in preparation of a prospectus that misled the public).   * P argued that the chair of the Securities Commission should be disqualified from sitting b/c he had received a call from the Minister stating that the RCMP were investigating P and authorized review of their previous file (wasn’t enough evidence to proceed previously) * Commission chair sits on hearing   Does the Chair’s involvement in the internal file review disqualify him from sitting in the hearing? |
| Holding | No reasonable apprehension of bias |
| Analysis | Act specifically contemplated involvement of the Chair at both investigative and adjudicative phases  Specialized tribunal w/ multiple roles and decision-making processes taking on different functions pursuant to their statute. Not unreasonable that they would encounter the same parties in different proceedings. |
| Ratio | Where overlapping functions have been authorized by statute, there is an exception to reasonable apprehension of bias |

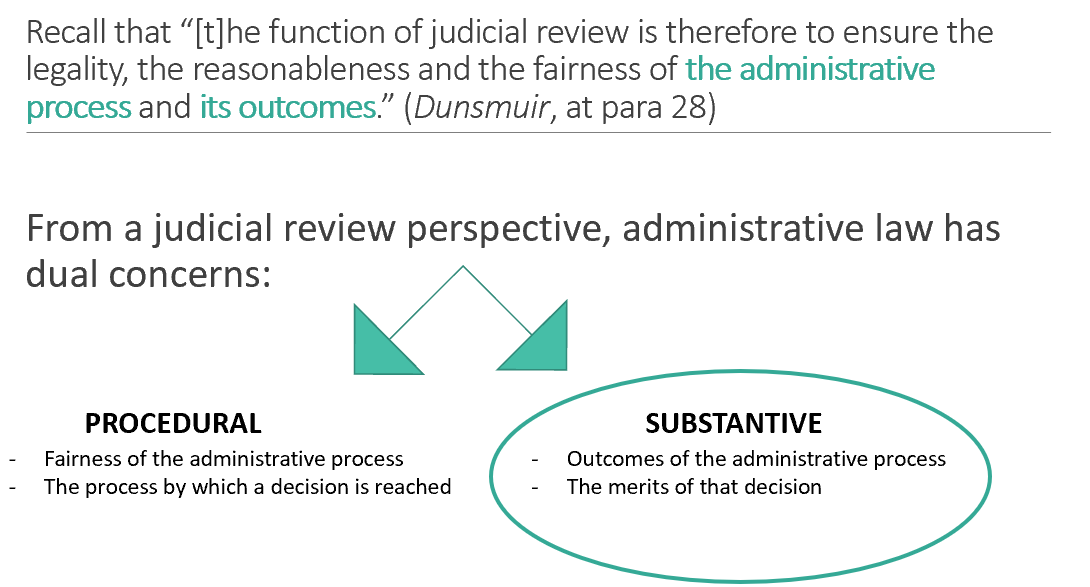
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| *EA Manning Ltd v ON Securities Commission, 1995* | |
| Facts | Securities Commission investigating several fraudulent stockbrokers in Ontario and issued a report naming and shaming dealers trading penny stocks – “abusive and unfair sales practice.”  Chair made comments in an industry newspaper about penny stock dealers being a constant problem “Wolf of Wall Street.” New Commissioners (who weren’t involved in the report) are brought in to prosecute individual stockbrokers. Biased? |
| Holding | No bias |
| Ratio | Where you have expert tribunals with multiple roles authorized by statute (investigative, regulatory, adjudicative roles), the courts are going to give them a lot of leeway in terms of being involved in different functions with the same individuals and not assigning bias by virtue of that. |

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| *2747-3174 Quebec Inc v Quebec (Regie des permis d’alcool)* (1996) | |
| Holding | Liquor Control Board decision quashed because decision not being made by independent and impartial tribunal |
| Ratio | Where a decision is not being made by an independent and impartial tribunal, the decision may be quashed.  Quebec Charter (s.23) to be limited to Quebec – civil law |

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| *Eli v AB* (2003) SCC | |
| Ratio | Extended constitutional principle of judicial independence to justice of the pace because they exercised judicial functions related to enforcement of law and Court system. Also applies to res ten adjudication |

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| *Oceanan Port Hotel LTd. v BC* | |
| Facts | Liquor Control & Licensing Branch made a ruling imposing a penalty on Plaintiff   * + Plaintiff argued that this was judicial process and therefore “serving at the pleasure” indicated that there was insufficient independence on the part of the General Manager of the Liquor Control & Licensing Branch   + Liquor Control & Licensing Branch argued, absent a constitutional challenge, a statutory regime prevails over common law principles of natural justice |
| Analysis | Tribunals are created to implement gov policy |
| Ratio | Statute prevails over common law |

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| **Chapter 10: Standard of Review** |



## INTRODUCTION

* + What is “Standard of Review”? 🡪 3 Sections
    1. Pre-*Dunsmuir* framework
    2. *Dunsmuir* and its progeny
       - What is reasonableness?
       - Presumption of reasonableness
    3. Where to now?
* Privative Clauses & Statutory Rights of Appeal
* Expertise and Statutory Purpose

## WHAT IS THE STANDARD OF REVIEW?

* “The day may come when it is possible to write a judgment like this without a lengthy discussion of the SOR. Today is not that day.” (*Capilano*)
* Degree of intensity with which the courts will examine the decision of a statutory delegate (on appeal or on JR) – courts will start first with the SOR analysis. AKA – to what extent will the reviewing/appellate court defer to the decision of the statutory delegate
* SOR attempts to balance two competing values, both critical to judicial review of admin decisions. Underlying tensions 🡪 legislative supremacy and ROL
* **Barry’s take**: if it’s correctness, just leave it to the courts. The courts can just disregard the elected legislatures that pass the laws and give them the authority to make these decisions when they can make the decisions on judicial appeal anyways. Can you tolerate a decision that might be “Reasonable” but not necessarily “Correct” in your opinion, or does everything have to be correct in your view? That’s the tension and balance – that’s what the standard of review is. When is a court going to intervene and when will it defer to the intent and purpose of legislature to allow that decision maker to make that decision it was created to make. Who was the legislature intending to deicde? The admin tribunal or the court? It ultimately comes down to the intent of the legislature. The court would say that’s all they’re doing is interpreting the intent of the legislature. OR when we interpret, it’s clear that this decision on this issue was meant to be decided by the tribunal.

**Statutory appeal vs judicial review**: statutory gives right of appeal in statute re jurisdiction, etc. directly to the court. Judicial review is CL and not in the statute. If there’s no statutory appeal, there will still be judicial review. Sometimes there are both.

SOR question: **who did the legislation intend to answer the question at issue – the administrative tribunal or the court?**

**IF YOU…**

* + 1. **Want the decision to stand 🡪** argue reasonableness saying that it was not the intention of the legislature to have the court making the decision
    2. **Want decision to fail 🡪** argue correctness and say that it was the intention to have the court making the decision and not some tribunal that isn’t as knowledgeable

**Fact or policy or mixed fact and law 🡪** more deference

**Legal question (interpretation of legislation or legal principles) 🡪** more towards correctness and a court making that decision

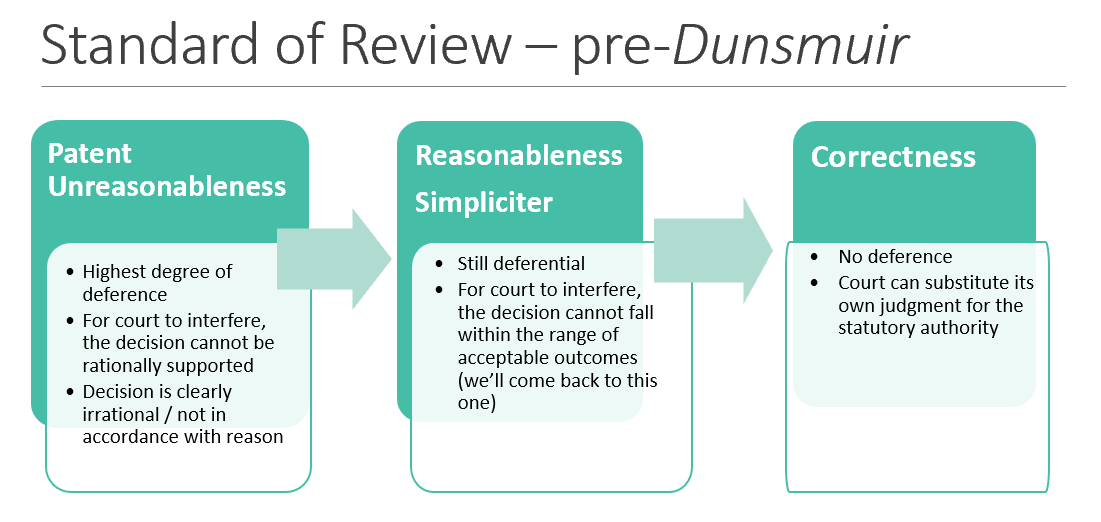
## STANDARD OF REVIEW PRE-*DUNSMUIR*

Factors that are looking at as part of the pragmatic and functional analysis (*Pushpanathan*)

1. The wording of the enactment conferring jurisdiction on the admin tribunal, in particular the existence of a privative clause (complete/full privative clause saying there is no JR = compelling evidence that the court must show deference to the tribunal. If it allows full appeal, person setting up admin tribunal intended to have some supervisory oversight)
2. The purpose of the statute creating the tribunal
3. The reason for the tribunal’s existence
4. The area of expertise of its members; and
5. The nature of the problem before the tribunal

### 3 Standards of Review Prior to *Dunsmuir*

1. Patent unreasonableness (confusing). Highest degree of deference; suggested that courts would uphold unreasonable decision so long as it wasn’t completely insane
2. Reasonableness simpliciter
3. Correctness “hitting the bull’s eye”



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| *Pushpanathan v Canada (Minister of Employment & Immigration),* [1998] 1 SCR 982 | |
| Facts | P claimed Convention refugee status but said he was never adjudicated as he was granted permanent residence statuts under a different admin program. P was arrested in Canada, serving 8 years for trafficking. Once on parole, P renewed his class for refugee status. He was ordered deported but the deportation was condition upon a determination that the claimant is not a convention refugee. Board upheld he was not a refugee b/c of an exclusion on the Convention that provided that it would not apply to any person guilty of acts contrary to the purposes and principles of the UN. |
| Issue | Is he entitled to refugee status? |
| Holding | SCC: majority not satisfied that drug trafficking is contrary to purposes of principles of the UN. Individuals shouldn’t be deprived of the essential protections contained in the Convention for having committed those acts. SOR = correctness |
| Ratio | 4 factors to be used in pragmatic and functional approach to determining SOR:   1. Whether there is a privative clause that suggests a more deferential standard 2. Whether the statutory delegate has greater expertise on the matter in question than the board 3. The purpose of the Act as a whole, and the provision at issue in particular 4. The “nature of the problem” (polycentric nature, many components they will look at to determine this) |

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| *Dunsmuir v NB,* [2008] 190, 2008 SCC | |
| Facts | D was employee of Dept of Justice, held position under the Civil Service Act (he was a lawyer). D’s employment terminated, no cause was explicitly alleged, 4 months pay given in lieu of notice provided. D commenced grievance process, arbitratory determined that D was denied procedural fairness in his termination. Applied for JR  Full privative clause found in legislature. Nature of question – statutory interpretation |
| Holding | CA: judge erred in correctness standard  SCC: reasonable simpliciter standard. Arbitrator’s decision unreasonable |
| Analysis | Long history of deference by courts to decisions like those in labour area. |
| Ratio | Move from 3 standards down to two (got rid of patent unreasonableness). Where the SOR has been adequately ascertained once, you no longer have to redo that assessment. |

## WHAT IS REASONABLENESS?

“Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

* 1 reasonableness standard and no variable degree of deference (*Alberta (Information and Privacy Commissioner) v Alberta Teacher’s Association,* 2001 SCC 61)
* Reasons must be read together with outcome and must show whether the result falls within a range of possible outcomes (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62)
* Threshold for establishing reasonableness is very onerous, even where no reasons are given by admin DM
  + NO CL DUTY TO GIVE REASONS
  + Courts will give flexibility to the body where reasonableness decision could be made based on the facts. May not have articulated reasons but they can still see that it was reasonable
* Existence of other tribunal decisions on the same issue can be of assistance to a reviewing court in determining a reasonable basis for the tribunal’s decision exists (*AB Teacher’s Association; Communications, Energy and Paperworks Union of Canada, Local 30 v Pulp & Paper Ltd.,* 2013 SCC 34)

### Presumption of Reasonableness

Presumptions applies where…

1. The administrative tribunal or body is interpreting its own statute or statutes closely connected to tits function, with which it will have particular familiarity; and
2. Where an administrative tribunal has developed particular expertise in the application of a general CL or civil law rule in relation to a specific statutory context
   1. Court just has to justify that this issue falls within the particular expertise of the DM

**Note:** since *Dunsmuir*, there has been a trend away from the idea that the relative expertise of the tribunal was a prerequisite for the presumption of reasonableness towards a presumption of expertise (*Nor-Man Regional Heath Authority Inc v Manitorba Association of Health Care Professionals,* 2011 SCC 59; *Rogers communications Inc v Society of Composers, Authors, and Music Publishers of Canada,* 2012 SCC 35)

* Courts will look at legislation more generally, not looking at expertise of those individuals making the decision
* Presumption of reasonableness continues to expand

### Where does correctness apply?

*Dunsmuir* established four categories that **are always subject to review on correctness standard:**

1. Constitutional questions (includes questions regarding division of powers between Parliament and provinces)
2. Questions regarding the jurisdictional lines between two or more competing tribunals
3. Questions of true jurisdiction or *vires* 🡪 THE UNICORN
4. Questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise (i.e. human rights cases – courts loathe giving away ownership in these HR questions but there are bodies with specific expertise in that subject matter.)

Narrowing what is reviewed under the correctness standard…

* Limitation of category for QS of general importance to the legal system (*McLean; AB Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53)
* Limitation of jurisdiction questions category – exceptionally rare but may not be altogether eliminated (*AB Teachers)*

## POST-*DUNSMUIR* ANALYSIS -- 2.5 STEP PROCESS

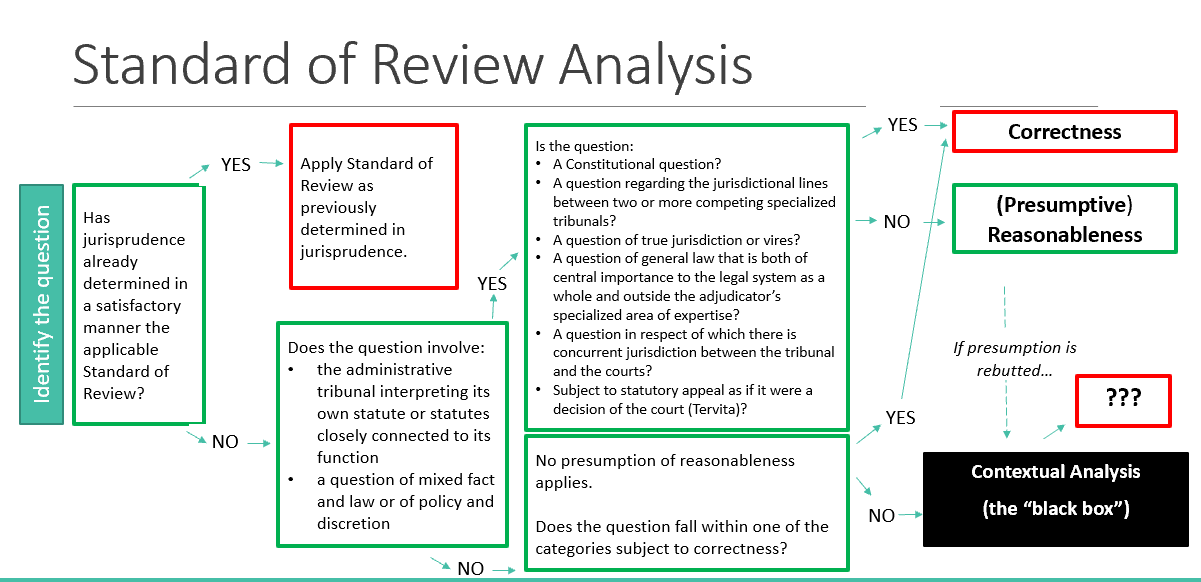
**STEP 0.5:** Identify the issue to be reviewed by the court (could be different standards if more than one issue – *Canadian Broadcasting Corp. v SODRAC 2003 Inc.,* 2015 SCC 57)

**STEP 1:** Ascertain if the case law has already determined in a satisfactory manner the degree of deference to be accorded to the particular issue or question. Whether someone has established the SOR

* 1. Consider if any precedents apply
  2. If yes 🡪 take it and run with it. No further analysis required.
  3. If no 🡪 go through contextual analysis (getting back into breaking it down into the 4 factors)

**STEP 2:** If the answer from step 1 is “no”, undertake a contextual analysis to determine the applicable SOR

* + - * 1. Presumption of reasonableness (and its exceptions) happens here



Presumption of reasonableness and ascertaining whether or not it will apply (exceptions)

### Cases Decided Post-*Dunsmuir*

* *Capilano; Wilson v Atomic Energy of Canada Ltd.,* 2016 SCC 29: illustrate conflict between legislative supremacy and ROL. Both resulted in multiple sets of reasons (some concurring, some dissenting) among the SCC
  + Key issue; what happens when you have a multiplicity of DMs, all independent of one another, and they don’t agree on a legal question?
  + *Capilano* 🡪 narrower view of expertise: courts must not infer from the mere creation of an admin tribunal that it necessarily possesses greater relative expertise in all matters it decides, especially on questions of law
  + Abella in *Wilson*: “undoubtedly many models that would help simply the SOR labyrinth we currently find ourselves in”
  + CJC Karakatsania, Wager, Gascon JJ: “We appreciate Justice Abella’s efforts to stimulate a discussion on how to clarify or simply our SOR jurisprudence to better promote certainty and predictability. However, as it is unnecessary to do so in order to resolve this case, we aren’t prepared to endorse any particular proposal to redraw out current SOR framework at this time.
  + Cromwell J: nope. *Dunsmuir* sets out appropriate framework for addressing SOR
  + Moldaver, Cote and Brown JJ (dissent): importance of rule of law

WHERE TO NOW 🡪 The trilogy cases

### PRIVATIVE CLAUSES AND STATUTORY RIGHTS OF APPEAL

### Privative Clauses

* Statutory provision protecting decisions made by authorities under the statute from JR. Attempt by legislature to send clear message to courts “we want this decision made by this public agency and not by your SCC or CA or QB”
  + i.e. decisions of Board are final and not subject to appeal or JR by court
* Privative clauses don’t oust authority of superior courts to carry out JR (constitutional issues and *vires* issues)
  + Statutory appeals and privative clauses act as a barrier to JR
* JR is constitutionally entrenched
  + SCC – affirmed that the rule of law requires that the courts are constitutionally empowered to decide whether decisions made by public decision makers are constitutionally and jurisdictionally valid. Everyone must exercise their authority legally. That means that the SCC decides who is deciding things legally – that they’re compliant with the law. They’re the ones who get the last say on what the law is.
  + Generally, we take the view that judicial review is constitutionally protected. Constitutional argument that you can’t restrict the court’s ability to judicially review
* Interpretation of privative clause may also depend on statutory appeal clause – statute has “authorized” or “circumscribed’ the court’s role
* Important to examine statute b/c of wide variety of privative clauses and statutory appeal clauses
* Generally, privative clause 🡪 intent of deference (but not determinative)
* Despite presence of a full privative clause, the superior courts retain constitutional authority to review admin action to ensure statutory authority has not been exceeded
* Look to see if there’s a privative clause in your *Pushpanathan* factor analysis

**Full/strong privative clause** 🡪 broad language to preclude any form of review by court, deference!

**Weak privative clause** 🡪 some deference, finality clause/exclusive jurisdiction clause

### Reasons for privative clauses:

1. Protracted delays of JR of collective agreement interpretations by labour arbitrators;
2. Court litigation is expensive
3. Admin tribunals are sometimes created for the very purpose of keeping the dispute out of the courts; and
4. Tribunals in labour disputes are tripartite
   1. You have management nominee, labour nominee and they choose a third independent nominee – how could a court make a better decision than this?
   2. This is why you have privative clauses – with varying degrees of success, they trigger various degrees of deference

IF YOU HAVE…

1. Employment contract between parties, that should govern relationship and not admin law. Contract governs, not whether or not he had a right to a fair hearing or reasons when he was terminated
2. Labour cases/arbitrations: admin processes to decide these cases. Toughest privative clauses and history of deciding things administratively – people can’t hang around waiting for their case to be decided by the SCC)

**REMEMBER: JR IS A DISCRETIONARY REMEDY!!!!!!!!!!! DON’T HAVE A RIGHT TO IT – YOU NEED CLEAN HANDS**

### Statutory Appeals

* Appeal lies to CA on a question of law or jurisdiction ONLY. Statutory appeal for questions of law or jurisdiction, not mixed fact and law, not fact. Also applies to decisions of the municipal government board
* If you have mixed fact and law 🡪 have to go to JR and NOT statutory appeal
* Many statutes provide right of appeal to specific court
* Can be broad (all questions) or limited (e.g. errors of law and jurisdiction)
  + With or without leave of the court (now referred to as “permission to appeal” in AB).
  + Once you have permission of judge at CA – argue case in front of panel (3 or 5).
  + Good lawyers make the issue into question of law
* Inclusion of statutory appeal weighs against deference
  + Signal that those decisions weren’t final and binding – recourse to the courts to have those decisions reviewed at least on some basis
  + *Capilano*: just because there’s a statutory appeal doesn’t automatically mean that the standard of appeal is correctness. Not a strong case for deference, like a privative clause, but it’s not automatic correctness either
  + The stronger the privative clause – the bigger case you have for reasonableness
* Where no statutory appeal exists 🡪 JR exists by default
  + Can also exist in limited/rare cases even when there are statutory appeals
* Judicial deference signals given by right of appeal not clear cut in the case of privative clauses
* *Dunsmuir* didn’t discuss statutory rights of appeal and their impact on SOR analysis
* *Pre-Dunsmuir* 🡪 statutory appeal on question of fact – deference to trier of fact
  + Statutory appeal on question of law – no presumption of deference
* But in *Bell* (1989), *Pezim* and *Southam*, the standard of review was reasonableness even on a question of law where a statutory appeal existed if within core expertise of tribunal (their home statute) – statutory appeal is reasonableness here even on a question of law.
* The existence of a broad statutory right of appeal may indicate less deference but the absence of a privative clause doesn’t imply high standard of scrutiny
* Correctness standard of review may be appropriate on a question of law where full statutory appeal
  + When it’s their core expertise, it will probably be reasonableness
  + If outside their core expertise, (e.g. Teachers case)
  + Have to look at context and mandate and expertise of the decision maker
* However, deference may also be appropriate where question of law is from the decision-maker’s “home statute”

|  |  |
| --- | --- |
| *Crevier v AG (Quebec) et al,* [1981] 2 SCR – con law case, not admin but does talk about constitutional protection of JR | |
| Facts | Professional Code governed 38 professional corporations in QB. Professions Tribunal served as appellate court from the decision of the disciplinary committee. Tribunal didn’t allow for any appeals (privative clause0 – final determiner of all issues and appeals.  2 optometrists charged with 3 offences. Crevier sought to overrule decision b/c it violated s.96 of the *Constitution Act, 1867* |
| Issue | Can Tribunal be immune from JR? |
| Holding | NO! |
| Analysis | As long as there was a clause allowing appeal on jurisdiction – would be functional under s.96  Otherwise, privative clause insulating Tribunal on questions of jurisdiction renders it unconstitutional |
| Ratio | Provincially constituted tribunal can’t be constitutionally immune form review on questions of jurisdiction  JR can’t be precluded when it comes down to a constitutional jurisdictional issue |

## Recap

* Standard of Review
  + - * How much deference will the reviewing court afford to the decision-maker?
      * Must be ascertained in every case (often times in respect of every single issue)
      * Conflict between legislative supremacy and rule of law
* Four critical aspects of *Dunsmuir*:
  + - * 2 Standards of Review: reasonableness and correctness (used to be 3 standards)
      * Presumption of reasonableness
      * Categorical exceptions of the presumption of reasonableness
      * Standard of Review framework/process (used to be pragmatic analysis)

SOR analysis

* + Identify the issue(s) to be reviewed by the court
  + Ascertain if the case law has already determined in a satisfactory manner the degree of deference to be accorded to the particular issue or question. If it has already been decided, that’s as far as you need to go – reasonableness applies.
  + If the answer is no, undertake a contextual analysis to determine applicable standard of review.
    - Does a presumption of reasonableness apply? Is it rebutted? Will apply where it’s determining home statutes or statutes close to that tribunal/judicial body?\*\*
    - Does the issue fall into one of the categories to which correctness applies? (the 4 or 5 categories)
* Reasonableness:
  + - Is there justification, transparency and intelligibility within the decision-making process?
    - Does the decision fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law?