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| Administrative Law Summary |

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*Knight v Indian Head School Division (1990, SCC) 🡪 common law bill of rights endorsement –there may be a general right to procedural fairness, autonomous of the operation of any statute; split reasoning here* 25

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***Homex Realty v Wyoming [1980, SCC]*** *🡪 Municipal by-law (delegated law-making) does engage the right to be heard where it is targeted at an individual; nature of the decision important here* 32

***Canadian Assn. of Regulated Importers v Canada (1993 FC/1994 FCA)*** *🡪 Court of Appeal said the rules of natural justice do not apply to legislative or policy decisions (including minister decisions pertaining to policy)* 33

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***Canada v Mavi (2011, SCC)*** *🡪 given the legitimate expectations created by the wording of the undertaking, it would not be right to proceed without notice and without permitting those to make a case before the ADM* 44

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***Agraira v Canada [2013, SCC]*** *🡪 legitimate expectations grounded in Baker are a factor to be applied in determining what is required by duty of fairness; if public authority has made representations about the procedure, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been –must be clear, unambiguous language* 46

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***Mayan v World Professional Chuckwagon Association (2011 ABQB)*** 🡪 notice must be sufficient so that a person knows the case alleged against them and has the opportunity to answer it before the ADM 51

***R v Chester (1984 Ont HC)*** 🡪 severity (context) of case dictates notice –notice cannot be misleading/inadequate 51

***Canada (AG) v Canada (Commission of Inquiry on the Blood System) [1997 SCC] 🡪*** commission is required to give parties a notice warning of potential misconduct findings but as long as the notices are issued in confidence to the party receiving them, they should not be subject to as strict a degree of scrutiny as the formal findings 51

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***Ontario HRC v v Ontario Board of Inquiry (Board of Inquiry of Northwestern General Hospital) [1993, Ont Ca]*** *🡪 Claims to discovery have to be rooted firmly in the empowering statute; not likely a presumption will be drawn in the absence of express authority* 53

***CIBA-Geigy v Canada [1994, Fed CA]*** *🡪 efficiency and economic consequences are factors in disclosure; admin context is different from criminal and human rights with obligation being less stringent* 53

***May v Ferndale Institution (2005, SCC)*** *🡪general robust standard of disclosure in admin context; Stinchcombe does not apply to admin context but the duty of procedural fairness generally requires that the decision-maker disclose the information he relied upon –the requirement is that the individual must know the case he or she has to meet* 54

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***Innisfil (Township) v Vespra (Township) [1981 SCC]*** *🡪 key principles of cross examination –it is vital to legal system and administrative tribunals, but that is not to say that administrative decision makers are expected to follow same procedures as regular courts except where statute indicates so* 60

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***Howard v Stony Mountain Institution [1985 Fed CA]*** *🡪 factors to consider in determining if representation is required (note: look similar to Baker factors)* 60

***Re Mens Clothing Manufacturers Association of Ontario (1979 Arbitration Decision)*** *🡪 there is no absolute right to legal representation in the courts or other forums, discretion should not be warranted here because of efficiency, cost, and tradition concerns but there is a limited exception where there are certain kinds of issues that impact general legal rules* 60

***Re Mens Clothing Manufacturers Ass’n of Ontario (Ont. Div. Ct.)*** *🡪 overturned arbitration decision 1) as a general rule parties are entitled to choice of representation and this cannot be restricted 2) the arbitrator erred in his exercise of discretion because the issues were complex in matters of law and fact and thus, legal counsel was necessary* 61

***Irvine v Canada (1987, SCC)*** *🡪 fairness is flexible and the extent of the right to counsel and role of counsel are determined by characteristics of proceedings, nature of result in relation to the public and the penalties that will result (still discretion through decision maker on how lawyer will be involved)* 62

***Re Parrish (1993, FCTD)*** *🡪 distinguishes Irvine –outlines considerations where duty of fairness implies the presence of counsel in investigations which includes: testifying under oath, privacy not assured, reports made public, possibility of deprivation of livelihood, or some other irreparable harm* 62

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***Baker v Canada (1999, SCC)*** *🡪 reasons requirement is flexible as to the form of reasons required and when they are required; outlines benefits of providing reasons* 64

***Newfoundland and Labrador Nurses’ Union v Nfld [2011, SCC]*** *🡪 where we are looking at requirement to provide reasons as matter of procedural fairness, only issue is whether reasons were provided at all –where there are flaws with the content/reasons that is addressed under substantive review* 64

***2127423 Manitoba Ltd o/a London Limos v Unicity Taxi Ltd et al [2012, MBCAA] (London Limos)*** *🡪 flexibility of reasons requirement; reasons can be found in other places apart from what are thought of as formal reasons of a court (i.e. the hearing record, someone’s notes, etc.)* 65

***Wall v Independent Policy Review Director (2013, Ont Div Ct)*** *🡪 reasons have to answer the basic question of “why was this decision made?” –to be considered adequate reasons this must be addressed.* 65

***Wall v Independent Policy Review Director (2014, CA)*** *🡪 minimal standard of adequacy for reasons to get over the hurdle of procedural fairness and be considered reviewable –this is a fairly basic level of adequacy and low threshold* 66

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Haida Nation: Trigger for the Duty to Consult Test 🡪 *1) Crown conduct/decision, 2) knowledge of potential right/title claim, 3) might adversely impact* 68

***Mikisew Cree First Nation v Can [2005, SCC]*** *🡪 the duty to consult is read into existing treaties as an implied term* 68

***Rio Tinto Alcan v Carrier Sekani [2010, SCC]*** *🡪 for part three of the trigger test, there must be a causal relationship between the adverse impact and the decision –with a continuing breach, threshold is not met if there is no potential for a novel adverse impact* 68

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***Clyde River (2017, SCC)*** *🡪 ADM undertakes procedural steps of duty to consult but it remains the Crown’s duty to fulfill; ADMs might have to take additional steps to meet the duty but if the Crown’s duty is not satisfied, the ADM cannot proceed* 70

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Association Between the Party and ADM 76

***Marques v Dylex Ltd (1977, Ont Div Ct)*** *🡪 Context matters because in labour, we understand that labour board members often have interests that cross over; timing and involvement are also important* 76

***Terceira, Melo v LUINA (2013, Ont Div Ct)*** *🡪OVERTURNED; complexity, length of matter and deeply entrenched issues justified disqualifying board member* 77

***Terceira, Melo v LUINA (2014, ONCA)*** *🡪 need evidence to support claim of bias; must prove sufficient “nexus” between member and prior retainer/involvement in the matter to show bias* 77

***United Enterprises v Saks (1997, Sask QB)*** *🡪 personal connections; showing a special relationship or preferred treatment of one party raises RAB* 77

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***Province of NB v Comeau (2013, NBCA)*** *🡪 overlapping roles within a particular administrative context can raise a RAB* 78

***Committee for Justice and Liberty v NEB (1978, SCC)*** *🡪 prior participation can be enough to raise a RAB; shows flexibility of test and context specific analysis* 78

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***Old St. Boniface Residents Assn. v Winnipeg [1990 SCC]*** *🡪 Closed mind standard in municipal context: the test is whether the councilor was not “amendable to persuasion” and so had a “closed mind”; different standards apply in different contexts (highly contextual approach)* 79

***Richmond Farmland Society v. Richmond [1990, SCC]*** *🡪 concerns over closed mind standard –there is difficulty in gauging openness of the mind and would lead to posturing (i.e. just saying I have an open mind); standard should be a corruption standard not closed mind* 80

***Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992 SCC]*** *🡪 For a policy side tribunal, tribunal members need not be as impartial as a quasi-judicial tribunal member prior to hearing, but once hearing starts must keep opinions quiet and be open minded (remain "capable of persuasion")* 80

***Pelletier v Gomery (2008, FC TD)*** *🡪 hearing stage; the required standard for a public inquiry falls between the flexible and strict RAB standard* 81

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***2747-3174 Quebec Inc. v Que. [1996, SCC]*** *🡪 claims can be brought for institutional bias; the test for institutional cases = a well-informed person, viewing the matter realistically and practically – and having thought the matter thought – would have a reasonable apprehension of bias in a substantial number of cases* 83

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***Brosseau v ASC (1989, SCC)*** *🡪 Provided that a particular decision-maker is not acting outside its statutory authority (and the governing statute is constitutional), an overlap in functions may not give rise to a reasonable apprehension of bias that would traditionally arise without stat authorization* 84

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*Ocean Port Hotel Ltd. v BC (2001, SCC) 🡪 Statute can by express or implicit implication override the common law with claims of bias/right to be heard; there is no general freestanding constitutional guarantee of independence for ADMs exercising adjudicative functions (ADMs lack same independence as courts)* 86

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***Metropolitan Life Insurance Co v International Union of Operating Engineers, Local 796 (1970, SCC)*** *🡪 courts framing ADMs as acting without jurisdiction because it asked the “wrong question”* 90

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***CUPE (1979)*** *🡪 a court should only interfere (by labelling as a jurisdictional error), an interpretation of the provision that is “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review”; acknowledges and gives weight to expertise of ADMs and legislative intent with privative clauses deferring to ADMs* 90

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***Pushpanathan v Canada (1998, SCC)*** 🡪 *affirmed existence of three SOR; set out four factors to consider in SOR* 91

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***CUPE (2003, SCC)*** 🡪 *concurring judgment criticized the pragmatic and functional approach –lack of clarity and understanding of different SORs and reconsideration necessary* 92

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***Catalyst Paper Corp v North Cowichan (2012, SCC) 🡪*** *rejects reasonableness spectrum but says it is rooted in colour from context; identifies general indicators of unreasonableness in context of bylaws but test = only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside* 98

***Alta. V Alta Teachers Association (2011, SCC) 🡪*** *in some cases an ADM can omit reasons if there are 1) limited reasons required to satisfy duty of fairness and 2) absence of reasons not raised as issue before ADM; Show deference where a tribunal is interpreting its own statute and related statutes also within its core function and expertise* 99

***NL Nurses’ Union v BL (2011, SCC) 🡪*** *tension with Alta Teachers –Broader view in reviewing reasons omitted; the standard is whether the reasons “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within a range of acceptable outcomes”* 100

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| Introduction |

# What is Administrative Law?

* No consensus on what admin law actually is –possible interpretations and different ideas of what it is
* Two interpretations:
  + Harnden’s definition 🡪 “…The law governing the implementation of public programs, particularly at the point of delivery, where they are likely to have their most immediate impact on the lives and rights of individuals.”
    - Focus on public program implementation and enforcement of them
    - Note: no reference to courts
  + Flood’s definition 🡪 “The law relating to the supervision (although this term is unduly loaded) by courts of decision-making made pursuant to statute or the royal prerogative [with the aim of ensuring] at a minimum, that decision-makers do not step outside the boundaries of what they are legally empowered to do.”
    - Focuses on boundaries and ideas of limits on power
    - More focus on courts here as reviewing administrative decision makers
    - No inherent power –legal authority must be delegated to them from a legal source –usually a statute

## Key Principle of Administrative Law

* “Show me the legal power” 🡪 administrative power must point to source of authority when acting
* If they cannot point to a valid legal source –decision is invalid

## Relationship to other Areas of Law

* Statutory interpretation
  + First place to look with admin law
  + To see if they are able to make that decision in the particular way they made it via the statute
  + Concerned with delegations of power and whether decisions were properly made by virtue of delegation
* Constitutional law
  + Not concerned if legislatures have authority to make law, but if the implementation and enforcement of those laws is proper
  + If you want to challenge a decision regarding a law –admin realm
  + Key tool to challenge certain decisions
  + If a particular law is held to be constitutionally invalid, any decision made under the authority is also invalid
* Private law
  + Tort, contract, etc.
  + Some decisions can be challenged in private law but opens up to a number of problems that protect public actors from claims in private law

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| The Administrative State |

# The Administrative State

* What? Subject matter of the administrative state
* Why? Reasons for the administrative state
* Who? Key institutions (or players) of the administrative state
* How? Key tools used to create the administrative state
* How much? Limits on the administrative state?
  + Sources of administrative law limits
  + Limiting what? Key outputs of the administrative state

## Administrative State 🡪 What? (Subject Matter)

* “Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfill are legion.” *Newfoundland Telephone Co. v Nfld* [1992] 1 SCR 623, 635-636.
  + Admin law is everywhere
  + Admin schemes deal with basically everything –industries, activities, etc.

## Administrative State 🡪 Why? (Reasons for Delegation)

* Size and scope of government and necessity 🡪 Imagining a single decision-maker implementing laws for all public programs
* Expertise and complexity 🡪 many issues are technical and complex in nature, and legislators needs experts to pursue a program effectively
* Flexibility, innovation and experimentation **🡪** In the face of new an unexpected development, flexibility is important. The governmental body is not as fluid, and is difficult to change or experiment.
* Speed **🡪** It takes legislation a very long time to make changes in laws and statutes
* Accessibility **🡪** conventional litigation is slow, expensive, and poses significant barriers for those who lack adequate resources. Administrative decision-maker promotes accessibility and makes it less complicated (access to justice) whereby individuals can represent themselves or hire non-lawyers to represent them
  + *Critics of this have a preference for small government (ie. Steve Bannon)*

## Administrative State 🡪 Who? (Key Institutions/Players)

* Legislative branch
  + **Federal** Parliament and **Provincial** legislatures
    - the principal forum of where legislation is pursued (primary legislation)
  + Although the role of legislatures has declined as senior executive bodies (prime minister’s/ premier’s office) have centralized and consolidated their power by various means, from a legal point of view, nearly all public programs must originate with a statute enacted by the provincial, territorial, or federal legislature in order to create new legal rights and duties.
  + Legislature also plays a role in a program’s subsequent administration
* Executive branch
  + Federal 🡪 Crown (Governor General); Cabinet (Prime Minister, Ministers); various administrative actors (i.e. civil servants)
  + Provincial 🡪 Crown (Lieutenant Governors); Cabinet (Premier, Ministers); Various administrative actors (ie. civil servants)
  + The Cabinet can play a variety of roles:
    - Right of Appeal: A statute can provide a right of appeal to the cabinet – they can overturn decisions
    - May be empowered to supplement a statute with delegated legislation
    - May play a decisive role in determining the shape and scope of public programs
  + The Minister is accountable for the decisions that civil servants make, where they are under their direct managerial control. The Minister can also be accountable for the decisions that are not subject to the ministers’ direct managerial control, f they are under their portfolio. They also exercise discretionary powers that direct effect individuals – ie. extraditions

## Other Administrative Decision Makers (ADMs)

* Municipalities (provincial)
  + Exercise powers delegated to them by legislature. Granted the authority to enact by-laws, enacted by elected council members, which must respect provincial authority.
  + Municipal officials are dedicated statutory power to deliver and enforce municipal policies and programs (ie. noise by-laws)
* Crown corporations
  + I.e. Canada Post, CBC, Canadian Council for the Srts, Canada Mortgage and Housing Corporation, and National Capital Commission
  + Governments incorporate public bodies that deliver services. They exercise public functions but have independence from government in day-to-day operations, although government controls determination of budgets and board members
  + Decisions will be based on commercial principles, and their legal relations with suppliers and customers are governed by contract
  + Government characteristics – established by statute to perform functions that private corporations neglected; typically occupy a powerful position in the industry (sometimes a statutory monopoly); they are in public ownership, financed by government grants; report to legislature through minister responsible.
* (Nominally) private bodies with public functions
  + I.e. Children’s Aid Societies, sports franchises, real estate
  + Private bodies that make decisions about public flavor
  + Some derive legal authority purely from contract, yet, by virtue of the control they exercise over particular activities and the nature of the functions they perform, they may resemble administrative agencies that otherwise discharge governmental functions.
  + If they did not exist, they would often have been created by statute
* Indigenous governments
  + Delegation or self-government?
    - How much should admin principles apply to Indigenous governments
    - Convectional view: these communities exercise federal power delegated to them under the Federal *Indian Act* – not a view accepted by Indigenous communities, the power they exercise is inherent jurisdiction that predates contact, and was not extinguished by contact
    - Basically, apply admin principles or respect their inherent sovereignty?
* Independent Administrative agencies (boards, commissions, tribunals, etc.)
  + The most commonly recognized actors
  + CRCT, Human rights commission, Ontario securities commission, LTB

### Similarities of ADMs

* Measure of independence from political execution 🡪 minister cannot direct what decision they must reach
* Specialization 🡪 deliver a particular program or a part of one
* Those who are liable to be affected by a decision by these agencies are given an opportunity to participate in the decision-making process by producing evidence and making submissions
* Operate on the “sharp end” of the administrative process 🡪 at the point when a program is applied to the individual
  + I.e. denial of a license, rezone refusal, refugee determination, unfair employee dismissal

### Differences of ADMs

* Range of decisions 🡪 e.g. Individualized/broader policy
  + I.e. hydro rates affect all citizens whereas other decisions may impact only a few individuals
* Extent of resemblance to courts
* Place in the decision process 🡪 e.g. Final or investigative
* Potential impact on the decision involved 🡪I.e. deportation or whether a deck can be built in backyard
* Composition

### Why ADMs?

* De-politicize decisions 🡪 On the other hand, this lets the government avoid accountability/responsibility for the sensitive decisions
* Expertise
* Limits of formal, adjudicative courts
  + Reluctance to mesh courts in matters that do not fit into judicial review
  + I.e. Hostility to labour movement

### Roles of ADMs

* Policy-making 🡪 Implementation 🡪 Enforcement 🡪 Adjudication
  + Roles are delegated
  + Roles may be blurred, but the nature of the roles differs

### Tools for ADMs

* Usually based in **statute**
* The tools delegated vary considerably 🡪 education roles, CRA, etc.
* **Discretion** 🡪 the “ubertool” –it allows all other tools to be utilized
  + Concerns that it allows government to abuse power
  + And it makes it difficult to hold the government accountable
* Although admins have an adjudicative role, they are different from the courts
  + Do not function the same way with the same level of formality

## Four Basic Questions for ADMs *🡪 source, to whom, nature of power, how it is exercised*

1. The **source of the legal power** (authority) being delegated?
2. **To whom** is the legal power being delegated?
   1. Explicit or implicit (“necessary implication”) delegation possible
   2. Any of the actors discussed
   3. Delegation might be granted explicitly in the statute, but it might not
   4. Implicitly – subset of cabinet can act for the entire cabinet
   5. Gov’t dept. can act for a minister that is delegated the power to make some decision *The Baker Case*
3. The **nature of the legal power** being delegated?
   1. Spectrum:
      1. One extreme: broad discretionary bower – look for the word “may”
      2. Other extreme: duty – legal authority must be exercised; look for the word “shall” or it is “their duty”
      3. Other possibilities on spectrum – e.g. “May” do y in the “public interest”
4. **How** is the legal power to be exercised?
   1. Procedural requirement imposed on its exercise?
   2. Substantive requirements imposed on its exercise?

### Apiary Inspection 🡪 Statute example

1. Source of legal power delegated 🡪 Apiary Inspection Act
2. To whom power is delegated 🡪 Provincial Apiarist and inspectors
3. The nature of the legal power 🡪 sections 3-17 outlines the duties and powers (look for may and shall)
4. How is the legal power to be exercised?
   1. Procedural requirements
   2. Substantive requirements

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| Limits on Administrative Power |

# Limits on Administrative Power

## Sources of Limits 🡪 in hierarchal order legally

1. The Constitution
   1. I.e. Charter s. 7
   2. Also, “quasi constitutional” instruments (i.e. Bill of Rights)
   3. Because it confers certain procedural rights
2. The Statutory Framework
   1. Always the first place you look!!
   2. Primary legislation 🡪 the “enabling statute” (or statute)
   3. Delegated legislation 🡪 e.g. Regulations
      1. That implements a particular program
      2. Subordinate legislation may be much more detailed than primary legislation, which is often broadly termed. I.e. *Securities Act*
3. General statutes dealing with judicial review
   1. Ontario 🡪 *Statutory Powers Procedure Act*
   2. Some jurisdictions enact laws that apply to a broad range of decision makers and require them to respect particular procedural safeguards
4. The common law
   1. Articulating principles and rules that decision makers must respect and when
5. Decisions/reasons of administrative decision-makers
   1. First instance decisions, perhaps appeal decisions as well (depending on the context)
   2. Non-binding, but can be treated as persuasive (e.g. *IWA v. Consolidated Bathurst* (1990) SCC)
   3. Courts cannot fetter their power by making decisions binding
6. Policies and Guidelines
   1. Non-binding, although the impact they have can be fairly significant in some cases

## Practically 🡪 *hierarchal order of limits is different in practice*

1. Policies/guidelines
2. Statutes and/or decisions of ADMs (depends on the context)
3. Common law
4. Constitution
   1. This is in inverse order because of how it is practically enforced
   2. Focus on policies because it is what the boards/authorities look to first for ease
   3. Day to day reality

## Nature of Limits 🡪 *key outputs of the administrative state*

* Individual administrative decisions
  + Most common object of scrutiny
  + Can be individualized or more general in focus (policy-based)
* Subordinate legislation
  + Has to respect the terms of the primary legislation. If you want to challenge an administrative decision, you might look at the primary legislation and try to argue that the subordinate legislation does not follow the primary legislation
* Policy guidelines 🡪 too much authority
* Municipal by-laws
* Crown prerogative 🡪 Much less common

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| Avenues for Redress of Grievances |

# Avenues for Redress of Grievances

* Focus on the role of courts in reviewing administrative agencies and on the remedies that a court may award when the decision maker is found to have access to the courts
  + Not that most government actions are never subject to litigation

## Questions to Ask in Considering Avenue(s) to Pursue

1. **Who** exercises the authority to review the delegated power?
2. **What** procedure must be followed in seeking the review?
3. On **what grounds** is review exercised?
4. What **relief** of remedy is available?

### Possibilities for Political and Administrative Redress

* Legislative oversight 🡪 legislative officers (e.g. Ombudsman –officer of the legislature)
  + Empowered to investigate action taken in the administration of a government organization that affects individuals
  + Has power to obtain information in connection with the investigation, which is conducted privately
  + Complainant merely has to file a complaint
  + Can consider a wide range of possible errors that may have been committed in the delivery of a public program
  + Can ask the organization to provide a remedy 🡪 such as compensation, a revision of practices, or an apology
  + These conclusions are not legally binding, and are enforceable only through the political pressure that can be exerted by the legislature and public opinion.
* Administrative remedies
  + E.g. appeals to administrative appeal bodies

### The Courts 🡪 three options

1. Original jurisdiction and direct actions 🡪 *Claim in tort, contract, etc.*
2. Statutory rights of appeal 🡪 *No automatic appeal; must be provided for in statute*
3. **Applications for judicial review 🡪 *Our focus*:** Applications for Judicial Review

Note 🡪 must pursue the relevant avenues before applying for judicial review

## Application for Judicial Review

* “Inherent jurisdiction” of “superior” courts to review legality of administrative decision-making
  + Constitutionally protected to some extent in the provincial courts/SCC –*Crevier v Quebec* (1981)
  + Cannot be displaced by legislation
* Historically, this inherent power exercised through “prerogative writs”; but laws were technical and complex
  + These were very important and very technical. Lots of trap doors to fall through, and therefore lots of complaints from individuals that things need to be simplified
  + Lots of criticism which led to the reforms in the 1970s –intended to simplify judicial review
* Reforms in the 1970s
  + A new, simplified single application for judicial review 🡪 Ontario: *Judicial Review Procedure Act*
  + Did away with focus on particular writ and created one common application
  + Some jurisdictions changed the court hearing applications. They altered the court that you apply to
    - Ontario: from the high court of justice to the Divisional Court (branch of the Ontario Superior Court of Justice); 3 judges, like an Appeal
    - Federal: Federal Court (newly created)
      * Sometimes it goes to one, and sometimes the other: “it depends” – on what?

## Administrative Law in a Nutshell

Parliament/Legislature 🡪 by Statute 🡪 to Executive (administrative decision-makers) 🡪 Decision made by ADM 🡪 an affected party (person, corporation, etc.) 🡪 Challenge 🡪 Avenues for redress (political redress, the courts, etc.) 🡪? 🡪 Parliament/Legislature

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| Underlying Theoretical Principles and Tensions |

# Underlying Theoretical Principles and Tensions

## Three Key Principles that Underlie Admin Law 🡪 *1) rule of law 2) parliament sovereignty 3) separation of powers*

1. The rule of law
2. Parliamentary (or legislative) sovereignty (or supremacy)
3. The separation of powers

## Other Key Principles

* Becoming increasingly important in recent years
* Includes:
  + Honour of the Crown
  + Human rights, etc.
* Other key ideas:
  + Jurisdiction
  + Fairness
  + Reasonableness, etc.

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| Rule of Law |

## First Key Principle 🡪 Rule of Law

* Examples:
  + *Constitution Act*, 1982, Preamble 🡪 “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law”
  + *Secession Reference 🡪* Rule of law is underlying principle of constitution
* What does this mean?
  + The root idea is that the **government should be subject to law** 🡪 an “essentially contested concept” (Jeremy Waldron, leading legal philosopher)

### Spectrum of Rule of Law 🡪 Thick/Thin

* Definitions can be placed on a **spectrum between thick/thin**

1. Thin definition 🡪 **emphasize formal/procedural requirements**
   * + E.g. principle of legality –“show me the legal power” = All decisions must find their source in a valid law
     + Common justification for principle of legality –prevents arbitrary public decisions and requires decisions to be made in accordance with law
2. Thick definition 🡪 **emphasizes substantive requirement**
   * + E.g. “all laws must respect basic individual rights” (Trevor Allan, leading scholar at Cambridge)

* Many definitions fall between these two definitions

### Rule of Law Requires Seven Basic Principles to be respected 🡪 Lon Fuller (Harvard)

1. Publicity 🡪 idea that all laws need to be publicly available to be obeyed
2. Prospectivity (non-retroactive) 🡪 about how people act in the future, not in the past
3. Clarity 🡪 to respect rule of law, laws need to be sufficiently clear and understood
4. Generality 🡪 not targeting specific individuals
5. Consistency 🡪 non-contradictory – one law shouldn’t prohibit what another allows
6. Stability 🡪 doesn’t change easily
7. Capability of being obeyed

* The virtue of these is the ability to predict the decisions of legal individuals and therefore maximize legal action in daily life
* Principles of good administration or legal craftsmanship. Arguably, legislators should respect these values when they make laws, and administrators should respect when making administrative decisions
  + Many would consider this a thin definition, but Wright places it on the spectrum between the extremes

### *Roncarelli v Duplessis (1959, SCC) 🡪 the rule of law is a fundamental postulate of our constitutional structure –thin/thick reading of the rule of law but Rand endorses thick reading –All power has purposive restrictions and bad faith restrictions and so there is no such thing as absolute discretion for decision makers*

* Facts 🡪 Duplessis was a premier in Quebec who was pretty bad. Roncarelli posted bail for hundreds of Jehovah’s witnesses who were being persecuted by the government, using his restaurant as security for bail. Mr. Archenaud, a dude in charge of licensing, told Duplessis about this and asked what he should do. Mr. Duplessis, who was also Attorney General, told him to take away Mr. Roncarelli’s liquor license forever. Mr. Roncarelli sued for damages arising out of the taking away of the liquor license.
  + This is not an admin case because it is for damages, but it stems from administrative decision making that reflects on the admin system
* Held 🡪 damages awarded
* Ratio 🡪 the rule of law is a fundamental postulate of our constitutional structure –thin/thick reading of the rule of law but Rand endorses thick reading –All power has purposive restrictions and bad faith restrictions and so there is no such thing as absolute discretion for decision makers
* Reasoning 🡪 Rand (majority)
  + There is no such thing as absolute and untrammelled discretion
  + No legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however irrelevant, regardless of the nature or purpose of the statute
  + Discretion implies good faith in discharging public duty, there is always a perspective within which a statute is intended to operate
  + To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred.
  + All power has purposive restrictions and bad faith restrictions
* NOTE 🡪 what does the rule of law entail here? Thick and thin takes on the rule of law in this decision:
  + **Thin reading** 🡪 It endorses the principle of legality. Duplessis testified that “when an authority figure says something, it is an order, and the subordinate (Archenaud) is obligated to follow”. This is the idea of power. However, the Court did not accept this, and did not see his authority as valid, because it was not backed by legal power. Duplessis acted without legal power, so damages were owed
    - If you adopt the thin reading you might think just the wrong person made the decision, if Archenaud made the decision and not Duplessis it would have been fine? NO –still ill intent and outside purpose of Act
  + **Thick reading** 🡪 Decision tells us how public power may be exercised, in the absence of clear statutory language, if it is to respect the rule of law. Rule of law requires purpose underlying the legal power to be respected; there no such thing as an “absolute” discretionary power. Rule of law prohibits bad faith exercises of public power
    - Better reading here because it looks at the substantive purpose of the rule of law and not just the person as the decision maker

### *Quebec Succession Reference (SCC, 1998) 🡪 endorses a thinner definition of rule of law: “show me the legal power” –all exercise of public power must be regulated by law*

* Facts 🡪 three reference questions put forth: 1) Can Quebec secede unilaterally from Canada under Constitution? 2) What about under international law? 3) Which prevails if the two conflict?
* Reasoning:
  + The Constitution includes written and unwritten parts, including unwritten constitutional powers
  + Identifies four unwritten constitutional powers:
    - Federalism
    - Democracy
    - The rule of law
    - Respect for minorities
  + Draws the connection between democracy and rule of law –one cannot exist without the other
* Rule of Law Defined (para 71)
  + “... That the law is supreme over the acts of both government and private persons. There is, in short, one law for all.”
  + “Requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”
  + “’... [That] the exercise of all public power must find its ultimate source in a legal rule’. Put another way, the relationship between the state and the individual must be regulated by law.” (*Show me the power*)
    - This is recognized as a thinner conception of the rule of law

NOTE 🡪 tension between Duplessis (thicker definition) and Quebec Seccession (thinner definition)

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| Parliamentary Sovereignty |

## Second Key Principle 🡪 Parliamentary Sovereignty

* *Constitutional Preamble, 1867* 🡪 “Whereas the Provinces … have expressed their Desire to be federally united… with a Constitution similar in Principle to that of the United Kingdom …”

### Two Key Ideas of Parliamentary Sovereignty

1. Parliament/legislature can make or unmake any law, and no other body can invalidate them
   1. People who are fans of this are not fans of “constitutional rights”
2. Parliament/legislature cannot bind itself for the future
   1. If a later law contradicts an earlier law, the later law trumps the earlier law
   2. This is associated by the democratic guarantee because we can elect someone in the future who will replace laws from the past.

### Why is parliamentary sovereignty important?

* Supports democracy 🡪 we elect the representatives
* Ensures ultimate public power rests with the “people”
  + These ideas are in their pristine forms, but they don’t actually exist

### Limitations on Parliamentary Sovereignty

1. Procedural 🡪 manner and form
   1. Rules to make law –legislature must follow its own rules and requirements for making valid laws
   2. I.e. reading a law three times in parliament, voting, etc.
2. The Constitution 🡪 laws must be constitutional because it is supreme
   1. Now constitutional supremacy?
   2. Is this the exception that swallows the “rule"?
      1. Within the limits imposed by the Constitution, the relevant legislature has the ability to make or unmake any law whatsoever.
      2. The sovereignty continues to have purchase where Constitutional limits are respected
      3. How broad this power is depends on the broadness of the Constitution and the power granted to same by the Courts.

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| Separation of Powers |

## Third Key Principle 🡪 Separation of Powers

* Three branches 🡪 each is expected to respect the functions of the other branches (sometimes disagreement on this)
  + Legislative branch makes law
  + Executive branch implements and enforces law
  + And Courts interpret and apply laws
* Concept used in two ways:
  + **1) Descriptively:** as an account of what is
  + **2) Normatively:** as an account of what should be

### Descriptively

* No strict separation of powers in Canada
* The legislative and executive branches are “fused”
  + But, judicial independence
  + Also, generally accepted allocations of responsibility
  + When people say “that’s not the Court’s job” they are making a separation of powers argument

### Normatively

* Concept invoked to criticize and prescribe
* Administrative context
  + Used to defend judicial involvement – to ensure ADMs respect legal limits
  + Used to criticize judicial involvement – courts lack expertise of ADMs

### Implications of these principles for administrative views

* A spectrum of views:
  + **CLASSIC LIBERAL 🡨🡨🡪🡪 FUNCTIONALIST**

### Two Views 🡪 1) Classic 2) Functionalist critique

1. Classic view 🡪 AV Dicey (1835-1922)
2. Functionalist critique 🡪 Willis, Laskin, etc.

#### Classic View 🡪 AV Dicey

* Professor of Law at Oxford 🡪 aimed to establish public law as legitimate discipline among private law subjects
* Emphasized two ideas:
  + **Parliamentary sovereignty** 
    - All competence, legislative monopoly 🡪 that government power must be channeled through the legislative branch, in order to implement democratic rule beforehand, and subject it to democratic scrutiny after-the-fact
  + **Rule of law:** three ideas
    - 1) All governmental action must be authorized by law; no one should suffer except for a “distinct” breach of the law (*show me the power)*
    - 2) That government and citizens alike must be subject to the general law of the land; no special treatment for government (*endorsed in Secession reference)*
    - 3) The law – including the law relating to the government – should be reviewed in the ordinary common law courts (*new idea)*
      * Suspicious of administrative decision-making and does not like discretion and statutes that confer discretion on administrative decision makers –need to be able to point to clear law
* He found administrative decision-making was problematic:
  + It doesn’t respect parliamentary sovereignty (it limited Parliament’s role as the locus of accountable decisions)
    - Note: there is also an implicit separation of powers argument here
  + It doesn’t respect the rule of law (it opened individuals up to interferences with their rights, not due to a distinct breach of the law, but the discretion of an administrative decision-maker)
  + It circumvented the common law courts, undermining their superior ability to protect individual rights (e.g., to private property)
    - Note: there is also an implicit separation of powers argument here
* **Takeaway:**
  + Emphasized parliamentary sovereignty
  + Endorsed thin view of rule of law 🡪 show me the legal power, hold government accountable
  + The law should be reviewed in the ordinary common law courts
  + DOES NOT LIKE ADMINISTRATIVE DECISION MAKERS 🡪 finds them problematic

#### Functionalist Critique 🡪 Willis, Laskin, etc

* Defended administrative decision-making
* Challenged the descriptive assumptions underlying Dicey’s claims
  + E.g. Legislative branch did not wield all public power
  + Argued judging involved considerable discretion, and administrative decision-making applies the same discretion
* Challenged the normative assumptions underlying Dicey’s claims
  + Embraced administrative decision-making as necessary and desirable
  + Questioned Dicey’s assumptions that the courts were well placed to review administrative decision-making
  + Pointed out that Dicey seemed to overlook the democratic pedigree of delegated administrative decision-making
    - This was inconsistent with democratic principle
  + Argued Dicey’s rule of law concerns could be addressed in other ways, without the wholesale assault on the administrative state. Statutes could accommodate flexibility
* Recommendations:
  + Don’t presume that administrative decision-making is bad
  + Don’t force ADMs to be courts either:
    - Procedurally or
    - Remedial
  + Balance the rule of law concerns against other concerns, and look for other ways to address any rule of law concerns that do arise

#### Recent Debates

* Courts defer more readily to administrative decision-makers 🡪 shift towards functionalist perspective
* But, do they now defer too readily in some cases?
* Should courts try to encourage administrative decision-making that is more democratically transparent and accountable?
  + I.e. Emphasizing disclosure of reasons
* Should courts try to encourage administrative decision-making that respects basic human rights?
  + This debate is manifested in who gets to decide 🡪 How much should they defer? Not at all, or completely?
* NOTE 🡪 since things have tipped in favour of functionalists, now we are seeing a bit of back tracking from SCC on it too

#### Readings: Insight into debate

* It is possible to rework elements of the liberal view in order to provide a role for the law of judicial review in advancing the values of rule of law and public interest in the delivery of public programs effectively, efficiently, and responsibly:
  + 1) Ensure procedural openness and enhance accountability in public administration. Public participation should be encouraged and not limited to those whose private rights may be adversely impacted by administrative action
  + 2) Scrutinize more closely those decisions that seem contrary to the interests of the intended beneficiaries of the legislation or to that aspect of the public interest that the legislation was enacted to protect
  + 3) The courts have a role to play in upholding the democratic processes of the legislature when reviewing administrative action
  + 4) Infringements of Charter rights are weighed carefully against competing public interests, an exercise to which administrative agencies will often be able to make an informed contribution

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| Administrative Law Four Major Components |

# Administrative Law: Four Major Components

1. Threshold issues
2. Two grounds for review:
   1. Procedural fairness review
      1. The right to be heard
      2. Right to an independent and impartial decision maker
   2. Substantive review
3. Remedies

## Background Questions to Consider in All Cases

1. Context: who, where?
   1. Who made the decision?
   2. Where does the authority to make it come from?
   3. If statute (the usual case), consider the questions:
      1. Source of legal power (authority) being delegated?
      2. To whom is the legal power being delegated?
      3. The nature of the legal power being delegated?
      4. How is the legal power to be exercised?
2. The procedure: how?
   1. How was the decision made, procedurally?
3. The substance (outcome): what, why?
   1. What was the decision?
   2. How was it made?
4. Remedy?
   1. What remedies (avenues for redress) might be available, *and of use*?
      1. Who exercises the authority to review the delegated power?
      2. What procedure must be followed in seeking the review?
      3. On what grounds is review exercised?
      4. What relief of remedy is available?

**The level of procedure required for a decision (The Baker Factors)**

1. The court must consider the **nature** of the decision being made and the **process** followed in making it.
   1. The closeness of the administrative process to the judicial process indicates that more procedure is required.
2. The court must consider the nature of the **statutory scheme** and the terms of the statute pursuant to which the body operates.
   1. Greater procedural protections are required when no appeal is provided, or when the decision is determinative of the issue.
3. The court must consider the importance of the decision to the **individual(s) affected**.
   1. The more important the decision to the lives of those affected and the greater its impact on those people, the more stringent the procedural requirements will be.
4. The court must consider the **legitimate expectations** of the person challenging the decision.
   1. This step considers the administrative decision maker's regular practices – they cannot backtrack on substantive promises previously made without according significant other procedural rights.
5. Finally, the court must consider the **choices of procedure** made by the administrative decision maker itself.
   1. When a statute gives a decision maker considerable deference to set its own procedure, this will indicate less stringent procedural requirements. This factor is not determinative.

* This list is not intended to be exhaustive and other factors might also be important.

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| Procedural Fairness Ground for Review |

# Procedural Fairness 🡪 First Ground of Review

* Were the procedures used in making decision fair?
* Focus on the procedure followed, not decision reached

## Two Components to Duty of Procedural Fairness 🡪 *1) right to be heard 2) right to independent impartial decision maker*

1. The right to be heard (captured by the latin *adi alteram partem*, meaning “hear the other side’); and
2. The right to an independent and impartial decision-maker (captured by the latin *nemo judex in sua causa debet esse*, meaning the decision-maker must not be “a judge in his own cause”)

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| The Right to Be Heard |

# The Right to Be Heard

* Protects various procedural rights
* Entails the opportunity to:
  + Know the case to meet; and
    - Protecting rights to info that may be relied upon by the ADM in making their decision; capturing the basic intuition that when the ADM is making a decision that impacts us, we at least have the right to the information that they’re relying upon
  + Try to meet that case
  + Rights to challenge the information that the info that the ADM has and try to present other info that presents your case in a more favorable light
* Context is key in this area
* Procedural rights that might be required include:
  + Notice
  + Disclosure of information
  + An oral hearing
  + The right to counsel
  + The right to call evidence and cross-examine witnesses
  + Reasons for the decision, etc.
* **Focus on process, not outcome**
* The procedural rights serve several purposes
  + Encourage better decisions (including respect for the rule of law)
  + Encourage more legitimate decisions
  + Foster public accountability
  + Protect basic human dignity interests

## Four Questions of the Right to Be Heard 🡪 *1) sources 2) trigger 3) content 4) statute authorization*

1. What **sources** of procedural rights might be engaged?
2. Of these sources, which are engaged? (**Trigger**)
   1. The nature of the trigger depends on the source
   2. If the answer is none, the analysis stops here
3. Were the required procedural rights provided? (**Content**)
   1. What procedural rights should have been provided? And,
   2. Were they in fact provided?
4. Is there a claim for **statutory authorization**? (Have some or all of the procedural rights been eliminated or restricted by statute?)
   1. Ignore if the Charter is the source; the Charter trumps, unless S.33 is invoked

## Trends in Right to Be Heard Cases

1. Recent cases have a stronger focus on context; in previous years, if something was triggered, you got a package of rights/redress based on the trigger. Now, the procedures required vary between decisions based on context;
2. More deference to procedural decisions of ADMs (*Is there too much?*)

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| The Right to Be Heard: Sources |

# The Right to Be Heard 🡪 Sources

* The enabling statute
  + Always check the enabling statute first
  + May set out a detailed list of procedural requirements that decision-makers must follow in making specific decisions
* Delegated legislation 🡪 rules, regulations, etc.
  + Legally binding
  + E.g. RCMP Public Complaints Commission –Rules of Practice SOR/93-17
    - Regulation enacted pursuant to RCMP Act, RSC 1985
  + Rather than prescribing specific procedures in an administrative board’s enabling statute, legislatures may choose to statutorily delegate to the executive – the (lieutenant) governor in council, an individual minister, or the board itself – the power to enact regulations or rules that establish procedural requirements
  + Regulations and rules made pursuant to statutory authority, knock as “subordinate legislation” are binding on those parties subject to them.
  + Motivation for delegation of this power 🡪 expertise & efficiency
  + Potential issue:
    - Principal-agent” problem 🡪 a risk that those who are making the rules are not following the wishes and expectations of those who delegated the power, and as a consequence, the wishes of the electorate.
    - Risk is minimized through mechanisms of accountability and scrutiny, public consultation, and judicial review
* Policies and guidelines
  + Legally non-binding but play dominant role in public authorities’ decision making
  + Front line decision makers sometimes rely almost exclusively on guidelines to make decisions, and refer to their enabling statutes on when the guidelines are not clear
  + Hard vs. soft law
    - Relied on by ADMs
    - Relied on by courts under *Baker*
  + E.g. Immigration and Refugee Board Guideline 7 (Conduct of a Hearing)
    - Guideline issued by the Chairperson of the IRB under the *Immigration & Refugee Protection Act*
* General Procedural Statute
  + Ontario 🡪 *Statutory Powers Procedure Act*
    - Corresponding Acts for other provinces as well
  + Thresholds for application vary between provinces –but apply to general procedural
  + Once triggered, the codes prescribe common procedural standards for the decision-makers falling within their ambit.
  + Scope and application may be modified by enabling statute and delegated legislation, and great care must be taken to read these legislative procedural sources together to determine procedural entitlement in a given case. Ie. *Ontario Human Rights Code* references the *SPPA* directly.
* Common Law Procedural Fairness
  + If a particular procedure is not required by any of the above, the authority may nevertheless be obliged to provide an affected party with fuller procedural protection under principles of common law procedural fairness.
  + A party affected by the public authority’s decision is entitled to be heard by the authority in an impartial and independent hearing
  + May be a “source” of procedural rights where none of those other sources are engaged on the facts, or they are silent
  + May also supplement the procedural rights in these sources
  + What is the source of these procedural rights?
    - The common law?
    - The statute, properly interpreted?

NOTE 🡪 there may be no legislative protected right or source, we may be relying entirely on common law or even mostly on common law

* E.g. oral hearing request –we might argue common law here because it is not necessarily outlined in rules, statute, etc.

## *Cooper v Board of Works for Wandsworth District (1863) 🡪 traditional common law doctrine of procedural fairness; even without positive words in a statute, the common law can step in and supply the omission of the legislature –three reasons 1) forgetful legislature 2) implied stat intent 3) common law bill of rights*

* First of seminal cases that marked the development of the modern doctrine of procedural fairness from natural justice
* Facts 🡪 Board had a provision that if no proper notice is given (7 days), then Board can step in and may demolish a house without notice. Plaintiff started building a house 5 days after sending the Board notice to build a house (2 days earlier than allowed). The Board stepped in and ordered his house torn down without notice. Claims it didn’t receive the notice. Plaintiff brought an action for damages in trespass. Succeeded at trial, board appealed
* Issue 🡪 Whether notice and a hearing were required before a demolition with the result that the board did not have legal authority to act the way it did
  + There was a Q of authority even though this was a private law claim of trespass
* Ratio 🡪 although there are no positive words in a statute requiring that the party shall be heard, the justice of **the common law will supply the omission of the legislature**”
  + Common law can supply the omission of the statute
  + “I think the appeal clause would evidently indicate that many exercises of the power of a district board would be in the nature of judicial proceedings; because, certainly, when they are appealed from, the appellant and the respondent are to be heard as parties, and the matter is to be decided at least according to judicial forms.”
* Three justifications for explaining common law filling in gaps:
  + 1) The forgetful legislature 🡪 they would have included it if they turned their mind to the issue, they were just forgetful
  + 2) Implied statutory intent 🡪 statutory interpretation where legislature legislates with common law in mind and enact protections where statute is silent; if they did not want this included they would legislate language to prohibit it
  + 3) A common law bill of rights 🡪 idea that courts themselves create these rights which is permissible
* Reasoning:
  + “The nature of the interest at stake – property
  + The “enormous” impact of the decision on the interest at stake
  + Cost-benefit analysis
  + The statute itself
    - The act contemplated an appeal to aboard called the Metropolitan board and the statute indicated for those appeals that a hearing was actually required
    - Complicit support for a hearing
  + How do we explain this? The forgetful legislature? Implied statutory intent? A common law bill of rights?

## *Knight v Indian Head School Division (1990, SCC) 🡪 common law bill of rights endorsement –there may be a general right to procedural fairness, autonomous of the operation of any statute; split reasoning here*

* Facts 🡪 The appellant board of education dismissed the respondent director of education when he refused to accept a renewal of his contract for a shorter term than the original. Respondent brought an action for wrongful dismissal.
* Issue 🡪 is procedural fairness due to an office holder at pleasure?
* Ratio 🡪 There may be a general right to procedural fairness, autonomous of the operation of any statute
* L’Hereux-Dube for 4 of 7
  + There may be a general right to procedural fairness, autonomous operation of any statute
  + Consults the statute only after determining whether such common law applies
  + NOTE 🡪 very narrow approach endorsing common law bill of rights
* Sopinka J for dissent of 3
  + Says her approach is wrong
  + Says the correct approach requires an examination of relevant statutory instruments first to determine whether they expressly or by implication point to a duty of fairness
* Three factors that trigger general duty of fairness
  + **The nature of the decision to be made by the administrative body**
    - No longer a need to distinguish judicial, quasi-judicial, or administrative decisions (*Nicholson*)
    - Now there is a distinction between legislative or general nature and an administrative or specific nature, which do not entail such a duty
    - Finality of the decision – decision of a preliminary nature will not in general trigger a the duty to act fairly
  + **The relationship existing between the body and the individual**
    - Possible employment relationships (*Ridge v Baldwin*):
      * Master and servant – no duty to act fairly
      * Office held at pleasure – no duty to act fairly
      * Office from which one cannot be removed except for cause – duty to act fairly
    - However, decision in *Ridge v Baldwin* has been adopted by Canada and tries to make procedural fairness an essential requirement of an administrative decision to terminate the last two categories.
    - Fairness for the categories dictates only the requirement that the administrative body give the office holder reasons for dismissal and an opportunity to be heard
    - Public policy concern – the public has an interest in the proper use of delegated power by administrative bodies
  + **The effect of that decision on the individual’s rights**
    - There is a right to procedural fairness only if the decision is a significant one and has an important impact on the individual

## *Mavi v Canada (2011, SCC) 🡪 supports implied bill of rights approach and its key role but that it yields to clear statutory language*

* “… It is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people ... On the contrary, the general rule is that a duty of fairness applies. … But the general rule will yield to clear statutory language or necessary implication to the contrary …” (para. 39)
* Supports the implied bill of rights approach?
* NOTE 🡪 still unclear today, but case law suggests still supports common law has key role

## The Modern Common Law Doctrine 🡪 Dimensions and Limitations of Procedural Fairness

* Following *Cooper*, the courts’ willingness to impose hearing requirements on decision-makers become contingent on how they categorized the nature of their decision-making power.
* Judicial or quasi-judicial functions were required to comply with natural justice but ministers, public servants, or tribunals were not.
* In *Ridge v. Baldwin* [1964 HL], the HL decided that the existence of the duty to comply with natural justice did not turn on finding in the enabling statute a “super-added duty to act judicially”.
  + The judicial character of the decision-maker’s power could be inferred from the nature of that power and, in particular, could be implied from the mere fact that rights were being affected.
* The SCC followed this lead in *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979].

## Constitutional and Quasi-Constitutional Sources of Procedures

* Resort to these, such as the Bill of Rights, Charter, and Quebec’s Charter, becomes necessary under three circumstances:

1. Legislation may expressly deny certain procedural safeguards or provide a lower level of same, leaving no room for common law supplementation (*Singh*)
   1. In such a case, the constitutional/quasi-same may override the statute
2. The constitutional or quasi-constitutional provisions may establish procedural claims in circumstances where none existed previously at common law
3. The provisions may mandate a higher level of procedural protections that would the application of common law procedural fairness to the challenged species of administrative decision-making

* In the latter two cases, they “boost” procedural protections beyond those recognized at common law

### Sources: Bill of Rights, Charter & Quebec Charter

* The Canadian Bill of Rights
  + Purports to be applicable to both prior and subsequent legislation in that it declares its primacy over all other legislation unless that legislation expressly provides that it overrides the Bill of Rights.
  + Procedural protections are found in ss. 1(a) and 2(e).
    - Each is viewed as a vehicle for rendering inoperative federal statutes that do not provide the protections of “due process of law” and “fundamental justice”, respectively
* The Canadian Charter of Rights and Freedoms
  + Main source is S.7: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”
* Quebec Charter of Rights and Freedoms
  + S. 23: “every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him”

### *Nicholson v Haldimand-Norfold Regional Police Commissioners (1979, SCC) 🡪 in the sphere of so-called quasi-judicial rules in administrative filed, there is a general duty of fairness*

* Facts 🡪 Dismissal of a probationary police constable after 15 months without opportunity to make submissions. He sought review and succeeded in the Divisional Court. An appeal by the board was allowed, and Nicholson appealed to the SCC.
* Ratio (Laskin)
  + Although the appellant clearly cannot claim the procedural protections afforded to a constable with more than 18 months’ service, he cannot be denied any protection…. ‘**in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness.**” (adopted from *Bates v. Lord Hailsham of St. Maryleborne*, 1972)
  + Criticism of old approach: “... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult...; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.”

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| The Right to Be Heard: Trigger/Threshold |

# The Right to Be Heard 🡪 Trigger/Threshold Question

* Judge-made thresholds for the application of the duty of fairness have been to a varying extent incorporated into thresholds for some general procedures codes, like Ontario’s SPPA and for the quasi-constitutional *Canadian Bill of Rights*.

## Where to Identify the Trigger 🡪 Four Points

1. Statutes, regulations, rules, etc. 🡪 consult their language to see if engaged. May require interpretation
2. General procedure statutes 🡪 *SPPA* has its own trigger; Consult its language, cases interpreting it
3. Charter, Canadian Bill of Rights 🡪 Have their own triggers; consult them, and cases interpreting them
4. Common law 🡪 has its own trigger

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| Common Law Trigger |

## The Common Law Trigger

## History

* If a decision was ‘judicial’ or ‘quasi-judicial’ in nature, the rules of natural justice applied
* However, if a decision was merely ‘administrative’ in nature, no procedural rights were required at all
* In 1979, the SCC began to abandon this distinction
* Now, with several exceptions, the right to be heard applies where an admin decision affects an individual’s rights, privileges or interests 🡪 focus is on the nature of the impact
  + If so, the right to be heard is presumptively engaged
  + Note: old distinction still relevant to SPPA
* As a result of *Nicholson*, it remained unclear whether there were two distinct levels of procedural protection 🡪 natural justice for decision-makers exercising judicial and quasi-judicial functions and procedural fairness for those exercising administrative functions, and whether there were any decisions to which procedural protections did not extend.
  + With the 1992 proclamation of the amendments to the *Federal Court Act* the need to make these distinctions disappeared, unless otherwise stated
  + The distinction is still relevant to SPPA

## *Nicholson v Haldimand-Norfold Regional Police Commissioners [1979, SCC] 🡪 in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive filed there is a general duty of fairness; critical of old approach*

* Facts 🡪 Dismissal of a probationary police constable after 15 months without opportunity to make submissions. He sought review and succeeded in the Divisional Court. An appeal by the board was allowed, and Nicholson appealed to the SCC. The wording of the provision was:
  + “No… constable or other police officer is subject to any penalty under this Part except after a hearing… but nothing herein affects the authority of a board …
  + (b) To dispense with the service of any constable within eighteen months of his becoming a constable.”
* Held 🡪 Court splits 5-4, several procedural rights triggered
* Ratio
  + Although the appellant clearly cannot claim the procedural protections afforded to a constable with more than 18 months’ service, he cannot be denied any protection…. ‘**in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness.**” (Adopted from *Bates v. Lord Hailsham of St. Maryleborne*, 1972)
  + Criticism of old approach 🡪 “... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult... and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.”
  + Fairness 🡪 he’s entitled to know why he was dismissed and to make submissions (orally or in writing – up to the Board)
  + Statute creates a ceiling of the rights available to Nicholson, but it does not create a floor – the common law can give some level of procedural protections, it just cannot give the same level to those who have been employed for more than 18 months
* Reasoning:
  + The present case is one where the consequences to the appellant are serious in respect to his wish to continue in public office, and yet the respondent Board has thought it fit and has asserted a legal right to dispense with his services without any indication to him of why he was deemed unable to continue to hold it.
  + The appellant should have been told why his services were no longer required and given the opportunity, whether orally or in writing as the Board might determine, to respond.
  + Once it had the appellant’s response, it would be for the Board to decide what action to take, without outside review. This provides fairness to the appellant, as well as the Board to determine his suitability after a response. Status in office deserves this minimal protection, however brief the period for which the office is held.
    - Nicholson doesn’t get the full procedural protections provided to those with 18 months service (oral hearing and an appeal). But, Nicholson was still entitled to be treated “fairly”: (1) reasons required; and (2) an opportunity to respond (orally or in writing).
* Dissent (Martland)
  + “The point of the probationary period is to give the Board discretion in terminating employees without reason. This is purely administrative.
  + Takes conventional view 🡪 the decision was “purely administrative” in nature. There was thus no duty to explain the decision to Nicholson or to give him an opportunity to be heard.
* Gaps left by the decision:
  + 1) Would the judicial/quasi-judicial and administrative dichotomy be abandoned totally?
  + 2) What is the threshold? Are all administrative functions to have hearing requirements? If not, which ones?
  + 3) What procedures are going to be required? [Laskin mostly left it to the Police Board to decide]
  + 4) What is the effect of *Nicholson* on the significance of the distinction between judicial and administrative functions?
  + 5) More generally, what is the justification for fairness development, both for crossing the threshold and for stopping short of a trial-type hearing?
  + 6) Does the fairness development involve distinctive difficulties or administration and predictability? Will it be difficult for courts to determine whether a procedure is appropriate?
  + 7) Are courts competent to make decisions about procedure, especially compared to legislature or the institutions themselves? Should this have an impact on their willingness to second-guess procedural choices made by tribunals themselves, particularly in the context of a rulemaking exercise?

## Currently Two Common Law Triggers of the Duty of Procedural Fairness

1. Cardinal/Knight Trigger
2. The legitimate expectations trigger

## Cardinal/Knight Trigger

* The existence of a general duty to act fairly will depend on the consideration of three factors:
  + 1) The 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”

## Cardinal/Knight In Practice

1. **The effect of the decision =presumptive trigger**
   1. “Does the decision of an administrative decision-maker “affect the rights, privileges, or interests of an individual” in a significant way? (*Baker*)
      1. If so, right to be heard usually presumptively triggered
      2. It’s a low bar (courts do not exclude a lot at this stage)
      3. Potential exception: potential, not existing, privileges or interests
         1. Example: taxi license, the taxi driver does not have a strict right to a license, but once the state establishes a taxi licensing scheme, then taxi drivers are clearly entitled to procedures of fairness in relation to that scheme
         2. *Re Webb and Ontario Housing Corp* [1978, ONCA] – an application for a gov’t benefit/permit/license, not something that the particular claimant *already has*, rather they are seeking/applying for it – the duty of fairness is not triggered in initial application for gov’t benefit/program AND where individuals have a license/permit, taking that away from them will engage the right to be heard – Webb was living in subsidized housing, taking them away so duty engaged
            1. Courts may not take it seriously – if its something the courts value (bodily integrity, autonomy, property, etc) they won’t care BUT also they might find it engaged but scale back the protections available
            2. We give a lot of protections in professional proceedings, whereas an applicant for a gov’t benefit is entitled to the least amount of protections – seems that we are considering the *impact* on the individual… but that does really make sense…?
2. The other two factors operate more as exceptions:
   1. **The nature of the decision**
      1. Legislative decisions or functions, decisions that are preliminary or non-dispositive, decisions involving emergencies (not assigned)
   2. **The nature of the relationship**
      1. Decisions relating to public employees employed under a contract, see *Dunsmuir*

## The Common Law Trigger: Exceptions

* Nature of the decision
  + Where not triggered due to nature of the decision
    1. Legislative decisions or functions
    2. Decisions that are preliminary, or non-dispositive
    3. Decisions involving emergencies (Not assigned)

1. Nature of the relationship
   1. Where not triggered due to nature of the relationship
      1. Decisions relating to public employees employed under a contract
      2. See *Dunsmuir v NB* [2008, SCC]

## Exceptions: Nature of the Decision

## Legislative Decisions

* Do not trigger the right to be heard
  + *Knight* (“[d]ecisions of a legislative and general nature”)
* This clearly applies to the passage of primary legislation, by Parliament or a provincial legislature
  + See, e.g., *Wells v Nfld* [1999, SCC] 🡪 (“Legislative decision making is not subject to any known duty of fairness”)
  + How far does this exemption extend?
* Does the legislative exemption turn on who is making the decision, the nature of the decision, or both?
* How far does this exemption extend?
  + Cabinet? Individual Ministers? Municipal council? – becomes more challenging if this particular exception applies
  + The SCC has not given us a clear indication in what we should focus on in figuring out how far this exception applies
    - Is it the nature of the institution involved? Legislature, cabinet, etc are exempt as a class
    - Or do we focus on the nature of the decision? If it is a general policy based decision (weighing differing interests), then exemption applies, BUT if it’s a decision based on a particular individual, then the exemption does not apply?
    - Seems that the Court applies both of these considerations in figuring how far this exemptions goes
* Does the legislative exemption turn on who is making the decision, the nature of it, or both?
* Some case examples:
  + *Inuit Tapirisat* [1980, SCC] (cabinet decisions)
  + *Homex Realty* [1980, SCC] (delegated lawmaking (by-laws))
  + *Canadian Association of Regulated Importers* [1993/93 FC/Fed.CA] (broad policy decision of an administrative decision-maker)

### *Canada v Inuit Tapirisat [1980, SCC] 🡪 While it is true that a duty to observe procedural fairness does not need to be express, it will not be implied in every case –It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply*

* Facts 🡪 Cabinet allowed to overrule the Canadian Radio-television and Telecommunications Commission “on its own motion,” “at any time,” and according to “its own discretion” (National Transportation Act, s. 64). In 1976 Bell made an application for approval of a rate increase. The Inuit Tapirisat intervened to oppose parts of the application, they wanted the rate increase to be conditioned on an increased obligation to provide better service for remote Northern communities. After an unfavourable decision, they appealed, but were not given any summaries of positions or appeal material, and the appeal was dismissed by Cabinet. Inuit Tapirisat applied to the Federal Court for a declaration that a hearing and an opportunity to make submissions should have been given. It failed, succeeded on appeal, and was now being appealed again by the government.
* Issue 🡪 was the right to be heard triggered?
* Held 🡪 No, the right to be heard is **not** triggered by the cabinet’s decision
* Ratio: Etsey
  + While it is true that a duty to observe procedural fairness need not be express, it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply.
  + In this case, the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1) of the *National Transportation Act*
* Reasoning:
  + “Parliament did not burden the executive branch with standards or guidelines in the exercise of its rate review function, nor were they implied. This was a Parliamentary choice.
    - It is akin to legislative action in its purest form – so falls within legislative exception
  + Practical difficulties if right to be heard was engaged – would undermine Cabinet’s public policy role by burdening it with hearing requirements
    - This is more obvious in consideration of the burden of providing notice to “all parties” of proposed changes.
  + “It may be said that the use of the fairness principle as in Nicholson ... will obviate the need for the distinction [between (quasi)-judicial and administrative] in instances where the tribunal or agency is discharging a function with reference to something akin to a lis [dispute] or where the agency may be described as an 'investigating body’…
  + Where an executive branch has been assigned a function performable in the past by legislature itself and where the *res* or subject-matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may arise… the Court [can] fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Counsel performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.
    - (1) if the function was performed in the past before by Legislature AND(2) if in addition the subject is not focused on a particular individual, something unique to the person 🡪 legislative exemption applies

**Notes**

* Note focus on decision’s substance, not the identity of the decision-maker
* Cabinet (decision) doesn’t trigger right to be heard
* Compare:
  + Desjardins v Bouchard [1983, Fed CA] individualized cabinet decision relating to criminal pardon does trigger the right to be heard
    - Just because the right is triggered does not mean you get the full Cadillac form of the right, it could be just basic procedures
  + Baker v Canada [1999, SCC] (individualized decision of a minister relating to an immigration matter does trigger the right)
* What about delegated lawmakers(ing)?
* Cabinet decisions that are broad and policy based in nature, will not trigger right to be heard – Cabinet decisions that are demonstrative and specific in nature may well engage the right to be heard

### *Homex Realty v Wyoming [1980, SCC] 🡪 Municipal by-law (delegated law-making) does engage the right to be heard where it is targeted at an individual; nature of the decision important here*

* Facts 🡪 The municipality and Homex quarreled about the obligation to install services in a subdivision owned by Homex. Without giving notice to Homex, the municipality made a bylaw under the *Planning Act*, designating the plan as a plan “deemed not to be a registered plan of subdivision.” The effect of this designation was that lots in the subdivision could not be conveyed unless a new plan was registered or consents were obtained from the committee of adjustments of the municipality and, in either way, the municipality would have been able to impose conditions. Homex made an application for review to quash the bylaw and succeeded. Municipality’s appeal succeeded, and Homex appealed to Supreme Court.
* Issue 🡪 was the right to be heard triggered?
* Held 🡪 Yes (5-2): the enactment of the bylaw triggered the right. However, Appeal was ultimately dismissed
* Reasoning: Estey (Majority)
  + The municipality got around the legislative exemption by framing the decision (enacting the by-law) as ‘quasi-judicial’ rather than ‘legislative’
  + The conduct of Homex, who checkerboarded its lands prior to hearing of the application to quash so that it would not be obligated to service its lots if and when they were occupied by residences, ultimately dismissed the appeal. This depended on the discretion of the court in administering remedies, so it was not about procedural fairness in the end.
* Reasoning: Dickson (concurring)
  + Says the focus should not be on the labels of judicial or quasi-judicial, but the nature of the decision
  + If, as here, a by-law was “aimed deliberately at limiting the rights of one individual”, then the right to be heard would be engaged

**Notes**

* Summary of Decision overall 🡪 Motivation for passing by-law was the dispute with the particular developer – Court said we will not allow the municipality to couch its actions that allow it to avoid the duty – this was all about targeting the particular developer and we will not allow the passing of a bylaw just to avoid it
  + It’s the nature of the decision itself that matters more than the nature of the decision maker
* Municipal by-law (delegated law-making) does engage the right to be heard, but where it is targeted at an individual
* What about decisions that are policy-based, or general?
  + *Knight:* (“[d]ecisions of a legislative and general nature… entail [no] duty [of fairness]”, in contrast to decisions of “a more administrative and specific nature”)
  + Consider Securities Commission that is tasked with applying a broad policy (rather than an individual decision) – would we say this exception applies in that situation as well?
  + The line between admin and policy decisions is hard to distinguish – leads to a lot of litigation…

### *Canadian Assn. of Regulated Importers v Canada (1993 FC/1994 FCA) 🡪 Court of Appeal said the rules of natural justice do not apply to legislative or policy decisions (including ministerial decisions pertaining to policy)*

* Facts 🡪 At issue was a ministerial decision changing the quota distribution system for the importation of hatching eggs and chicks, a change that significantly affected historical importers. In challenging the change, the historical importers claimed that they had not been consulted
* Trial Decision (Reed J)
  + “Holding the decision engaged the right to be heard: “…it is not necessary to find that a “right” exists in order to bring an application for judicial review. It is sufficient if the applicant can demonstrate an “interest” which justifies the bringing of an application for judicial review.
  + Why?
    - The serious economic interests at stake
    - The fact that the number of persons affected was “not large”; and
    - The ability to work out alternative ways to ensure procedural fairness
* Federal Court of Appeal (Linden JA)
  + “Generally, the rules of natural justice are not applicable to legislative or policy decisions… More particularly, it has been held that the principles of natural justice are not applicable to the setting of a quota policy although they may be to individual decisions respecting grants of quotas.”
    - Here, it is a Minister rather than a Board that is establishing the quote. Some may be damaged while others may gain, but the exercise is essentially a legislative or policy matter, with which Courts do not normally interfere. Any remedy that may be available would be political, not legal. It might have been a considerate thing for the Minister to give respondents notice and an opportunity to be heard, but he was not required to do so.”
  + A ministerial decision to change the quote system for the importation of hatching eggs and chicks, with implications for historic importers, did not engage the right to be heard
  + The setting of a quote was a “policy consideration”

### Summary of Legislative Decision Exemption

* If the decision is made by a body that we associate with a legislative function (ex. cabinet) you should consider the possibility that the exemption applies
  + Legislatures may be exempt as a class entirely
  + *Homex* that municipal councils are not exempt as a class
  + *Inuit Tapirisat* also show us that Cabinet is not exempt as a class
  + Classic administrative bodies could also be exempt if the decision is a broad policy decision that involves the weighing of broad policy considerations, rather than a particular individual

## Non-Dispositive/Preliminary Decisions

* “The right to be heard is not triggered by preliminary, non-dispositive decisions, involving investigations and recommendations to the final decision maker (*Knight*)
* But, as always, there are exceptions:
  + The statute says the right to be heard is triggered;
  + Where the preliminary, non-dispositive decision has significant consequences for an individual (e.g., impact on reputation); or
  + Where the decision has de facto finality

### *Re Abel and Advisory Review Board (1979 Div Ct/ Ont CA) 🡪 Non-dispositive or preliminary decisions will not trigger procedural fairness, but as a decision becomes increasingly final, the threshold drops; proximity between preliminary and final decision maker is critical to determining whether there is a duty of fairness*

* Facts 🡪 The Advisory Review Board was created under the Mental Health Act to review annually all patients who were confined in psychiatric institutions after having been charged with criminal offenses and found not guilty by reason of mental disorder. A report would then be provided to the lieutenant governor on who would make the decision regarding release. The lawyers requested disclosure and were repeatedly denied. The Act did not allow for the disclosure of the files to either the patients or their lawyers.
* Issue 🡪 is the right to be heard triggered?
* Held 🡪 Yes –disclosure of the documents may have been required, so sent matter back to decision maker
* Ratio:
  + Non-dispositive or preliminary decisions will not trigger procedural fairness, but as a decision becomes increasingly final, the threshold drops.
  + Where there is merely rubber-stamping of a preliminary decision, it can be argued that the decision is being made by the preliminary decision maker
  + The proximity between the preliminary decision maker/investigator and the final decision maker is critical in determining whether there is a duty of fairness.
* Reasoning:
  + The “proximity between the preliminary and final decision”
    - There can be no question that the reports heavily influenced the board and the lieutenant governor didn’t overrule the decision
  + The “exposure of the person investigated to harm”
    - This review was the only chance for the person not to be incarcerated

## Exceptions: Nature of the Relationship

* Where the right to be heard is not triggered due to nature of the relationship
* Decisions relating to public employees employment contract
  + Private employees do not have administrative law imported in their disputes
  + Public employees’ employment relationship is regulated extensively by statute – thought to lend employment decisions as sufficiently public character to trigger administrative principles of fairness
  + Decisions relating to public employees employed under a contract of employment (individual or collective bargain)
* ***Dunsmuir v NB* [2008, SCC]** 🡪 contract law principles will determine your rights, rather than the procedural duty of fairness (As established in *Knight*)
  + However, this includes exceptions and we won’t talk about them because they make no sense in the eyes of Wright
  + The law will not longer draw a distinction between public and private employees – if the terms of a relationship between employees and employers, whether it be a contract or collective agreement, will not trigger administrative law procedures
    - Unless the contract *specifically* explicitly or implicitly triggers principles of admin law – “this contract is subject to principles of administrative law”, “dismissal decisions of this contract are subject to notice requirement or requirement of oral hearing”
  + Generally speaking contract b/w public employee and employer *does not* trigger the right

### *Beetles Example 🡪 example of where minimal level of procedural protection is required due to nature of relationship; context matters*

* Facts 🡪 Acting under the authority of the Federal Plant Protection Act, an inspector of the Canadian Food Inspection Agency issued a “Notice to Dispose” to the municipality of Liverpool, MB, regarding a number of trees in Abbey Road Park. The trees had been found infested with Brown Spruce Longhorn Beetles. The inspector was acting on the basis of the recommendations of the Beetle Task Force, a body designed to consult with the public and gather scientific data. The Abbey Roadies, a community group of individuals with an interest in the park, is upset. They want to seek judicial review on the basis that they did not have adequate notice or an opportunity to make representations to the CFIA Inspector or the Task Force prior to the issuance of the Notice to Dispose.
* Issue:
  + Did the CFIA Inspector owe the Abbey Roadies a duty of fairness?
  + What is the legislative authority under which the CFIA Inspector acted?
* Notes:
  + What is the nature of their interest? We need more information
  + Might consider the size of the group – if they are just broad members of the community with no particular unique interest in the park, it is just a broad policy decision that impacts the community in a broad way
    - But if they could point to a particular use of the property or they are property owners and their property abuts the park, their interest could be unique enough
  + This is a borderline case…
* See ***Friends of Point Pleasant Park v Canada (AG) (2000, FC)***
  + Court found the right to be heard engaged, but a minimal level of procedural protection is required and it was in fact provided
  + Despite that principle of good public administration, I am not persuaded that the CFIA breached any legal duty owed to the applicants in the process here followed. While the process might have been more open and it might have dealt more efficiently with requests for information, it did not preclude the submission of views, opinions and questions and efforts were made to deal with some of those. In my opinion, the process did not violate principles of procedural fairness in the circumstances of this case.

## Legitimate Expectations Trigger

* An expectation of a hearing arising out of express representations, a practice of holding such hearings or a combination of the two.
* ***Old St. Boniface Residents Assn Inc v Winnipeg* [1990 SCC]**
  + “The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.”

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| Constitutional Triggers |

## Constitutional and Quasi-Constitutional Instruments

## General Triggers

* Where might these be useful?
  + If legislation expressly or impliedly denies a procedural right(s) or overrides common law principles of protection
  + If the common law provides inadequate protection
* Quasi-constitutional sources: The Canadian Bill of Rights
  + Federal statute; can override inconsistent federal legislation
  + Applies only to federal legislation and decision-making
  + Two key provisions: 1(a); 2(e)
* Constitutional sources 🡪 The Charter, S. 7

## Canadian Bill of Rights

* General trigger points
  + Applies to every “law of Canada”, including:
    - Existing and future federal legislation;
    - Any “order, rule or regulation” enacted under them; and
    - All administrative decisions taken under any of these (s. 5(2)).
* Does NOT apply to provincial laws or decisions 🡪 can only be invoked in relation to federal laws
* Section 1(a)
  + Guarantees the “right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law”
    - Property rights also included – in comparison to s. 7 of the Charter where its more life, liberty and security 🡪 If the federal legislation burdens economic or property interests, you could invoke s. 1(a), whereas you could not invoke s. 7
    - The word “everyone” in s. 7 has been used to exclude corporations
  + Why still relevant?
    - Corporations; *Canada v Central Cartage* (1990, Fed CA) says no; but no SCC decision yet
    - Reference to individual
    - Property; trial decision of litigation over rental courts ceased at the border, engaged property rights of the rental company…
* Section 2(e)
  + Protects the right of a “person” to a “fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations”
  + Why still relevant?
    - Corporations 🡪 seemingly yes, (CB page 177)
      * Argument to be made that “person” applies to corporation
    - Broader trigger than the Charter, s.7
      * Determination of rights and obligations could include economic rights – gets you around the s. 1(a) arguments
  + Precedent you can invoke: Bell Canada case from 2003 SCC, or Federal Interpretation Act

## The Charter

**Four Questions:**

1. “Does the Charter apply at all?
   * General threshold question
   * S. 32(1): Charter applies to legislatures, governments – ADM must be “part of the gov’t” (keep in mind: there is case law that says the Charter does not apply to hospitals, universities)
2. Has a Charter provision been violated?
   * S. 7: Key provision in administrative context: “everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
   * **S. 7 has its own internal threshold – two-step test**
     + **Has the claimant been deprived of his or her interest in (or right to) “life”, “liberty”, OR “security of the person” (*this is an internal threshold question)*; and**
     + **If so, was the deprivation of the interest or right “in accordance with the principles of fundamental justice”?**
       - Procedural fairness is a well accepted PFJ
   * What of ss. 8 – 14? May apply in *some cases*
     + Example – S. 8, protecting against unreasonable search and seizure, and s. 9, protecting against arbitrary detention and imprisonment, might apply if search, seizure, and detention are involved. S. 12, protecting against cruel and unusual punishment, might apply if incarceration is involved.
3. If so, is the violation justified under S. 1?
   * **If an individual decision, rather than a law, is challenged, it isn’t clear whether a full S.1 Oakes test analysis is required**
   * **We do a more flexible balancing analysis based on a decision from 2002**
   * What does this mean for procedural review?
4. If so, what remedy should be granted

### *Singh v Canada (1985, SCC) 🡪 where a court finds inadequate procedural rights and the engagement of life, liberty or security of the person, s. 7 will be violated and trigger duty of fairness*

* Facts 🡪 Refugee claimants who were already in Canada, and minister determined that they were not refugees in accordance with the Immigration Act and wee subject to deportation. No opportunity to present cases in hearings before the decision-maker (Minister). Statutory scheme provided for the possibility for an oral hearing but only on appeal before the Immigration appeal board, and only if the appeal board on the basis on the refugee’s written submissions, that there were reasonable grounds to believe that there was a violation of refugee status. In this case, there was no leave to appeal.
* Issue 🡪 Did the refugee scheme unjustifiably violate S.7, by failing to provide adequate procedural rights?
* Held
  + Wilson J (writing for 3) 🡪 Yes, S. 7 was unjustifiably violated;
  + Beetz J (writing for 3) 🡪 The scheme violated S. 2(e) of the Canadian Bill of Rights (No decision on S. 7)
* Reasoning (Wilson)
  + The statute was sufficiently clear to preclude reading in additional common law procedural rights
    - S. 7 of the Charter was triggered; step 1 of the test satisfied
    - The term “everyone” includes “every human being who is physically present in Canada,” not only citizens
    - It includes anyone that is subject to Canadian law
    - The appellants’ “security of the person” was engaged, because there was a threat of physical punishment or suffering
    - The right here is a statutory right – it includes a right not to be removed from Canada where the life or freedom of claimant’s would be threatened
      * It’s the potential wrongful denial of that statutory right to not be removed that engages s. 7
  + “Fundamental justice” was denied by the legislative procedures in place for refugee claimants; step 2 of the S. 7 test satisfied
    - “Procedural fairness may demand different things in different contexts.”
      * For example, an oral hearing will not always be required. But, where “a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.”
    - At a minimum, procedural fairness requires (including for S. 7):
      * That the decision-maker act in good faith, without bias; and
      * The opportunity to know, and meet/see, the case to be met
    - Here there was an inadequate opportunity to know and meet the case
      * They were expected to prove that the Minister was wrong without any knowledge of what the Minister’s case was – the problem was the inability to know the case and that undermines their ability to meet the case
  + S. 7 was violated, the violation was not saved by S. 1
    - Time and cost will *never* be a significant justification for a violation of the Charter
* Reasoning (Beetz)
  + Two issues for s.2 (e) breach:
    - Whether “rights and obligations” fall to be determined;
    - If so, whether a “fair hearing in accordance with the principles of fundamental justice” has been accorded.
  + Here, rights and obligations fall to be determined
    - The statutory scheme afforded the appellants various statutory “rights”; the refugee process involved a “determination” of these statutory rights
  + A fair hearing was not accorded
    - The claims have been “denied without their having been afforded a full oral hearing at a single stage of the proceedings before any of the bodies or officials empowered to adjudicate upon their claim upon the merits.”
    - Similar reasoning to Wilson J
  + Note: s. 7 and s. 2(e) – where a statutory scheme is deemed to be clear enough to override common law, may invoke s. 2(e) or s. 7

## Charter Section 7 Analysis

**Two Step Test for Infringement**

1. First, has the claimant been deprived of his or her interest in (or right to) “life”, “liberty”, OR “security of the person”; and
   1. This is s. 7’s internal threshold question
   2. **Life**
      1. Engaged at least where the government:
         1. Causes death (e.g. death penalty) OR
         2. Creates an increased risk or threat of death 🡪 *Chaouilli* [2005, SCC] and *Carter* [2015, SCC]
            1. Ex. *Chaouilli* – gov’t blocking access to need of medical care
   3. **Liberty**
      1. Engaged at least by
         1. By physical restraints/denials of physical liberty (eg. Detention or imprisonment)
         2. Where imprisonment is a *possibility* (*BC Motor Vehicle Reference, 1985 SCC*)
      2. What about deprivations of economic liberty (like property)?
         1. Generally no 🡪 but see *Wilson v BC* (1988 BCCA) (liberty includes a right to choose an occupation and where to pursue it) and *Godbout v Longeuil* (1997 SCC) – 3 judges say liberty captures choices where to live
         2. Note: there are doubts raised about whether *Wilson* is good law
   4. **Security**
      1. Engaged at least:
         1. By state interference with bodily integrity: use of force by the state against a person’s body (ex. taking bodily samples, use of force during arrest, state imposed medical treatment), also increased *risks* to bodily integrity
         2. By severe state-imposed psychological harm (*Blencoe*)
            1. This does not include “ordinary stresses or anxieties”
            2. It extends to state action that has a “serious and profound effect on a person’s psychological identity”
2. Second, if so, was the deprivation of the interest or right “in accordance with the principles of fundamental justice”

**If s. 7 is infringed, then do an s. 1 analysis**

* Note: if an individual decision, rather than a law, is challenged, it isn’t clear whether a full s. 1 Oakes test or Dore analysis is required

### *Blencoe v BC [2000 SCC] 🡪 outlines how s. 7 liberty and security of the person are engaged in administrative context; in administrative context, there must be proof of significant prejudice resulting from an unacceptable delay to constitute a stay*

* Facts 🡪 In 1995, while serving as minister in the government of BC, the respondent was accused by one of his assistants of sexual harassment. The case garnered media attention and forced the respondent to relocate with his family. He felt unemployable and became depressed. Meanwhile, there were numerous delays in the proceedings at the Human rights Commission. He applied for judicial review to have the complaints stayed due to unreasonable delay, which caused serious prejudice to him and his family that amounted to an abuse of process and a denial of natural justice. The BCSC disagreed, but the BCCA agreed, finding that the respondent had been deprived of his s.7 rights to security of the person that was not in accordance with the principles of justice.
* Issues:
  + Are S. 7 rights engaged?
  + If no S.7 breach, then is there a remedy through common law where the delay did not interfere with the right to a fair hearing?
* Held
  + Bastarache J (for majority of 5)
    - No breach of s.7; liberty and SOTP not triggered
    - No remedy at common law for the delay either
  + Lebel J (dissent)
    - Delay engaged common law principles
    - No need to consider s. 7 – and undesirable to do so
* Reasoning: Bastarache
  + **Liberty**
    - Not just freedom from physical restrain
    - Does not extend any economic protections
    - Includes “important and fundamental life choices” – zone of private autonomy
    - No infringement in this case – “Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making ‘fundamental personal choices.’”
      * Decisions that implicate the core of enjoying individual dignity and independence
      * Was that freedom to enjoy fundamental life choices? No
      * Freedom to enjoy without anxiety and stress does not rise to the level of fundamental personal choices
  + **Security of the person?**
    - Includes Interferences with bodily integrity; AND (1) state-imposed (2) serious psychological harm (There needs to be a causal connection)
      * Stress, anxiety, and stigma may arise from any criminal trial, human rights allegation, and even civil action, regardless of whether the trial or process occurs within a reasonable time. There must be state-imposed inducement of serious psychological stress to satisfy this causal connection.
      * Not freedom from basic stress, anxiety and stigma
    - Assumes (without deciding) a nexus here between state-caused delay and psychological harm
      * Even if there is a nexus, dignity is not a guaranteed right, but an underlying value of the Charter. Therefore, protection of one’s reputation is not a S. 7 guarantee. It is only in exceptional case where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s.7 security of the person interest.
    - Extends to severe state-imposed psychological harm – this does not include ordinary stress, stigma
    - On the one hand, this is expanding the definition, but it is applied in a restrictive way
  + **Admin Law Remedy**
    - Delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying a proceeding for the mere passage of time would be tantamount to imposing a judicially created limitation period… in the administrative law context, there must be proof of significant prejudice, which results from an unacceptable delay.

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| The Right to Be Heard: Content |

# The Right to Be Heard 🡪 Content Question

# General Content

* The “content” will vary with the context
  + *Nicholson* 🡪 ADM are subject to a duty of fairness
  + The level of fairness that you get will be flexible and context specific – this is why we consider the content
  + We adjust the content of procedural fairness in accordance with the context of the particular case
* Result = content falls on a spectrum
  + Highest level of fairness is in the criminal context
  + Generally speaking, ADM are not required to provide the same level as criminal context, so there is a ceiling – but I some situations it can come very close it
  + At the minimal end of the spectrum, the basic and lowest level of fairness is the right to be heard – right to know the case against you and make a case for yourself
    - An in person oral hearing is not always required, written notice and an opportunity to make written submissions will suffice
    - Written submissions can include standard form questionnaire (ex. application for gov’t benefits), a letter stating your position, all the way up to a formal sort of application supported by documentary evidence and expert reports, etc.
* Limits test for procedural fairness/the underlying right 🡪 ability to know case against you and to meet it
* Baker v Canada 🡪 widely adopted and applied

🡸 🡸 🡸 Minimal Rights  **-----------------** Maximum Rights 🡺🡺🡺

## Five Factors for Determining Content at common Law 🡪 *Baker v Canada (1999, SCC)*

1. The nature of the decision and the process followed;
2. The nature of the statutory scheme/terms of the statute;
3. The importance of the decision to the individual(s) affected;
4. The legitimate expectations of the individual; and
5. The procedural choices of the agency itself.

### 1) The Nature of the Decision and Process Followed

* ***Baker*** 🡪 The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by procedural fairness.
  + While the judicial nature of the decision is no longer determinative of the existence of procedural fairness, decisions that involve an adjudication between parties, directly or indirectly affect their rights and obligations, or require an ADM to apply substantive rules to individual cases will require more extensive procedural protection than regulatory decisions bearing on the implementation of social and economic policy.
  + I.e. Humanitarian and compassionate grounds of *Baker* involved a minister’s exercise of considerable discretion based on the application of many “open-textured” principles and factors, therefore very different from a judicial decision and indicated that fewer procedures were required

### 2) The nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates

* Where a statute provides an official with investigatory or fact-finding powers as a preliminary step to a hearing before an ADM with the power to make a dispositive decision, minimal procedures may be owed at the initial stage. However, no appeal/ finality in decision = more process.
  + Conversely, in *Cooper v Board of Works for Wandsworth District* (1863)🡪 the existence of a statutory administrative appeal was viewed by the court as implying the existence of a record from *some* first-instance proceeding before the Board and thus a common law right to notice of its decision to tear down Cooper’s house (unique case)
* The relevance of the statutory scheme is not limited to the dispositive nature of the decision or the existence of an appeal.
  + Ex. *Baker* 🡪 the role of the minister’s humanitarian and compassionate power as the source of discretionary exceptions to the normal application of the general principles of Canadian Immigration law set out in the *Immigration Act* indicated that fewer procedures were warranted.

### 3) The importance of the decision to the affected individual(s)

* The more important a decision to the lives of those it affects, the higher the level of procedural protections mandated by common law procedural fairness.
* Crucial factor – significance of the decision’s impact may elevate the requirements of fairness above what they would otherwise be, underlining the crucial importance of the factor.

### 4) The legitimate expectations of the person challenging the decision

* This confirms the procedural nature of the doctrine
* May be raised by an ADM’s representations about available procedures or substantive results
* Procedure 🡪 required to be followed
* Outcome/Result 🡪 fairness may require more extensive procedural rights than would otherwise be accorded – such as notice that the ADM intends to renege on the substantive promise or representation and an opportunity to argue against such a course of action

### 5) The choices of procedure made by the agency itself

* Situation-sensitive
* Agency may have a better awareness of the complexity of the issues, the problems of getting at truth in the area it is regulating, its own personal and budgetary constraints, and a better appreciation than the courts of what an appropriate compromise among the competing claims of fairness, efficiency, effectiveness, and feasibility.
* Courts should sometimes be deferential to agencies’ procedural choices.

## Legitimate Expectations 🡪 Trigger AND Content

* Arises in two situations:
  + Where a particular procedure is legitimately expected;
  + Where a particular outcome is legitimately expected
* Note: generates an entitlement to process, not outcome!

### What can generate legitimate expectations?

* Actual representations 🡪 verbal promises, policies available to the public
* Pattern of conduct 🡪 adherence to specific process in the past

### Two Potential Impacts

1. Impact as a **trigger for common law procedural rights**
   1. So, two potential triggers for common law procedural rights
      1. The *Cardinal/Knight* trigger
      2. Legitimate expectations
2. **Impact on the content of procedural rights owed**
   1. Ratchet up the level of procedural rights that ADM has to provide
      1. Wrinkle – substance 🡪 it won’t be the conduct itself that will trigger; Court will have to fill in blanks about what the process should actually be
         * Tension – hold government to the expectations they create in people but also give them flexibility to develop in response to change in circumstances

### *Reference re CAP (1991, SCC) 🡪 legitimate expectations only generate procedural rights (not outcome), cannot arise in relation to legislative functions, and cannot prevent federal executive from introducing legislation without provincial consent*

* Facts 🡪The CAP, a federal statute, authorized the government to enter into agreements with the provinces for sharing the costs of provincial social assistance and welfare programs. S. 8 of the Plan provided that these agreements would continue in force for as long as the relevant provincial law was in operation, subject to termination by consent, or unilaterally by either party on one year’s notice. As part of a deficit reduction policy, the federal government introduced a bill that limited the increase in its financial contribution to BC, Alberta, and Ontario to a figure below that provided in the Plan and the agreements with the Provinces. No notice was given.
* Issue **🡪** Whether the government was precluded from introducing the bill by virtue of the legitimate expectation that amendments would only be made to the agreements by consent.
* Held **🡪** Appeal allowed, as the court below ruled in favour of the AG of BC.
* Ratio: Sopinka J **🡪 Legitimate expectations:**
  + **1)** Cannot prevent the Federal executive from introducing legislation that amends legislation without provincial consent
    - If the doctrine of legitimate expectations required consent, and not merely consultation, then it would be the source of substantive rights
  + 2) Can only generate procedural rights (not substantive outcomes)
    - Relevant because in this case they argued for a right to consent aka a substantive outcome (veto over substance of Federal policy)
    - There is no support in Canadian or English cases for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make representations or to be consulted. It does not fetter the decision following the representations or consultation.”
  + 3) Cannot arise in relation “to a body exercising purely legislative functions” (defined to include “a purely ministerial decision, on broad grounds of public policy)
    - Wasn’t open to Provinces to restrain the executive decision-making power
    - Note: broad definition of legislative function: there is an essential role of the executive in the legislative process of which it is an integral part: “a cabinet is a combining committee – a buckle which fastens the legislative part of the state to the executive part of the state.”
    - A restraint on the executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself
    - *Inuit Tapresa* – where is legal expectation triggered? Investigative decisions, labour (*Dunsmuir*)

### *Canada v Mavi (2011, SCC) 🡪 given the legitimate expectations created by the wording of the undertaking, it would not be right to proceed without notice and without permitting those to make a case before the ADM*

* Facts 🡪 A group of eight individuals challenged Ontario’s process for debt collection re: undertakings signed as part of the Family Sponsorship Program.
* Issue 🡪 Was a duty of fairness owed to the sponsor families?
* Held 🡪 Yes
  + The duty of fairness applies, but the content of it is “fairly minimal”
    - Does not grant discretion about “how” the cost will be paid (ie. timely manner)
  + These “minimal” requirements were not met
* Ratio 🡪 Given the legitimate expectations created by the wording of the undertakings I do not think it open to the bureaucracy to proceed without notice and without permitting sponsors to make a case for deferral or other modification of enforcement procedures.”
* Reasons: Binnie 🡪 applying the *Baker* factors (we fall at the fairly minimal end of the spectrum)

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| Factor | Analysis | Result |
| Nature of the decision | Straightforward debt collection; sponsors undertake obligations in writing, and understand – or should – the financial consequences (in advance) | **Less** process |
| Nature of the statutory scheme | Parliament’s intention to avoid a complicated review process is clear  BUT no appeal process so the decision is final | **Less** process  **More** process |
| Importance of the decision | Significant – sponsorship debts can be large, accumulate quickly | **More** process |
| Legitimate expectations | Discussed below | Discussed below |
| Choice of procedure | Not addressed |  |

* What was the government required to do?
  + “To provide notice to the sponsor;
  + To afford the sponsor an opportunity to explain any circumstances that militate against collection;
  + To consider any relevant circumstances; and
  + To notify the sponsor of its decision
    - However, reasons are **NOT required** (because no appeal) 🡪 reasons are generally required to facilitate appeals
* Legitimate expectations as a trigger:
  + Sponsors’ legitimate expectations reinforced procedural protections:
    - “Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and **the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified**, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. **Proof of reliance is not a requisite**.”
  + “When are government representations sufficiently “clear, unambiguous and unqualified”
    - “... government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.”
    - This is a contractual analysis – sufficient level of clarity that it if were a contract, it would be upheld
  + Why is this standard satisfied here?
    - [Para 72] “While the terms of the IRPA undertakings support the position of the AG that the debt is not forgiven, they also support the sponsors’ contention of a government representation to them that there exists a discretion not to take enforcement action ‘if the default is the result of abuse or in other circumstances (post-2002).’Such representations do not conflict with any statutory duty and are sufficiently clear to preclude the government from denying to the sponsor signatories the existence of a discretion to defer enforcement.”

### The Precise Role of Legitimate Expectations

* How is it operating, and how does it interact with the *Baker* factors?
  + Wright reads *Mavi* in the first way, below.
* If the legitimate expectation arose in relation to process, does this create an entitlement to (at least) the particular process?
  + If so, does it make sense to treat legitimate expectations as merely one factor among many, as Baker does?
  + Isn’t the legitimate expectation then determinative on its own?
* Or is it merely one of several factors, which does not necessarily entitle the claimant to the particular process, but only more process? And if so, is it possible to counter-balance the entitlement to more process with the other Baker factors?
  + If so, does it then make more sense to treat legitimate expectations as merely one factor among many, as Baker does?
* *Mavi* 🡪 treats legitimate expectations separately from the *Baker* analysis
  + Also: “**Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word**, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a requisite.”
    - Suggests an entitlement, if relevant, to the particular process?
    - This contributes to confusion because it doesn’t include legitimate expectations as part of its *Baker* analysis, but considers it separately afterward. More strangely, it says that legitimate expectations only “reinforce” the *Baker* analysis

### *Agraira v Canada [2013, SCC] 🡪 legitimate expectations grounded in Baker are a factor to be applied in determining what is required by duty of fairness; if public authority has made representations about the procedure, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been –must be clear, unambiguous language*

* Facts 🡪 Permanent resident found not admissible to Canada, based on Libyan group affiliation (seen as terrorists). Applied for ministerial relief, denied exclusively on links. Applied for judicial review for legitimate expectations:
  + (1) Representation that factors of national security would be counterbalanced; and
  + (2) “Specific process” would be followed.
* Issue 🡪 were legitimate expectations triggered?
* Held 🡪 A legitimate expectation re: process arose from a CIC guideline, but was satisfied on the facts
* Ratio
  + “**This doctrine [legitimate expectations] was given a strong foundation in Canadian administrative law in Baker, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness.** 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 practices in the past in making such a decision, **the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been**. Likewise, if representations with respect to a substantive result have been made to an individual**, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous**”
* Reasoning: Lebel
  + Basis: guidelines were public, were used, and were comprehensive in setting out the process to be followed
    - In this case, they *were* followed.
  + Specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in the *Judicial Review of Administrative Action in Canada*: “The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive action can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, *the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.*”
    - “Clear, unambiguous, and unqualified” are defined by *Mavi* as contractually enforceable.
  + “In the case at bar, the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, **and thus a legitimate expectation that that framework would be followed**” (para. 98).
  + Are these passages inconsistent? Do they support a Baker factor-based approach, or the conclusion that legitimate expectations as to process are determinative? Or both?
  + What’s the role of legitimate expectations in analysis? This remains unclear, but seems to learn toward *Mavi*
  + Agraira’s expectation that the minister consider specific factors in exercising the discretionary power relates to the substance of the decision rather than the procedures to be employed in reaching it.
* ***Takeaways from the three cases:***
  + From Agraira, CAP and Mavi, the hurdle for legitimate expectations is hard to reach but not impossible
  + Test 🡪 clear, unambiguous, and unqualified –looking for contract level of specificity

## Statutory Authorization

* Biggest issue 🡪 enabling statutes vs. common law
* **Test:**
  + The general rule is that a duty of fairness applies ... but the **general rule will yield to clear statutory language or necessary implication to the contrary**”: *Canada v Mavi* [2011, SCC]
    - If a statute is silent, the duty of fairness will apply (if triggered)
    - If a statute is not silent, apply the test
* Examples:
  + *Singh* (common law excluded) 🡪 so turned to Charter analysis
  + *Nicholson* (common law only partly excluded) 🡪 probationary vs. non-probationary officers, status of the common law and also on statutory interpretation
* Caveat 🡪 if delegated legislation is involved, the issue is whether the enabling statute authorizes the delegated lawmaker to override the common law, through clear statutory language or necessary implication
  + Delegated legislation is not analyzed because they can’t make changes that the enabling statute doesn’t provide the authority to make.
* Is there a statute that displaces the common law? If so, it’s a matter of statutory interpretation

## Result of Procedural Defects

* General rule 🡪Invalidation
* Denial of the right to a fair hearing [will] render a decision invalid –whether or not “it may appeal to a reviewing court that the hearing would likely have resulted in a different decision” 🡪 *Cardinal v. Director of Kent Institution* [1985, SCC], para 23.
* But see 🡪 *Mobil Oil Canada Ltd. V. Canada-Newfoundland Offshore Petroleum Board* [1994, SCC] “exceptional” exception
* Practical note 🡪 if you might get the same outcome next time, consider whether a process challenge is worth it
  + The answer may be yes, for several reasons 🡪 Time, for example, is a factor

## General Content: Baker Factors

* Use the five factors to place on the procedural spectrum; then from there, use this to decide the specific content required
  + You have to determine the kind of procedural rights, then place them on the spectrum
  + Wide “menu” of options – this is what we will cover over the coming weeks
    - Notice of the decision
    - Opportunity to make written submissions
    - Discovery of relevant information (pre-hearing stage)
    - Oral hearings
    - Disclosure of relevant information (hearing stage)
    - Representation
    - Right to call/cross-examine witnesses
    - (Written) reasons
* On top of the spectrum, you won’t get anything better than a criminal trial “the gold standard”
  + But the content itself is on a spectrum
  + Even providing someone notice varies on the spectrum; content of notice varies
* You always need to consider precedent to help you determine what procedural rights are actually required, along with the content of the right

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| Specific Content |

# The Right to Be Heard 🡪 Specific Content

* Since the advent of the procedural fairness doctrine, a clear division between the pre-hearing and the actual hearing stage in a proceeding does not fit all forms of decision-making to which procedural fairness obligations attach.
* The administrative process is not confined largely to the one continuous hearing, which is characteristic of the adversarial process. Rather, the interchange of information and submission between decision-maker and the person affected takes various forms, such as through letters, telephone calls, and sometimes personal interview. These interchanges occur over a lengthy period, and from the decision-maker’s point of view, occur at the same time as many other matters call for attention. The decision-maker will be presented not only with new information, but sometimes with a new theory of just what are the central issues in the matter. … The administrator is not an adjudicator supervising and adversarial proceeding within a context bounded by time and by some form of pleading which will have shaped the issues for decision.”

## Three Stages *🡪 1) pre-hearing 2) hearing 3) post-hearing*

1. Pre-hearing stage
2. Hearing stage
3. Post-hearing stage (reasons)

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| Pre-Hearing Stage |

# Pre-Hearing Stage

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| Notice |

## Notice

### Test is Adequacy

* General common law rule
* Notice must be adequate in all circumstances in order to afford those concerned a reasonable opportunity to present proof and arguments, and to respond to those presented in opposition” 🡪 DJM Brown and JM Evans, *Judicial Review of Administrative Action in Canada* (1998+), 2000
* **Adequacy**
  1. Context specific 🡪 requirement will be higher as you move up the spectrum (entitled to more fulsome process)
     1. Example 🡪 professional discipline –impacts individual greatly and so requirement more information, personal service, and fulsome notice
     2. Contrast example 🡪 something that impacts public at large likely wont need personal service, etc. but maybe a general PSA
  2. Requirements may be prescribed in some statutes/rules
  3. Obligation to provide notice is ongoing
     1. If new issues are raised while you are going along during the process, notice of new issues arising must be given
     2. By virtue of participation this notice may already be evident

### Problems with Notice 🡪 *1) form 2) service 3) time 4) contents*

1. Form
2. Manner of service
3. Time
4. Contents

#### Forms of Notice

* Options:
  + 1) Written and
  + 2) Oral
* Written notice is the “norm” at common law 🡪 SPPA, s. 6

#### Manner of Service

* Generally personal service
* Exception 🡪 for large, indefinite groups, public service may be permitted
  + But the geographical area must be provided with sufficient clarity
    - But notice must delineate the area with sufficient clarity: see *re Central Coalition and Ontario Hydro* (1984, Div Ct) 🡪 “Southwestern Ontario” is insufficiently specific in the circumstances
    - Compare *Re Joint Board* [1985 Ont Ca] 🡪 “Eastern Ontario” sufficiently clear on the facts to delineate the area

#### Time

* It must provide adequate time to allow a response
* What is adequate will vary with the circumstances
* Length of time required varies with:
  + (1) The nature of the interests involved (significance will want to give people more time to prepare)
  + (2) The nature of the issues involved (complexity)
* ***Re City of Winnipeg v Torchinsky* (1981 Man QB)** 
  + An owner attempted to appeal a notice of assessment, which came in the mail on the first day of the hearings, but obviously, the appeal letter did not arrive on time since it had to arrive ten days before the day of the hearing. Court dismissed the city’s claim as if they had never provided notice.
* **Contrast: *Re Ryman and Niagara Escarpment Commission* (1981 Ont CA)** 
  + Owner sent a notice of appeal immediately after receiving a notice of decision, but the notice of appeal arrived one day late. The Court exercised discretion in granting remedies due to the recent development of unreliability of mail.
* Although ADMs must make reasonable efforts to provide notice of a hearing, they are entitled to rely on the addresses provided by the parties and the regulatory regime governing mail delivery.
* ***Wilks v Canada* (2009 FC)** 
  + Applicant appealed a deportation but then moved without providing changed address. After notice of readiness was requested by mail, and ignored, the Appeal was presumed abandoned. Return mail wasn’t received by the Immigration Appeal Division until a year later. 🡪 IAD was ruled not bound to act as the applicant’s legal counsel, or to remind him of the seriousness of his proceedings, or to ensure that he understood that he had to show up at his scheduling conference or that he was bound to advise the IAD of his change of address.

#### Content

* At common law, “adequate notice”, to give those concerned a “reasonable opportunity” to know and meet the case
  + Who is proposing to make the decision?
  + What is the nature of the decision to be made?
  + When will the decision be made?
  + Where will the decision be made?
  + Why is the decision being made?
  + How is the decision being made?
* SPPA, s. 6 🡪 “reasonable notice” –also different requirements for different types of hearings

#### R v. Ontario Racing Commission, ex parte Taylor (1970, Ont. HC) aff’d (1970, Ont CA) 🡪 whether sufficient notice was given depends entirely on the circumstances of the case

* High Court held 🡪 notice insufficient
  + It didn’t alert him of the nature of the hearing, as in, what exactly it will address, nor did it provide his possible penalties/discipline actions
* Ontario CA held 🡪 notice sufficient, but better if had set out that the hearing would concern Taylor’s behaviour; and the possible consequences of the hearing
  + *We must consider that someone of Taylor’s expertise in horse training would know that a positive result would trigger an inquiry into his behavior…. We can only conclude that a man of his knowledge and experience in the racing business must have realized that he could be adversely affected by the decision of the Commission following the hearing.”*
  + “…whether a notice given in any particular case is sufficient depends entirely on the circumstances of the case.”

#### Mayan v World Professional Chuckwagon Association (2011 ABQB) 🡪 notice must be sufficient so that a person knows the case alleged against them and has the opportunity to answer it before the ADM

* Notice was insufficient 🡪 a person must know the case alleged against him and be given an opportunity to answer it before the ADM…. Mr. Mayan could not have a fair hearing without knowing all of the relevant circumstances alleged against him, most of which he would have adamantly denied. This is especially so in this case, where the Hearing Panel considered the particulars as relevant to the seriousness of the sanctions imposed on Mr. Mayan.

#### R v Chester (1984 Ont HC) 🡪 severity (context) of case dictates notice –notice cannot be misleading and inadequate

* Prison officials considered moving an inmate to a special handling unit due to his general attitude and some incidents. A notice was given to him that a transfer was being considered and invited submissions. It specified, “your violent and threatening behavior and you assault on a staff member on [date].” Court found that the notice was at least equivocal because the inmate could have concluded that the reason was the dated incident (due to the conjunctive “and”), and he did, in fact, read it this way, as evidenced by his response letter which deals solely with the incident. Notice was misleading and inadequate, especially considering the severity of life in the Special Handling Unit as opposed to the general population.

#### Canada (AG) v Canada (Commission of Inquiry on the Blood System) [1997 SCC] 🡪 commission is required to give parties a notice warning of potential misconduct findings but as long as the notices are issued in confidence to the party receiving them, they should not be subject to as strict a degree of scrutiny as the formal findings

* Facts 🡪In the 1980s, 1,000 Canadians were infected with HIV and 12,000 with Hep C from blood and blood products. A public inquiry was made, and notices were sent out to various parties such as witnesses and participants, assuring them that this would not be a criminal or civil investigation, but would seek to determine the cause of the contamination. On the final day of hearings, a notice to a number of participants were sent with findings of misconduct, and a number of them applied for judicial review, after which the Federal Court decided that no findings of misconduct could be found against about half, but the rest of the applications were dismissed.
* Issue 🡪 should different limitations apply to notice warning of potential findings of misconduct?
* Held 🡪 appeals dismissed
* Ratio 🡪 A commission is required to give parties a notice warning of potential findings of misconduct, which may be made against them in the final report. As long as the notices are issued in confidence to the party receiving them, they should not be subject to as strict a degree of scrutiny as the formal findings.
* Reasoning:
  + The purpose of issuing noticed is to prepare for or respond to any possible findings of misconduct which may be made against them. The more detail included in the notice, the greater the assistance to the party. The only harm could be to reputation, but this will not happen if the notice is provided only to the party. Even if the content of the notice appears to amount to a finishing that would exceed the jurisdiction of the commissioner that does not mean that the final, publicized findings will do so. It must be assumed that the final report will not exceed jurisdiction.
    - In this case, the notices may have alleged that some of the parties “failed” to take certain steps, the allegations did not indicate any breach of criminal or civil standards of conduct.
    - Timing 🡪 The fact that the commissioner waited until the last day of hearings to send out notices was not contrary to statutory requirement, which does not mandate that notice be given as soon as possible or within a specific timeframe. Because this is a public inquiry focused on institutions and not individuals, there is no need to present particulars of a “case to meet” or notice of charges. It is possible that commissioners will not know the results until the proceedings are nearing their end, and it would unreasonable to impose a requirement that notices be send as soon as possible, rather than as soon as feasible.

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| Discovery |

## Discovery

* Civil Proceedings
  + Entitlement to discovery of all relevant information
  + Obligation extends to all parties
* Criminal Proceedings
  + “Accused is entitled to discovery of all relevant information in the Crown’s possession: R. v Stinchcombe [1991, SCC]
  + Obligation only extends to the Crown
  + ***R v Stinchcombe*** 🡪 emphasized the required degree of disclosure: the case to meet, not perfunctory, and complete, subject only to privilege or relevance.
* Civil principle of compelling discovery was adopted into criminal context, but does it trickle into admin?

### Administrative Context

* In the admin context, any claim to the exercise of a power of compelling discovery must be rooted firmly in the empowering statute, and there is not likely to be any presumption drawn as to the existence of such authority in the absence of express authority to make such orders.
  + It is an exercise in statutory interpretation
* Discovery vs. Disclosure:
  + Discovery has an element of compulsion, often trying to gather information held by a third party –information gathered prior to matter being set down for hearing
* **Administrative Context 🡪** ADMs do not have an inherent authority to order pre-hearing discovery of information in the possessions of third parties
* This power must be expressly or impliedly conferred by statute: *Canadian Pacific Airlines v. Quebecair* [1993 SCC]
* Clear statutory authority needed for ‘discovery’ from third parties

### *Ontario HRC v v Ontario Board of Inquiry (Board of Inquiry of Northwestern General Hospital) [1993, Ont Ca] 🡪 Claims to discovery have to be rooted firmly in the empowering statute; not likely a presumption will be drawn in the absence of express authority*

* Facts 🡪 A board of inquiry was set up under the Ontario *Human Rights Code* to hear a complaint of racial discrimination made by ten nurses employed by the hospital. In the context of that inquiry, an order was made for the Commission to provide the hospital with all the complainants’ statements and any interviewed witnesses at the investigations stage. The commission applied for judicial review of the order.
* Issue 🡪 What degree of disclosure was required to meet the duty of fairness in the circumstances of this case?
* Held 🡪 Application dismissed. The discovery order in this case was permissible
* Ratio 🡪 Any claim to discovery will have to be rooted firmly in the empowering statute, and it is not likely that any presumption will be drawn as to the existence of such authority in the absence of express authority
  + Section 12 SPPA 🡪 clearly recognizes the authority of a board of inquiry to order the production of all the documents, which are the subject of the order in this case, subject to claims of privilege.
* Reasoning
  + SPPA, s. 12: “A tribunal may require any person, including a party, by summons,
    - A) to give evidence on oath or affirmation at an oral or electronic hearing; and
    - B) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal, relevant to the subject-matter of the proceeding and admissible at a hearing”
  + Justice will be better served in proceedings under the Human Rights Code when there is complete information available to the respondents.
  + NOTE 🡪 broader approach to discovery than SCC in Quebecair case

### *CIBA-Geigy v Canada [1994, Fed CA] 🡪 efficiency and economic consequences are factors in disclosure; admin context is different from criminal and human rights with obligation being less stringent*

* **Note** 🡪 this case can be distinguished from Ontario HRC case
* Facts 🡪 Patented Medicine Prices Review Board scheduled a hearing to determine whether the drug Harbitol marketed in Canada by the Appellant is being sold at an excessive price. The appellant seeks disclosure of all documents in the Board’s possession, which relate to the matters in issue in the heading – it argues that all the facets of the staff investigation and all documents in the hands of the Board or its Chairman should be disclosed.
* Issue 🡪 What is the extent of the disclosure required to the appellant of documents in the hands of the Board?
* Held 🡪 Appeal dismissed; court upheld Board’s refusal of the appellant’s request of such disclosure.
* Reasoning:
  + The Court emphasized concerns about efficiency 🡪 “To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative viewpoint.”
    - “Fairness is always a matter of balancing diverse interests.”
  + The Court also distinguished the context from criminal proceedings and human rights cases, suggesting less disclosure was due where “economic regulatory functions” were involved
    - Despite serious economic consequences for an unsuccessful patentee and effect on the corporate reputation, “the administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings.”

### *May v Ferndale Institution (2005, SCC) 🡪general robust standard of disclosure in admin context; Stinchcombe does not apply to admin context but the duty of procedural fairness generally requires that the decision-maker disclose the information he relied upon –the requirement is that the individual must know the case he or she has to meet*

* Facts 🡪 Inmate was transferred from low security to higher security facility based on his scoring matrix. His score had changed. The inmate challenged the transfer because it had a change in his personal liberty and he said he is entitled to disclosure of the scoring matrix.
* Held 🡪 disclosure of scoring matrix was required
* Reasoning:
  + Court did not agree that *Stinchcombe* applies to the administrative context, but agreed that **disclosure of scoring matrix was required**, but on the basis of statute, rather than common law.
    - “It is important to bear in mind that the Stinchcombe principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. **The Stinchcombe principles do not apply in the administrative context” (**para. 91).
  + However, “[i]n the administrative context, the **duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet”** (para. 92).
* SPPA
  + Section 8 🡪 requires “reasonable information of any allegations” about the “good character, propriety of conduct or competence of a party” to be disclosed before a hearing.
  + Section 5.4(1) 🡪 also allows tribunals to set out rules relating to pre-hearing discovery, where they exercise the power granted to them under s. 25.1 to enact their own procedural rules.
    - Also context specific and on a spectrum\*

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| Pre-Hearing Delay |

## Pre-Hearing Delay

* Two potential impacts of administrative delay:
  1. Undermining the ability to mount a case; and
  2. Other forms of prejudice (eg. Financial and reputational harm)
* Can relief be granted for either/both of these?
  + Yes for both… but the bar is set very high, making it difficult to satisfy the threshold needed to meet in order to make out a claim for delay

**Blencoe v BC (2000, SCC) 🡪 two types of delay 1) compromising fairness of hearing 2) abuse of process**

* On the issue of delay:
  + Bastarache J (for majority of 5) 🡪 No remedy at common law for the delay
  + LeBel J (for dissent of 4) 🡪 Delay engaged common law principles
* Reasoning: Bastarache
  + **Delays that compromise the fairness of a hearing:**
    - A remedy may be granted
    - However, proof of prejudice must be of a sufficient magnitude to impact on the fairness of the hearing (lost witnesses, etc.)
    - Here, this has not been established
  + **Delay as an abuse of process**
    - Delay may also “amount to an abuse of process… even where the fairness of the hearing has not been compromised”
    - Where might this occur? 🡪 Threshold is HIGH
      * “Where an inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person’s reputation, such that… disrepute” to the system might result
      * However, “few lengthy delays will meet this threshold”
      * Factors to take into account 🡪 the “determination… depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case.”
  + Here, the delay did not rise to the level of an abuse of process
    - Blencoe did not push for a quicker hearing date
    - Blencoe himself brought forth bad faith allegations which caused delay by his own volition
    - Looked to case law for general time to process issues, 30 months was not out of line with usual time
* Reasoning: Lebel (dissent)
  + Three factors relevant to complaints of administrative delay:
    - 1) The time taken compared to the inherent time requirements of the matter, including legal complexities and factual complexities;
    - 2) The causes of delay beyond the inherent time requirements; and
    - 3) The impact of the delay
  + Here, applying the factors, the delay was unacceptable –the appropriate remedy was not a stay, but an order to expedite the case

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| Hearings |

# Hearings

## Oral Hearings

* Oral hearings vs. written and electronic hearings
  + Some examples of written “hearings” from earlier cases:
    - *Mavi, Baker, Suresh* (note not required even though s.7 engaged)
    - Note: the varied standards for the written hearings in the cases

### When are they required?

* The enabling statute may require one
  + SPPA. 5.1(2) 🡪 provides that a tribunal “shall not hold a written hearing if a party satisfies the tribunal that there is good reason for not doing so”
  + See also s.5.2 (2) 🡪 (ditto for electronic hearings)
* Common law used to determine if there is a “good reason”
  + More likely required if Charter-protected interests (“life, liberty, or security of the person” are engaged)
  + More likely required if credibility is an issue 🡪 in order for admin decision maker to make a decision on credibility they must do it in person to gauge their credibility, reactions, etc.

### Cases Regarding Oral Hearings

* **N*icholson*** 🡪 Laskin CJ left it to the Boards of Commissioners of Police to decide whether an oral hearing was required
  + Follow-up: the Board elected to hold an oral hearing
* ***Baker*** *🡪* an oral hearing was not required for humanitarian and compassion decisions –Baker could put forward a request outlining the exception but it was not required
* ***Suresh*** *🡪* s. 7 engaged but oral hearing not necessary, it is national security issue so it waters down the protection a bit
* ***Mavi*** *🡪* an oral hearing was not required in family sponsorship debts context
* From the readings:
  + ***Masters v Ont.* (1994 Div Ct)** 🡪 no oral hearing was required, even though credibility was in issue; the difference was that oral hearing was sought at investigate stage
    - NOTE: exception to credibility where oral hearing usually ordered
  + ***Khan v University of Ottawa* (1997, Ont CA)** 🡪 an oral hearing was required, as credibility was the key issue, and impact was significant on the student’s academic/career future (law student)
    - Majority
      * This is the loss of a year of law school possibly and this could end her legal career and hold her back a year –erases all other academic success really
      * Credibility is an issue here –failure to grade a fourth booklet is central to the issue and the only direct evidence that the 4th book existed was Khan herself
      * Cannot make adverse inference about credibility without seeing Khan and making an assessment
    - Dissent
      * Re-characterizes the issue not as of credibility but rather of whether the existence of an additional exam booklet would have changed anything for the student. The student was not entitled to an oral hearing because the impact was not as severe as the majority suggests, and, in fact, there has been no charge against the student, of misconduct or otherwise, unlike in the authoritative cases in which oral hearings were found to be necessary.
      * Important case to consider the illustration of how claims to an oral hearing are affected by the way that the courts characterize the issue before the ADM and the nature of the interest that is at stake.

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| Disclosure |

## Disclosure

### Two Major Caveats

1. The extent of disclosure required to satisfy the right to be heard varies with the context
2. Disclosure may be denied, or restricted, due to competing considerations or privilege

#### 1) The extent of disclosure required to satisfy the right to be heard varies with the context

* It’s all about the context
* Think of a spectrum of disclosure
  + Notice of the decision, along with “gist” or a summary of key information
  + All information that will be put to the ADM (this is typical)
  + All **relevant** information, even if not put to the ADM
* Relevance is a **minimum (but not necessarily sufficient) threshold**
  + Irrelevant information need not be disclosed
* Examples on considerations for deciding extent of disclosure:
  + Objectives of the statutory scheme;
  + Nature and functions of the ADM;
  + Extent of the formality prescribed for the proceeding; the nature of the interests at stake;
  + The knowledge and expertise of the party
* Note 🡪 SPPA, ss. 8 and 5.4 speak to disclosure
* *Kane v Bd of Governors of UBC* [1980 SCC] – Group of governors, including president, went to dinner after a hearing with Dr. Kane and discussed hearing without him. He was suspended and appealed successfully to SCC after failing all the way up. There could have been discussions about things he didn’t know.

#### 2) Disclosure may be denied, or restricted, due to competing considerations or privilege

* Due to competing considerations 🡪 where the identity of the source is a concern
  1. Where information is collected by the ADM itself from outside, third-party sources;
  2. Where the identity of sources might be revealed, with public safety, national security or other consequences;
  3. Where commercially sensitive information might be revealed (i.e. business secrets)
  4. Where internal information created by the ADM itself (e.g. staff reports) might be revealed
* Due to claims of privilege

### Disclosure Exceptions 🡪 as per second caveat

#### 1) Information from Outside Sources

* Concerns might arise about whether disclosure will:
  + Harm the individual involved; and/or
  + Compromise the quality of the information provided
* Examples:
  + *Re Napoli and Workers’ Compensation Board* [1981, BCCA] – disclosure of summaries of medical and other expert reports in a workers’ compensation file insufficient; full disclosure required
  + *Re Abel* [1981 Div Ct/ONCA] – Board erred by not even considering whether to disclose the reports prepared and submitted to it by the psychiatric institution in which Abel was detained
    - Compare *Re Egglestone and Mousseau and Advisory Review Board* [1983, Div Ct] – disclosure of reports by the Board properly limited

#### 2) Protecting the Identity of outside sources

* Involves claims to disclosure of sources of information, and there is no general rule beyond “reasonableness”
* The difficult issue of informants in a penitentiary setting is covered below, and raises the Charter’s impact on traditional common law justifications for withholding information.

#### Mission Institution v Khela [2014 SCC] 🡪 valid security interests will be protected but disclosure must be adequate for an individual to have their right to be heard –protecting identity of sources case

* Facts 🡪 Khela was a federal inmate serving a life sentence for murder. After three years at Kent, he was transferred to Mission Institution, which was a medium facility. After his transfer, an inmate was stabbed and one week later, the prison received information implicating Khela. The report completed by the securities office outlined their information. Khela as a result was reclassified and transferred back to max security. He challenged the transfer on procedural grounds and said the disclosure was inadequate
* Issue 🡪 was this transfer unlawful because it was procedurally unfair?
* Held 🡪 disclosure was inadequate here
* Reasoning: LeBel
  + Points to statute which governs federal prisons and allows transfers, outlining a number of factors that go into the decision to transfer an inmate based on non-disclosure: jeopardizing (a) the safety of any person; (b) the security of a penitentiary, or (c) the conduct of a lawful investigation. This is necessarily reviewable by way of an application for *habeas corpus*.
  + If prison authorities don’t disclose, they need to provide reasonable grounds for non-disclosure
  + Two requirements to meet this burned:
    - 1) Submit non-disclosed information to the judge in a sealed affidavit, along with reasons for the non-disclosure
    - 2) If anonymous tips relied upon, explain why they are reliable
  + In this case, the withholding of info was not justified based on the statute: the Warden did not give an adequate summary of the missing information, and failed to disclose information about the reliability of the sources, specific statements made by the sources, or his scoring matrix for security classification.

#### 3) Commercially Sensitive Information

* Examples
  + Secret formulas;
  + Programming information;
  + Sensitive financial information 🡪 may give competitors an advantage
* Disclosure may be refused, or, more likely, limited
* Limited case law on the matter **🡪 *Savik Enterprises*** considers information that would not otherwise be available to the general public as worthy of protection
* Often dealt with in statute, rules of practice

#### 4) Staff Studies and Reports

* Information gleaned from inside sources
* Examples:
  + Inspection reports of firms under regulatory supervision;
  + Reports summarizing evidence and submissions at a hearing
* Considerations for disclosure to administrative participants:
  + (1) Information that might assist in preparing submissions may be denied, thereby diminishing the usefulness of participation; and
  + (2) The participants’ confidence in fairness and impartiality of an agency will be undermined.
* Considerations for disclosure to the public:
  + (1) Not possible to assess the performance of an agency or its staff without knowledge of the staff’s access and analysis of information;
  + (2) Public is entitled to information that affects the public
* **Case regarding disclosure of staff studies and reports**
  + *Toshiba Corp. v Anti-Dumping Tribunal* (1984, Fed CA) 🡪 failure to disclose two reports relied upon by the Tribunal OK because the breach was minor and inconsequential and would not change the results of the inquiry
  + *Trans-Quebec & Maritimes Pipeline Inc. v. NEB* (1984, Fed CA)
    - Disclosure of staff papers prepared for the National Energy Board not required; but, “where the decision of a tribunal can be shown to have been based on staff reports to which parties have not had access containing evidentiary material to which the parties have not had the opportunity to respond, disclosure may be required”
  + These cases sit in tension with each other, similarly to *Egglestone* and *Chakouli:*
* **But see in contrast** 🡪 do these cases suggest that a broader approach than that adopted in *Toshiba* and *Trans-Quebec* may be required?
  + *Tremblay v Quebec* [1992, SCC] and *IWA*
  + *Local 2-69 v Consolidated-Bathurst Packaging* [1990, SCC]
  + *Suresh v Canada* [2002, SCC] 🡪 SCC held that disclosure upon which the minister intended to rely had to be disclosed including important info that had been prepared by member of minister’s staff
    - *These cases support notion that all information prepared may need to be disclosed if the information would be relied upon by administrative decision maker*

### Disclosure Issues

* “Where the duty of fairness is triggered, a party is usually entitled to adequate disclosure of the ‘case to meet’.
  + ***May v Ferndale* [2005, SCC]** 🡪 “the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet”
* Thus, the question is not whether disclosure is required in administrative proceedings, but **how much**
* **Discovery vs disclosure 🡪** Discovery is at the prehearing stage, and disclosure is at the stage where a hearing of some sort is going to be held so certain information is entitled at this stage
* Disclosure is sometimes just information or evidence; but it can also be things like the names of the complainants, witnesses that will testify, or the essential issues to be considered at the hearing

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| Right of Parties to Cross-Examination |

## Right of the Parties to Cross-Examination

* At common law, is an oral hearing is required, there is generally also a right to call and cross-examine witnesses. However, the right is not absolute
  + *SPPA s. 10*.: A party to a proceeding may, at an oral or electronic hearing,
    - call and examine witnesses and present evidence and submissions; and
    - conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.

### Limitation to Right of Cross Examination

* Right has been limited in, for example, in:
  + Sexual harassment cases (*Masters*); and
  + The investigatory context (*Irvine v Can* [1987 SCC])

### *Innisfil (Township) v Vespra (Township) [1981 SCC] 🡪 key principles of cross examination –it is vital to legal system and administrative tribunals, but that is not to say that administrative decision makers are expected to follow same procedures as regular courts except where statute indicates so*

* “It must be noted that cross-examination is a vital element of the adversarial system applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times. ... **That is not to say that because our court system is founded upon these institutions and procedures that administrative tribunals must apply the same techniques.** Indeed, there are many tribunals in the modern community, which do not follow the traditional adversarial road.
* **On the other hand, where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen’s right to meet the case made against him by cross-examinatio**n”

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| Right to Representation |

## Right to Representation

* Not a general constitutional right but *Charter*, s.10(b) 🡪 right to counsel on arrest/detention
* Often required by statute 🡪 SPP s. 10
* Often recognized at common law by the right to be heard
  + But the right is not absolute 🡪 often denied/limited in investigative setting (timing); often denied/limited if relatively minor interests at stake – if you are a participant in a proceeding but not exactly a party, then you may be entitled to less procedural fairness

### *Howard v Stony Mountain Institution [1985 Fed CA] 🡪 factors to consider in determining if representation is required (note: look similar to Baker factors)*

* The nature of the proceeding (complex or easy)
  + The extent of formality of the proceeding
  + The complexity of the issues
  + Whether any questions of law are at issue
* The seriousness of the consequences for the party
* The party’s experience with that type of proceeding
* Whether later chances to correct errors are afforded

### *Re Mens Clothing Manufacturers Association of Ontario and Toronto Joint Board, Amalgamated Clothing and Textile Workers’ Union (1979 Arbitration Decision) 🡪 there is no absolute right to legal representation in the courts or other forums, discretion should not be warranted here because of efficiency, cost, and tradition concerns but there is a limited exception where there are certain kinds of issues that impact general legal rules*

* Facts **🡪** After a long arbitration proceeding without counsel during a dispute within the men’s clothing industry, one of the parties wanted to continue with counsel.
* Issues at arbitration
  + Whether ther is an absolute right to legal representation in labour arbitration?
  + If not, whether discretion should be exercised here to permit legal representation?
* Held
  + No, not an absolute right to legal counsel
  + Qualified no to exercising discretion to allow it here
* Ratio
  + General hesitancy over the introduction of lawyers does not mean that they should be excluded altogether. There may be certain kinds of issues, especially those that touch the impact of general legal rules upon the parties’ special regime of understandings, which are suitable for argument by counsel
  + I am therefore prepared to permit Mr. Stringer (counsel) to participate in the hearing to the limited extent of making the legal argument to which I have referred, in accordance with the direction set forth below. The union and association are likewise invited to retain counsel, who may participate on the same basis.
* Reasoning:
  + **There is no absolute right to legal representation**
    - “Neither in courts nor in other forums is an absolute right to counsel regarded as an indispensable feature of natural justice”;
    - “Generally, legal representation is desirable, and the exercise of discretion by the tribunal should favour it”;
    - However, “there may be some circumstances where the participation of counsel is inimical to the functioning of the tribunal”
  + **Discretion should not be exercised to permit a broad role for lawyers**
    - Various reasons to be concerned about introducing lawyers:
      * Cost to efficiency and efficacy of industrial relations
      * Disruption of 60 years of practice
    - However, “there may be certain kinds of issues, especially those which touch the impact of general legal rules upon the parties’ special regime of understandings, which are suitable for argument by counsel”
    - A limited role for lawyers was accepted about the legal question raised – in particular, the legal scope of the arbitrator’s role

### *Re Mens Clothing Manufacturers Ass’n of Ontario (Ont. Div. Ct.) 🡪 overturned arbitration decision 1) as a general rule parties are entitled to choice of representation and this cannot be restricted 2) the arbitrator erred in his exercise of discretion because the issues were complex in matters of law and fact and thus, legal counsel was necessary*

* Issues:
  + Did the arbitrator err in limiting the right to representation?
  + Did the arbitrator err in granting legal counsel a limited role?
* Reasoning: Issue one
  + “…The learned arbitrator had no authority to limit the right of persons who were clearly entitled to appear before him as agents, and he erred in law.
  + He limited the parties in their choice of agents by denying them the right to retain as agents a particular class of persons whose members are wifely retained in such matters in other industries (“choice of representation”)
  + “**As a general rule… a party entitled to be represented by an agent before a domestic tribunal, cannot be restricted by the tribunal in the choice of its agent**, in the absence of an applicable rule of agreement such restriction”
* Reasoning: Issue two
  + He also erred on issue two by granting legal counsel a limited role
  + In view of the **vital importance** of the controversy **to the applicant company**, and the apparent **complexity** of the matter both in fact and **in law**, natural justice, in my view, requires that the applicants be represented by legal counsel at the arbitration hearing without any limitation, even if the applications had no absolute right thereto.

**Limiting (but not denying) representation**

* May be limited to advice giving, no (cross-) examination, etc.
* Representative, but not client, may be present, with representative undertaking not to disclose information
  + Commercially sensitive info, national security, informer privilege, etc.
  + SPPA s. 11, regarding representation for witnesses:
    - It is important to assess the qualifications on representation, including limitations on the extent of counsel’s participatory entitlements and of the concept of counsel “of one’s choice”

### *Irvine v Canada (1987, SCC) 🡪 fairness is flexible and the extent of the right to counsel and role of counsel are determined by characteristics of proceedings, nature of result in relation to the public and the penalties that will result (still discretion through decision maker on how lawyer will be involved)*

* Facts 🡪 the investigative stage of a 2 part proceeding before the Restricted Trade Tribunal which is now the competition tribunal. What was recommended was a full-blown investigation into allegations under what is now the Competition Act. There was questioning done on camera and this meant that those being questioned couldn’t hear the questioning of others. The accommodation was the lawyers could attend the questioning of others unless prejudicial info was to be revealed. The Statute here permitted those appearing before the hearing officer to be represented but what it didn’t do was specifiy the nature of the representation. So Irvine, one of those impacted, challenged the hearing officer’s decision.
* Issue 🡪 Were the limitations imposed on the role of cousel consistent with the Act or the common law duty of fairness?
* Held 🡪 NO as per Estey
* Reasoning:
  + “Neither the Act nor the doctrine of fairness provides the appellants with a right to cross- examine witnesses at the inquiry. **Fairness is a flexible concept ... The extent of the right to counsel and the role of counsel, where counsel are authorized by statute, are determined by the characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties that will result** when events succeeding the report are put in train”.
  + The questioning was not oublic and the results would be released to ublic after full hearing, Act restricts use of information gathered 🡪therefore, no right to cross examine and role of counsel is limited

### *Re Parrish (1993, FCTD) 🡪 distinguishes Irvine –outlines considerations where duty of fairness implies the presence of counsel in investigations which includes: testifying under oath, privacy not assured, reports made public, possibility of deprivation of livelihood, or some other irreparable harm*

* Facts 🡪 collision between boats, and there was an investigation made.
* Held 🡪 Distinguishes Irvine because here, there could be significant impact on reputation and livelihood of Parrish because the investigative reports could be made public
* Reasoning: Rouleau
  + “The duty of fairness implies the presence of counsel [in investigations] when ... some or all of the following [are found]:
    - Where an individual or a witness is subpoenaed, required to attend and testify under oath with a threat of penalty
    - Where absolute privacy is not assured and the attendance of others is not prohibited
    - Where reports are made public
    - Where an individual can be deprived of his rights or his livelihood
    - Where some other irreparable harm can ensue.

### Right to State Funded Representation

* Is there a right to state-funded legal representation in administrative (not criminal) proceedings?
  + Generally no 🡪 *BC v Christie* [2007 SCC]
* But, where “life, liberty, or security of the person is at stake, S. 7 of the Charter may require state-funding of legal representation in the administrative process
  + *New Brunswick v G(J)* [1999 SCC] 🡪 state-funded legal representation required in child protective custody cases
  + Very narrow amount of cases

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| Post-Hearing Reasons |

# Post-Hearing: Reasons

* Historically, reasons were not required
* SPPA, s. 17, enacted in the early 1970s, contains a reasons requirement, but triggered only on request
* The position at common law changed with *Baker*
* ***Baker v Canada [1999 SCC]*** (where reasons were required, but the notes of Officer Lorenz were deemed sufficient):
  + Benefits of reasons
  + Contribute to more careful reasoning, better decisions
  + Inspire public confidence in administrative decisions
  + Can facilitate statutory appeals and judicial review
  + Concerns about delay, cost?
    - These concerns can be met with flexibility as the form of reasons required, and when they are required
    - Reasons not always required
    - Low threshold to satisfy the duty for procedural purposes

## *Questions 🡪 1) when duty arises 2) what is the content of the duty*

1. **When does the duty to give reasons arise?**
   1. Reasons are not required in all cases… it depends on the context
   2. Some form of reason will be required (***Baker)***
      1. Where the decision has importance significance for the individual,
      2. When there is a statutory right of appeal, or
      3. Other circumstances 🡪 catch all category
   3. No reasons required for decisions related to the collection of family sponsorship debts in the immigration context in contrast ***(Mavi)*** Why? “
      1. Straightforward debt collection”, obligations understood;
      2. Parliament wanted to avoid complicated review process;
      3. No statutory right of appeal
2. **What is the content of the duty to give reasons (i.e. when are reasons sufficient)?**
   1. Giving no reasons at all will clearly not satisfy the duty
      1. How much will the courts review contents of reasons provided at the procedural fairness stage?
         1. *Newfoundland & Labrador Nurses’ Union* [2011 SCC]
            1. Two approaches prior to this case: (1) Only a failure to provide reasons at all is a breach of the duty to provide reasons; **claims about deficiencies or flaws should be dealt with as a matter of substantive review**. (2) A failure to provide “sufficient” or “adequate” reasons is tantamount to providing no reasons at all, and so **sufficiency or adequacy must be assessed on procedural review.**
      2. Where an ADM has made a decision without giving reasons, will the courts ever supply the missing reasons?

### *Baker v Canada (1999, SCC) 🡪 reasons requirement is flexible as to the form of reasons required and when they are required; outlines benefits of providing reasons*

* Issue:
  + Whether Officer Caden’s failure to provide his own reasons violated the duty of fairness?; or
  + If Officer Lorenz’s notes constituted the reasons for the decision, were they sufficient?
* Held
  + Reasons were required
  + However, Officer Lorenz’s notes were the reasons for the decision, and were also sufficient
* Reasoning:
  + Some form of reasons should be required…”
    - Where the decision has importance significance for the individual,
    - When there is a statutory right of appeal, or
    - Other circumstances
  + Benefits of reasons
    - Contribute to more careful reasoning, better decisions
    - Inspire public confidence in administrative decisions
    - Can facilitate statutory appeals and judicial review
  + Concerns about delay, cost?
    - These concerns can be met with flexibility as the form of reasons required, and when they are required
    - Reasons not always required
    - Low threshold to satisfy the duty for procedural purposes

### *Newfoundland and Labrador Nurses’ Union v Nfld [2011, SCC] 🡪 where we are looking at requirement to provide reasons as matter of procedural fairness, only issue is whether reasons were provided at all –where there are flaws with the content/reasons that is addressed under substantive review*

* At paras 20-22 🡪 “It strikes me as an unhelpful elaboration on Baker to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review.”
* “It is true that the breach of a duty of procedural fairness is an error in law. **Where there are no reasons in circumstances where they are required, there is nothing to review.** But where, as here, there are reasons, there is no such breach. **Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis...**”

### *2127423 Manitoba Ltd o/a London Limos v Unicity Taxi Ltd et al [2012, MBCAA] (London Limos) 🡪 flexibility of reasons requirement; reasons can be found in other places apart from what are thought of as formal reasons of a court (i.e. the hearing record, someone’s notes, etc.)*

* Facts 🡪 London Limos applied to the Taxicab Board for a taxicab business license. Taxicab dispatch companies filed oppositions to the applications. Although these objectors were not parties, they were provided with summary information regarding the application and given an opportunity to present reasons for their opposition. The Board issued its disposition with respect to the application, granting London Limos’ application in part. However, it did not issue written reasons for the order. The objectors appealed the decision to the Court of Appeal citing breach of duty of fairness by failing to provide reasons.
* Issues:
  + Can the hearing record of the Taxi Board be a surrogate for the written reasons not provided?
  + Must reasons be requested for the duty to provide reasons to be breached?
* Held: Steel JA
  + Yes 🡪 hearing record can substitute for reasons not provided
  + No definitive answer, but doubts cases saying yes
* Reasoning:
  + She agreed with the Board that the lack of formal written reasons did not constitute a breach because the hearing record could actually be a “sufficient and adequate” surrogate for reasons
    - London Limos also had an interest in protecting its confidential business information and the dispatch companies were not parties to the proceedings, but objectors whose legal rights were not affected by the decision.
  + Reasons can sometimes be found in other places apart from what we typically associate with reasons, such as formal reasons of a Court
    - Similar to *Baker,* which used the notes of Officer Lorenz
  + The record was publicly available and therefore easy to access
  + The applicable legal test to make the decision was also disclosed in the record of the hearing, and it showed that the various parties understood that it was the legal test to be applied
* ***NOTE: this looks at the content of the reasons which seems to be in tension with Newfoundland Nurses –to see if there are any reasons at all there is an analysis***

### *Wall v Independent Policy Review Director (2013, Ont Div Ct) 🡪 reasons have to answer the basic question of “why was this decision made?” –to be considered adequate reasons this must be addressed.*

* Facts 🡪 Wall was arrested at the Toronto G20 summit for wearing a disguise with intent and later released without charge. He made a complaint of police misconduct that lead to disciplinary charges against the arresting officers. Through the investigation report, he learned that the officers may have acted under instructions from senior officers and possibly the Chief, so he filed a further complaint asking that his original complaint be fully investigated or that a new complaint against the Chief and other officers be lodged. The director dismissed Wall’s complain because it had been filed more than six months after the G20 summit. Wall sought judicial review of the decision on the grounds that the director had breached his statutory and common law duty to provide reasons for his decision.
* Issue 🡪 does the decision letter from the director breach the duty to give reasons?
* Held: Molloy 🡪 Yes, the letter here in effect provided no reasons at all
* Reasoning:
  + The letter here in effect provided no reasons at all;
  + The letter basically answered “why” with “because I can”
  + “The failure to provide reasons is not only a breach of the requirements of the legislation; it also violates principles of procedural fairness and natural justice. The complainant is entitled to know why the Director decided to exercise his discretion against dealing with the complaint.
  + Likewise, this Court is entitled to know why the Director decided as he did. There are specific factors that the Director is required to consider before making such a decision. The complainant cannot have any confidence that the Director took these factors into account at all, much less that he considered and applied them reasonably in reaching his decision. Again, the absence of any reasons makes it impossible for this Court to conduct a meaningful review.”
* ***NOTE: this looks at the content of the reasons which seems to be in tension with Newfoundland Nurses***

### *Wall v Independent Policy Review Director (2014, CA) 🡪 minimal standard of adequacy for reasons to get over the hurdle of procedural fairness and be considered reviewable –this is a fairly basic level of adequacy and low threshold*

* Issues:
  + Did the Div Ct err in finding the decision letter did not satisfy the duty to give reasons?
  + Where and ADM has made a decision, explicitly or implicitly, without providing reasons, will the court ever supply the missing reasons on judicial review?
* Held: Blair JA🡪 NO to both issues
* Reasoning:
  + ’Detail’ is a function of the need to explain the exercise of a statutory power of decision; it is not a descriptor distinguishing between the types of reasons required. The Director’s reasons… need not be lengthy. They need not be complex. But, as the Divisional Court observed, they must at least answer the question ‘why’. The complainant, and the court (for purposes of review), are entitled to know the rudiments of the explanation for why the complaint has been screened out.”
  + The letter is “devoid of any reasons **adequate** to allow for judicial review of the Director’s decision”

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| The Duty to Consult |

# The Duty to Consult

* Important consideration when decision makers affect Indigenous peoples and their rights
* Great impact in administrative context

## Section 35, *Constitution Act*

* **35(1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
* **(2)** In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.”

## Two Roles of the Duty to Consult

1. Interim: protect rights pre-resolution of a claim
   1. Our key concern in this course
2. Post-recognition: part of the *Sparrow* test for justification
   1. Comes into play after a right has been recognized
   2. Tsilhqot’in 🡪 duty to consult is a pre-condition to *Sparrow* test

## Section 35(1) Framework

1. “Has the claimant established an Aboriginal right or treaty right protected by s. 35(1)? (Aboriginal right includes title)
   1. If not, the claim fails.
2. If a s. 35(1) right is established, has the government established that it is not “existing” (was extinguished)?
   1. If yes, the claim fails.
3. If the government has not established extinguishment, has the claimant established that the right was infringed?
   1. If not, the claim fails.
4. If the right has been infringed, has the government established that the infringement is justified (Sparrow test)?
   1. If yes, the claim fails.

# Three Components to s. 35(1) 🡪 1) source 2) trigger 3) identifying parties

1. Source
2. Trigger
3. Identifying parties to consultation

## Source/Trigger

### *Haida Nation v BC (2004, SCC) 🡪 the duty to consult under s. 35 is sourced through the honour of the Crown and this means the Crown must act honorably in all dealings with Indigenous peoples and this extends to the pre-establishment context (before rights are formerly recognized); three part test for trigger of duty to consult*

* Facts 🡪 In 1961 the provincial government of British Columbia issued a "Tree Farm License" on the Queen Charlotte islands, located off the coast. The Haida Nation had a pending land claim which had not yet been recognized at law. The Haida Nation also claimed an aboriginal right to harvest red cedar in that area. In 1999 the Minister authorized a transfer of the license to the Weyerhauser Company without consent from or consultation with the Haida Nation. The Haida Nation brought a suit, requesting that the replacement and transfer be set aside. The Crown was successful at trial, but this was overturned on appeal where the court found that both the Crown had a duty to consult with the Haida. Weyerhauser did not.
* Issue 🡪 how do you know if there is a duty to consult with aboriginal peoples, and what does this duty entail?
* Held: McLachlin CJ 🡪 The provincial government was required to consult with the Haida regarding a tree harvesting license before title was established
* Ratio 🡪 It is a corollary of S. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, to accommodate
* Reasoning:
  + **Source** of the duty to consult
    - Foundation in the honour of the Crown –crown must act honourably in all dealing with Indigenous peoples and to do otherwise acts contrary to s. 35
    - This is recognized as an unwritten constitutional principle (*Beckman v Little Salmon)*
    - The honour of the Crown gives rise to different duties in different circumstances:
      * Assumed discretionary control over specific Aboriginal interests = fiduciary duty
      * Treaty making and application = honour and integrity, avoid even the appearance of “sharp dealing”
      * Conclusion of treaties = negotiations leading to a just settlement
  + **Trigger** for the duty to consult
    - Can the duty to consult be delegated?
      * Can the Crown delegate its duty to consult?
      * If yes, does it have a residual duty to ensure consultation is proper?
      * If yes, how is delegation properly achieved?
      * If the duty had not been delegate, does the ADM have to ensure Crown consultation is adequate before proceeding?
    - What is the trigger for the duty to consult?
      * 1) There is Crown conduct or a Crown decision (i.e. does not apply to private companies)
      * 2) The Crown has real or constructive knowledge of a potential Aboriginal rights/title or treaty rights claim; *and*
        + *Prima facie* case
        + Real or constructive knowledge of it
      * 3) The right/title might be adversely impacted

### Haida Nation: Trigger for the Duty to Consult Test 🡪 *1) Crown conduct/decision, 2) knowledge of potential right/title claim, 3) might adversely impact*

1. There is Crown conduct or a Crown decision
2. The Crown has real or constructive knowledge of a potential rights/title or treaty rights claim; and
   1. *Prima Facie* case (Haida tells us – the case has to have an “air of reality” proof of the claim itself is not required)
   2. Real or constructive knowledge 🡪 it actually must be aware of the possibility of this claim
3. The right/title might be adversely impacted (*Rio Tinto Alcan*)
   1. Past wrongs won’t suffice
   2. Must be a real, tangible impact

### *Mikisew Cree First Nation v Can [2005, SCC] 🡪 the duty to consult is read into existing treaties as an implied term*

* Duty to consult not limited to Aboriginal Rights/Title; applies to execution of written treaties
* Here, the duty to consult was triggered by exercise of Treaty 8 “take up” clause
* The duty is effectively read into the treaty –read as an “implied term”
* The Crown tried to argue the treaty itself exhausted the crown’s obligations, but this was rejected

### *Rio Tinto Alcan v Carrier Sekani [2010, SCC] 🡪 for part three of the trigger test, there must be a causal relationship between the adverse impact and the decision –with a continuing breach, threshold is not met if there is no potential for a novel adverse impact*

* Facts:
  + A dam and reservoir was built in the 1950s, which altered the amount and timing of water in the Nechako River. The Carrier Sekani claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River, but, pursuant to the practice at the time, they were not consulted about the dam project. Excess power generated by the dam is sold by Alcan to BC Hydro.
  + In 2007, the First Nation asserted that the new Energy Purchase Agreement should be subject to consultation under s. 35. The Utilities Commission accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, but found that the consultation issue could not arise as the purchase agreement would not adversely affect any aboriginal interest (no new impact, just maintaining the status quo].
  + The British Columbia Court of Appeal reversed the Commission's orders and remitted the case to the Commission for evidence and argument on whether a duty to consult the First Nations exists and, if so, whether it had been met.
* Issue 🡪 whether or not the duty to consult arose at all?
* Held: McLachlin J 🡪 duty to consult **not** triggered here
* Reasoning:
  + McLachlin CJ expands on the first two components, but appears to pull back on the third component
  + Pulls back from looking at the situation as a whole, and focuses on the one decision itself.
* Applying the trigger for the duty to consult test:
  + **1) There is crown conduct or crown decision**
    - Decisions that have an immediate, direct impact;
    - Also “strategic, higher level decisions”
    - Doesn’t include legislative conduct (*Mikiswq Cree 2018, SCC)*
      * But suggestions that honour of the Crown is relevant, may lead to other forms of recourse
  + **2) Real or constructive knowledge of a potential claim**
    - The threshold is “not high”
  + **3) Aboriginal/treaty right/title might be adversely impacted**
    - Need a “causal relationship”
    - If there is an ongoing breach to the duty to consult, such as here, that’s not enough.
    - There would have to be something about the particular decision that creates an adverse impact *beyond* the continuing breach in order to activate the duty to consult.
    - Note: You must point to evidence of this adverse impact as well
    - Things that are not enough to satisfy the factor of adverse impact:
      * Past wrongs, including previous breaches of the duty
      * Merely speculative impacts 🡪 Need an “appreciable” impact
      * Impact on unrelated interests (*Ie.*, on negotiating position)
      * A continuing breach, if no potential for a novel adverse impact
    - Note: there are possible remedies for (1) and (4), for example, damages.

## Delegation of the Duty to Consult

* Can the duty to consult be delegated?
  + The honour of the Crown cannot be delegated (*Haida*)
  + But, procedural execution of the duty can be delegated 🡪 such as to ADMs or even third parties
    - The steps needed to fulfill the duty can be delegated
* Does the Crown have a continuing duty to ensure duty satisfied?
  + Yes, because the honour of the Crown cannot be delegated

### How to Delegate the Procedural Execution of the Duty

* Explicitly by statute 🡪 this is rare
* Implicitly by statute
  + Three considerations:
    - 1) Does the ADM have the **jurisdiction** to consider questions of law? (This is usually conferred explicitly by the authoritative legislature)
      * Duty to consult is a question of law
    - 2) Whether or not the ADM has been delegated the **necessary procedural powers** necessary to execute the duty
      * Power to conduct hearings, make orders requiring disclosure and additional information, etc.
    - 3) Delegating of the **remedial powers** necessary to accommodate effective rights
  + If these are satisfied, then there is an implicit ability for the ADM to fulfill procedural duty on behalf of the Crown

### *Clyde River (2017, SCC) 🡪 ADM undertakes procedural steps of duty to consult but it remains the Crown’s duty to fulfill; ADMs might have to take additional steps to meet the duty but if the Crown’s duty is not satisfied, the ADM cannot proceed*

* Facts 🡪 One issue was whether the NEB had satisfied the duty to consult with the people to propose seismic testing that involved transporting air guns and creating sound waves. They held meetings in Clyde River for the purposes of collecting comments from communities, their reps attended the meetings but didn’t know much about the project, and couldn’t answer questions. The NEB suspended their assessment, and years later, they filed a document of 4000 pages to the NEB that purported to answer questions raised by the community, which was posted on the NEB website and delivered to the communities, but was not translated to the language of the Inuit People.
* Issue 🡪 did the NEB fulfill its duty to consult?
* Held: Karakastanis and Brown
  + The NEB process triggered the duty to consult
  + The duty was breached
* Reasoning
  + **Delegation to ADMs**
    - The Crown may “rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part”
    - ADMs – not just “the Crown”, can trigger the duty to consult
    - If delegated, the Crown must ensure consultation is adequate
    - Might have to take additional steps to meet its duty – e.g., by:
      * Filing gaps on a case-by-case basis
      * Introducing broad-based legislative, policy reforms
      * Making submissions to a regulatory body
      * Requesting reconsideration
      * Seeking postponement to carry out further consultation
    - Crown must give notice if it intends to rely on an ADM to fulfill its duty
  + **Role of ADMs to ensure Crown satisfied the duty**
    - Power in the ADM to consider questions of law = duty to consider whether the Crown’s duty to consult has been satisfied
      * Doesn’t matter if the Crown is a “party” or not
    - If the Crown’s duty is not satisfied, the ADM cannot proceed
      * ADMs should generally address concerns re whether consultation by the Crown is sufficient with written reasons

## The Content Question of the Duty to Consult

### What is Required to Satisfy the Duty? *(Haida)*

* Requirements vary with context
* Duty falls on a spectrum
  + Pre-establishment 🡪 focus is on consultation and accommodation
* 🡸 Consultation – Accommodation | 🡺 Consent
  + Consultation: Shallow vs. deep consultation
    - Shallow 🡪 Written notice
    - Deep: 🡪 First Nation is included as a party in the proceedings
  + Accommodation
    - An insistence on an adaptation of a decision, to avoid negative effects of the decision on an Aboriginal or Treaty Right
    - Revenue sharing contemplated, to offset the damages
    - Somehow accommodate the community and protect their rights to minimize, avoid, or compensate the harm. Push for a specific kind of decision, to alter it in light of these considerations
  + Consent

### Test for Requirements of Duty to Consult 🡪 *1) strength 2) seriousness of impact*

1. **The strength of the claim;** and
   1. Really two components:
      1. The nature of the claim – if there is an existing title, the duty will be higher
      2. The strength of the claim – dubious vs. strong
2. **The seriousness of the adverse impact on right/title** 
   1. If the impact is relatively small, then it falls lower on the spectrum
   2. In contrast if the impact is major, it falls higher on spectrum

### Application of Content Question to Cases

* ***Haida Nation v BC***🡪 The duty was triggered
  + Court didn’t have to consider this, but the strength of the case showed there was a prima facie case for both claims, an a strong prima facie case for the Aboriginal right to harvest cedar. There would be a serious impact of allowing the company to clear-cut the forest. There was no consultation at all, given the strength and seriousness, the Crown may have to significantly accommodate the Haida to preserve their right and title claims (obiter).
* ***Clyde River* 🡪** The consultation was not adequate
  + The inquiry was misdirected, and since the Crown was relying on the NEB to fulfill its duty to consult, it had an obligation to make the effects clear to the community. Limited availability of consultation, no hearings, no funding to participate in the process. Responses to questions were in an inaccessible document, released months after information was requested. The attempt to make some accommodation was not enough on the strength of the claim and seriousness of impact.
    - Established Treaty rights were involved, which makes it a strong claim.
    - The potential impact on the right was serious (the rights to hunt sea animals were in conflict with the proposed testing and would be harmed, it was a central part of their culture). Deep consultation with adequate accommodation

## Failure to Satisfy Duty 🡪 Remedies (Tsilhqot’in Nation v BC)

* Pre-establishment - various options, including:
  + Injunctive relief
  + Damages
  + Order to satisfy the duty
* Post-establishment
  + Obtain consent to avoid infringement
  + If no consent, justify infringement as per *Sparrow* test
  + If no consent and justification, various options:
  + For example, reassess prior conduct/decision, legislation rendered inapplicable to right/title

### *Chippewas of the Thames First Nation v Enbridge Pipelines, 2017 SCC 🡪 example of where duty to consult was satisfied –factors include: early notification, participation in the process, Crown providing funding to participate*

* Facts
  + The Chippewas of the Thames First Nation is located outside London. In November 2012, Enbridge applied to the National Energy Board (NEB) for approval of a modification of the Line 9 pipeline. The modification would have reversed the flow of part of the pipeline, increased its capacity, and enabled it to carry heavy crude. These changes would have increased the assessed risk of spills along the pipeline route.
  + The Chippewas have various unresolved claims in relation to their reserve lands and traditional territory, including claims for Aboriginal title to their reserve lands and the bed of the Thames River. Line 9 crosses the Chippewas’ traditional territory, and the Thames. The NEB issued notice to Indigenous groups, including the Chippewas, informing them of the project, the NEB’s role, and the upcoming hearing process. The Chippewas were granted funding to participate in the process, and they filed evidence and delivered oral argument delineating their concerns that the project would increase the risk of pipeline ruptures and spills, which could adversely impact their use of the land.
  + The Chippewas sent a letter to several ministers of the Crown, but did not receive a response before the NEB hearing. There was thus no discussion between the Chippewas and the Crown itself before the Chippewas went in front of the NEB to consider Enbridge’s application. Ultimately, the NEB was satisfied by Enbridge’s arguments about the safety of the pipeline and the contingency plans should a pipeline rupture occur. The NEB approved the project, subject to a number of conditions aimed at enhancing the safety and environmental measures in place. Was the duty to consult satisfied here?
  + For the SCC’s view, see Chippewas of the Thames First Nation v Enbridge Pipelines, 2017 SCC 41
* Applied to Duty to Consult
  + The duty was adequately fulfilled
    - The Chippewas were notified early
    - They participated as interveners in the process
    - They were provided funding to participate
* Reasoning:
  + A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown had knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision. The board's contemplated decision on the project's approval would amount to Crown conduct. Because the authorized work could potentially adversely affect C First Nation's asserted Aboriginal and treaty rights, the Crown had an obligation to consult with respect to E Inc.'s project application. The Crown may rely on steps taken by an administrative body to fulfill its duty to consult.
  + While it was the Crown that owed a constitutional obligation to consult with potentially affected Indigenous peoples, the board was tasked with making legal decisions that complied with the Constitution. The regulatory tribunal's ability to assess the Crown's duty to consult did not depend on whether the government participated in the hearing process. The Crown's constitutional obligation did not disappear when the Crown acted to approve a project through a regulatory body such as the board. The duty to consult was not triggered by historical impacts, and it was not the vehicle to address historical grievances. That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 Canadian Charter of Rights and Freedoms rights without considering the larger context. Neither the Federal Court of Appeal nor the board discussed the degree of consultation required.
  + The circumstances of this case made it sufficiently clear to C First Nation that the board process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice, its consultation obligation was met. The board's statutory powers were capable of satisfying the Crown's constitutional obligations. The process undertaken by the board was sufficient to satisfy the Crown's duty to consult. First, the board provided C First Nation with an adequate opportunity to participate in the decision-making process. Second, the board sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, the board provided adequate accommodation through the imposition of conditions on E Inc. The board's written reasons were sufficient to satisfy the Crown's obligation. The assertion that the board's reasons were insufficient to satisfy the Crown's duty to consult was rejected.

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| The Right to an Independent and Impartial Decision Maker |

# The Right to an Independent and Impartial Decision Maker

* Second component of the duty of fairness
* Captured by the Latin term *nemo judex* in *sua causa debet esse* meaning the decision maker must not be a “judge in his/her own cause”
* Why is this important?
  + Issues of certainty and predictability –concerns over rule of law if personal interests are added into the decision making
  + Broader notions of fairness –decisions impact individuals and their interests and should be made on relevant considerations and not personal feelings

## Two Aspects for Right of Independent, impartial decision maker 🡪 *1) bias/impartiality 2) independence*

1. Bias/impartiality
2. Independence

## Bias/Impartiality and Independence

* **At common law 🡪 same trigger as the right to be heard (Cardinal/Knight)**
  + If right to be heard is triggered, then impartiality and independence will also be triggered
* **Focus is usually on apprehension/perception**
  + It’s not about the actual mind of the decision-maker, but the *perception* of the mind of the decision-maker
  + This is for pragmatic purposes 🡪 It’s rare to know the actual mind of the decision-maker
  + In *Roncarelli*, 🡪 we had a rare instance where the decision-maker was so convinced of his correctness that he openly admitted to his own bias
* **Perfection is not required**
  + Everybody has predispositions, preferences, etc., and so courts do not insist that on an absolute standard of perfection. Rather, they look for impermissible types of biases
  + By virtue of the status of the ADMs, and their political ties, they don’t demand the same level of impartiality as the courts. Unless, of course, they act in a judicial or quasi-judicial capacity
* **Context-specific** 
  + Like everything else in administrate law, it is very context specific
  + It is so context specific that even though there is a general test that is applied, it is a sliding scale

### What is bias/impartiality and independence?

* **Bias 🡪 Focus on internal influences on ADMs**
  + Aims to ensure sufficient impartiality [the goal]
  + What is the state of mind, or our perception of the state of mind?
  + In an institutional level, what is the larger administrative context in which the ADM operates institutionally, but still within the same administrative structure?
  + Impartiality is “[a] state of mind or attitude of the tribunal in relation to the issues of the parties”:  *R v Valenta* [1985 SCC]
  + Examples:
    - Financial interests of decision makers
* **Independence 🡪 focuses on external influences**
  + Often, but not only, the relationship of the ADM to the executive
  + Impermissible outside influences 🡪 Ie. Pressures of the executive branch, or relationships established with the executive branch (I.e. lobbying)

### Sources

* Our focus 🡪 the common law
* But also important and potentially relevant are:
  + Statutes
    - I.e. some statutes that outline duration of sitting members, salaries, etc. that could impact impartiality/bias and independence
  + The Charter, s. 7
    - If this is engaged it confers procedural protections including right to independent and impartial decision maker –protected by principles of natural justice under s. 7
  + The Canadian Bill of Rights, ss. 1(a) and 2(e)
    - Similar protections of those of the Charter

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| Bias/Impartiality |

# Bias/Impartiality

## The General Test

* General test 🡪 reasonable apprehension of bias
* Outlined in dissent for *Committee for Justice and Liberty v NEB* [1978, SCC], Grandpré J (dissenting)]:
  + “... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]he test is “**what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly**” [*Committee for Justice and Liberty v NEB* [1978, SCC], Grandpré J (dissenting)]
  + Test adopted in many later cases: e.g., Baker 🡪 this varies from Baker though because standard applies differently depending on the context
  + Unpacking the test:
    - Focus on reasonable apprehension of bias is perception of bias 🡪 this means we do not need to show actual bias
    - Focus on reasonable, informed person and what they would reasonably see in the context
    - Standard varies depending on context 🡪 what gives rise to test in one context will not in another context –different standards apply

### Two Layers of Reasonableness in Test

* Who is the reasonable person, what do they know? 🡪 This seems to require the courts to go beyond what the particular individual actually knows and take into account information that the person in this position would be able to conduct diligent inquiries into the issues.
* From whose perspective should we assess the knowledge of the individual 🡪 The particular group of which the individual is a part, or is there some notion of perspective of reasonableness that exists outside of the community, into some objective idea of reasonableness?
  + Example 🡪 minority youth shot by a police officer –do we see the facts through the eyes of his community and family? Or do we see it through a neutral standard? This is unclear and unresolved what perspective we assess knowledge through

## Bias: Specific Contexts

## Antagonism during the hearing

* Can in some cases give rise to reasonable apprehension of bias
* ADM decision makers should not engage in overly hostile questioning, cast judgment based on the representatives or party dress/appearance, etc.

### *Baker v Canada (1999, SCC) 🡪 the standards for reasonable apprehension of bias may vary... depending on the context and type of function performed by the decision-maker involved; decisions that perpetuate stereotypes can be indicative of RAB*

* Facts 🡪 senior immigration officer made a decision regarding Baker with the power of the ministry. He made the decision based on the junior immigration officer’s notes. The junior immigration officer made the following notes:
  + *This case is a catastrophe. It is also an indictment of our “system” that the client came as a visitor in Aug. ’81, was not ordered deported until Dec. ’92 and in APRIL ’94 IS STILL HERE!**The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.**There is also a potential for violence – see charge of “assault with a weapon*”
* Issue 🡪 was there a reasonable apprehension of bias?
* Held 🡪 yes –the junior immigration officer’s notes give rise to a RAB
* Reasoning:
  + A high degree of impartiality is required here. Why?
    - The “great importance” of the decision, to Baker and the country
    - The decisions are individualized, not general in nature
    - Immigration decisions demand the “recognition of diversity, an understanding of others, and openness to difference”
  + The notes “do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker’s mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life”
  + “It would appear to a reasonable observer that his own frustration with the ‘system’ interfered with his duty to consider impartially [the appellant’s application]”
* Ratio 🡪 “... the standards for [RAB] may vary... depending on the context and type of function performed by the ... decision-maker involved”

## Association Between the Party and ADM

* Factors to consider:
  + Nature (significance) of the relationship 🡪 significant enough to potentially impact decisions itself?
  + Timing and currency of the relationship 🡪 how long did parties know each other, is it ongoing?
    - Between decision maker and parties
    - Between decision maker and others involved –i.e. lawyers, witnesses, experts, etc.

### *Marques v Dylex Ltd (1977, Ont Div Ct) 🡪 Context matters because in labour, we understand that labour board members often have interests that cross over; timing and involvement are also important*

* Facts 🡪 labour board member who had previously been a lawyer acting for the union appearing before his panel.
* Issue 🡪 should the member be disqualified for RAB?
* Held 🡪 not disqualified for bias
* Reasoning
  + There had been no involvement with the particular matter before the labour board –never been involved in the proceedings during his time at the firm at all
  + Timing 🡪 one year had passed since the member had any involvement with the union and almost a year since he had left the firm
  + Context is important
* Ratio 🡪 Context matters because in labour, we understand that labour board members often have interests that cross over; timing and involvement are also important

### *Terceira, Melo v LUINA (2013, Ont Div Ct) 🡪OVERTURNED; complexity, length of matter and deeply entrenched issues justified disqualifying board member*

* Facts 🡪 applicant asked board member to recuse himself and the board member refused.
* Held 🡪 labour board member disqualified
* Reasoning
  + Matter was ongoing for lengthy matter of time and issues had become deeply entrenched
  + Distinguished from *Marques* because the issues being dealt with were different in time and significance
* NOTE: overturned by ONCA

### *Terceira, Melo v LUINA (2014, ONCA) 🡪 need evidence to support claim of bias; must prove sufficient “nexus” between member and prior retainer/involvement in the matter to show bias*

* Held 🡪 overturns divisional court decision finding bias
* Reasoning
  + “No material or record… were filed in support” of bias claim
  + Issue central to bias claim was not before the Vice Chair
  + Even if it was, the “nexus” between the factual matrix before the Vice Chair and the prior retainer was inadequate

### *United Enterprises v Saks (1997, Sask QB) 🡪 personal connections; showing a special relationship or preferred treatment of one party raises RAB*

* Facts 🡪 Applicant had applied for a review of the suspension of its licence. On the hearing’s first day, the members of the commission panel, with in-house counsel (counsel L) from the commission acting in opposition to the applicant, arrived together and entered the hearing through a side door. When the applicant’s GM and counsel were invited in to the hearing room, counsel L was already seated and conversing with members of the commission. This occurred throughout the hearing, and the commission chair often referred to counsel L by his first name, while referring to the applicant’s counsel by their last name. At the end of the hearing, the commission chair confirmed an invitation for counsel L to attend her BBQ that evening and in-house counsel responded positively. According to the applicant, this last event confirmed concerns about favoritism, but it was then too late to make submissions on bias. Unknown to the applicant, the BBQ never took place.
* Issue 🡪 was there an association between the party and the ADM sufficient for RAB?
* Held
  + RAB arose on the facts
  + Special relationship, preferred status suggested
* Reasoning:
  + No requirement to be aloof, but judges and tribunals must avoid any conduct which leads to the perception that they have a closer relationship with counsel for one side than with counsel for the other
  + Informality vs. familiarity 🡪 both descriptive of atmosphere in which a tribunal conducts its affairs. RAB will not arise just because proceedings are conducted informally. But it can arise if the tribunal treats one party with a degree of familiarity that is not extended to the other.
  + This is a strong indication that respective submissions will also be considered with the same deference.
  + Repetition and cumulative effect of treatment is significant

## Prior Active Involvement

* Key Factors to consider:
  + The nature of the previous involvement
  + The extent of the previous involvement
* Examples:
  + The ADM plays other roles in the process before the hearing
  + Associations with the actual matter in an earlier capacity

### *Province of NB v Comeau (2013, NBCA) 🡪 overlapping roles within a particular administrative context can raise a RAB*

* Facts 🡪 NBCA overturned a decision by the minister of social development to discipline two employees of an adult residential facility. The decision emerged from an investigation that was initiated and conducted (in part) by a regional director who also approved the investigative team’s recommendations and finalized the findings and conclusions of the investigation. There was an overlapping of roles from the regional director.
* Issue 🡪 whether prior involvement in the decision making process gave rise to a RAB?
* Held 🡪 yes
* Reasoning:
  + Attendants were entitled to a separation between the engagement stage and the final stage. The regional director blurred these two stages, resulting in a finding of reasonable apprehension of bias.
  + The RD was involved in the investigative phase, and therefore was tainted with bias when deciding whether to approve or reject the investigation report. This prohibited him/her from fulfilling the role of final decision-maker.
  + While there are certainly circumstances in which a lack of formal separation between investigators and decision-makers will be acceptable within a statutory scheme… this is not such a case. Here, the ministerial policies contemplate both the need to respect principles of natural justice and to have the investigator’s recommendation referred to the RD for a final decision.
    - The separation of the investigative process from the decision making process is consistent with a high degree of procedural fairness is required in these circumstances.

### *Committee for Justice and Liberty v NEB (1978, SCC) 🡪 prior participation can be enough to raise a RAB; shows flexibility of test and context specific analysis*

* Facts 🡪 NEB conducted hearings into whether the certificate of convenience and necessity for the pipeline should be granted, but the Chairman of the Board had recently been employed as the director of an organization that was intimately connected to an earlier proposal to build this pipeline. He had quit that job to work for NEB less than 6 months before the hearings, and he assigned himself to be on 3-person panel hearing this.
* Issue 🡪 did prior involvement on the matter create a RAB?
* Held 🡪 yes
* Reasoning
  + It didn’t matter that the application was refined and revised, and the final decision to apply made, after Crowe left the group.
  + Participation is enough
* Ratio
  + *“****What would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude” [and the grounds for this apprehension must be substantial] (Minority)***
  + Majority focused on the apparent impartiality losing groups may perceive, deemed this to be a reasonable apprehension of bias (this shows that an “informed and reasonable person” is subjective)

## An Attitudinal Predisposition Towards an Outcome

* Suggests and ADM is not approaching an issue with an open mind
* Examples where this can occur:
  + From comments or conduct before a hearing beings; or
  + From comments or conducting during a hearing
* Attitudinal predisposition is often linked to prior involvement
* Context-dependent nature of cases

### *Old St. Boniface Residents Assn. v Winnipeg [1990 SCC] 🡪 Closed mind standard in municipal context: the test is whether the councilor was not “amendable to persuasion” and so had a “closed mind”; different standards apply in different contexts (highly contextual approach)*

* Facts:
  + T. Ltd. had acquired several adjacent lots in the area and wanted to purchase land owned by the municipality and change existing zoning so it could develop two condominium towers. One tower would be situated almost wholly on the designated park area and some of the municipality's land involved streets, which would have to be purchased and closed.
  + Discussions took place between T. Ltd. and the municipality which included municipal councilor S. T. Ltd. filed its application for rezoning before receiving written authorization from the municipality to apply for rezoning of municipally owned lands. A municipal report was filed with the finance committee recommending that T. Ltd. be given an option on the municipal lands. At the finance committee's in camera hearing, S., although not a member of the committee spoke in favour of granting the option. The finance committee approved the option.
  + The municipality then sent T. Ltd. authorization to proceed with the rezoning application. S. was one of three municipal council members sitting on the defendant community committee which held public meetings on the zoning application. The plaintiff opposed the application and S.'s participation in the decision of the community committee. S. did not disclose at the public meetings his earlier involvement with the application.
* Issue 🡪 whether the councilor was disqualified due to RAB?
* Held 🡪 No
* Reasoning: Sopinka
  + Context-specific approach
    - Some prejudgment is inherent to the city councilor’s role🡪 Here, a closed mind is not established
  + The proper test is that members of council who are capable of being persuaded hear objectors or supporters. This is consistent with the functions of a municipal councilor and enables the carrying out of political and legislative duties. The party alleging disqualifying bias must establish prejudgment of the matter, in fact, to the extent that any representations at variance with the view that had been adopted would be futile. Statements by members of council, which may raise an appearance of bias, will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.
  + S. had no personal interest in the development either pecuniary or by reason of a relationship with T. Ltd. He had earlier supported the development on its merits. It was inappropriate to apply the reasonable apprehension of bias test. This was purely a prejudgment case and S. had not prejudged the matter to the extent that he was disqualified.
* Ratio 🡪 the test is whether the councilor was not “amendable to persuasion” and so had a “closed mind”
  + This became the closed mind standard

### *Richmond Farmland Society v. Richmond [1990, SCC] 🡪 concerns over closed mind standard –there is difficulty in gauging openness of the mind and would lead to posturing (i.e. just saying I have an open mind); standard should be a corruption standard not closed mind*

* Companion case to *Old St. Boniface* Sopinka J wrote again for the majority
* Applied closed mind test; no disqualifying bias found
* Reasoning: La Forest Concurring
  + Criticizes the “amenable to persuasion”/closed mind test 🡪 Argues decisions at the “legislative end of the spectrum” should be able to be made with a closed mind, if the “closed mind is the result not of corruption, but of honest opinions strongly held”
  + Why?
    - (1) The difficulty of gauging “openness” of mind;
    - (2) The majority’s approach will lead to posturing

### *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992 SCC] 🡪 For a policy side tribunal, tribunal members need not be as impartial as a quasi-judicial tribunal member prior to hearing, but once hearing starts must keep opinions quiet and be open minded (remain "capable of persuasion")*

* Facts 🡪 Nfld. Tel Co. wanted to increase rates for consumers in Newfoundland, but to do so; it has to have its rates approved by the Commission. Mr. Wells was one of the Commissioners and he audibly did not like the telephone company (had previously called them “Fat cats”). On Day 1, a motion was put to the panel that that Mr. Wells should recuse himself from his bias. The commission disagreed. That night, Mr. Wells went on television, saying, “I’m not letting him increase his pension. I don’t care what he has to say.”
* Issue 🡪 was there an RAB?
* Held 🡪 yes at the hearing, no at the pre-hearing
* Reasoning:
  + Comments made pre-hearing: depending on how political the tribunal it, you can say what you want
    - Here, this one sets rates for a wide population and is thus more policy based - therefore Mr. Wells was entitled to have his opinion leading up to the hearing
  + The problem was that when the hearing started, no matter how political on the spectrum the hearing may be, you have to remain capable of persuasion. You are entitled to have a point of view, but you have to have appearance of being open to persuasion once hearing starts. More discretion is required once hearing begins.
  + In sum, Wells' enthusiasm for speaking with the media and sharing his views with everyone was fine prior to hearing, but once it started, it was not
  + Boards “can, and often should, reflect all aspects of society”
    - “Members may include the experts who give advice on the technical nature of the operations to be considered by the Board, as well as representatives of government and of the community. There is no reason why advocates for the consumer or ultimate user of the regulated product should not, in appropriate circumstances, be members of boards. No doubt many boards will operate more effectively with representation from all segments of society who are interested in the operations of the Board”
  + There shouldn’t “be undue concern that a board which draws its membership from a wide spectrum will act unfairly”
  + Pre-hearing investigatory stage 🡪 the Old St. Boniface “closed mind” standard applied
    - Why? 🡪 “During the investigative stage, a wide license must be given to board members to make public comment”
    - Wells’ comments before the hearing didn’t show a “closed mind”
  + Once the hearing date was set 🡪 the RAB test applied (but, the test should be applied less strictly here, as dealing with policy matters)
    - Wells’ statements after this date gave rise to a RAB
    - Indeed, they “demonstrated that he had a closed mind”
  + The appropriate result was to invalidate the decision
* Ratio 🡪 For a policy side tribunal, tribunal members need not be as impartial as a quasi-judicial tribunal member prior to hearing, but once hearing starts must keep opinions quiet and be open minded (remain "capable of persuasion")

### *Pelletier v Gomery (2008, FC TD) 🡪 hearing stage; the required standard for a public inquiry falls between the flexible and strict RAB standard*

* Facts 🡪 A retired judge, Gomery, was appointed as commissioner of a politically contentious inquiry into the alleged misuse of government funds as part of a federal sponsorship program aimed at enhancing federal visibility in Canada and especially Quebec. Extensive media coverage of the inquiry and its findings played a significant part in the minority Liberal government’s electoral defeat in 2006. Two parties at the inquiry who were criticized in the inquiry’s report, former PM Chretien and his former chief of staff Pelletier, claimed an apprehension of bias against the commissioner. The claim arose primarily from statements given by the commissioner to the media during the inquiry.
* Issue 🡪 was there a RAB?
* Held 🡪 Yes
* Ratio 🡪 The required standard for a public inquiry falls between the flexible and strict RAB standard
* Reasoning: Teitelbaum J
  + Applying this standard, RAB was created
  + An informed person, viewing the matter realistically and practically and having thought the matter through would find a RAB on the part of the Commissioner. The comments made by him, viewed cumulatively, not only indicate that he prejudged issues but also that he was not impartial towards the Applicant.
  + Gomery during inquiry 🡪 “I’m coming to the same conclusion as (Auditor General) Sheila Fraser that this was a government program which was run in a catastrophically bad way. I haven’t been astonished with what I’m hearing, but it’s dismaying” (para. 81).
    - Teitelbaum J: “... the Commissioner was not in a position to conclude that the program was mismanaged before having heard from government officials of all levels who were set to testify. This is especially so given that the Commissioner ultimately concluded that the Sponsorship Program was run out of the Prime Minister’s Office under the direct supervision of [Mr. Pelletier] (who had yet to testify)...” (para. 83).
  + Gomery after PM Chretien’s testimony: “... the very answer he gave me [about management of the Sponsorship Program] was the only answer that counted as far as I was concerned.” “So, with this answer, I had everything that I needed” (para. 85).
    - Teitelbaum J.: “Again, this comment was made before all the evidence had been heard.... A reasonable, well-informed person, viewing this statement, would conclude that, instead of sitting as a dispassionate decision-maker presiding over the hearings with no pre-established ideas regarding the conclusions he would eventually reach after hearing all the evidence, the Commissioner had a plan or checklist of the evidence that was expected and which was required in order to support pre-determined conclusions” (para. 86).
  + Gomery on upcoming evidence: “juicy stuff” is to come (para. 87)
    - Teitelbaum J.: “This comment trivialized the proceedings, which had enormous stakes for the witnesses involved in the proceedings, especially those who had yet to testify. It telegraphed to the public a prediction that evidence of wrongdoing was forthcoming.... Whatever interpretation is given to this comment, the comment bears a pejorative connotation to which no witness ought to have been subjected” (para 88).
  + On Gomery’s quest for media attention:
    - Teitelbaum J.: “I agree with the Applicant that the Commissioner became preoccupied with ensuring that the spotlight of the media remained on the Commission’s inquiry, and he went to great lengths to ensure that the public’s interest in the Commission did not wane” (para. 95).
    - “I do not read that it is a function of a Commissioner to grant press interviews nor to express, during such an interview or interviews, an opinion as to what the evidence showed, and more particularly, to express that opinion before all of the evidence had been heard from the witnesses who were called to testify or were to be called to testify” (para. 97).

What are the rules of bias for different boards? 🡪 Newfoundland Telephone Co v Nfld (1992, SCC)

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| **Board** | **Standard** |
| Primarily adjudicative ADMs | Traditional reasonable apprehension of bias standard (RAB) |
| Elected ADMs | Closed minded standard |
| Investigatory ADMs | Closed minded standard |
| Policy setting ADMS | More flexible reasonable apprehension of bias standard |

## Pecuniary/Material Interest

* One of the clearest cases giving rise to RAB
  + E.g. 🡪 A RAB will arise if an ADM is a shareholder in accompany that is a party to a proceeding: *Dimes v Grand Junction Canada Co.* [1852, HL]
* Does the pecuniary/material interest have to be direct?
  + Only a direct and certain interest is sufficient 🡪 Energy Probe [1985, FCA]
* Is any interest at all sufficient, no matter how small?
  + See Pearlman v. Manitoba Law Society Judicial Committee [1991, SCC] 🡪 pecuniary interest of members of disciplinary committee was “too attenuated and remote” to give rise to a RAB
    - Conventional view is that any interest at all is enough to cause RAB but cases have started to place limits on this view 🡪 *Pearlman v Manitoba Law Society*

## Institutional Bias

* A RAB can arise from:
  + Individual comments or conduct or
  + Institutional structures or practices
* Focus of later is on the structure of operation of an ADM
* Claims commonly arise:
  + Where individual members of an ADM collaborate to set policy, creating concerns about pre-judgment in situations covered by it
  + Where ADMs are multi-functional, combining an investigative, ‘prosecutorial’ and/or adjudicative role

### *2747-3174 Quebec Inc. v Que. [1996, SCC] 🡪 claims can be brought for institutional bias; the test for institutional cases = a well-informed person, viewing the matter realistically and practically – and having thought the matter thought – would have a reasonable apprehension of bias in a substantial number of cases*

* Facts 🡪 The provincial liquor control board, which was responsible for issuing and cancelling liquor permits, revoked the permit of the bar following a hearing into complaints of excessive noise. Section 75 of the Act respecting liquor permits (Que.) required that a permit holder not disturb the public tranquility, and s. 86(8) of the Act allowed the board to cancel a permit for a violation of s. 75. The bar claimed that the board's decision violated s. 23 of the Charter of Human Rights and Freedoms (Que.), which states that every person has the right to a hearing by an independent and impartial tribunal for the determination of his or her rights and obligations. Section 56(1) of the Charter states that a tribunal, for the purposes of s. 23, included an agency exercising quasi-judicial functions. The bar claimed that the board was not impartial because its employees participated in every stage of the complaint process, including the investigation and the filing of complaints, the presentation of the case before the directors, and the making of the board's decision. The board's lawyers both made submissions to the directors, who made the decision to cancel a permit, and then advised the directors, who had no legal training, in making their decision. The directors had the power to both decide to hold a hearing and to decide the case on its merits. As well, the bar claimed that the board was not independent, because its directors held office for only five-year terms, and their appointment could be revoked by the government before the expiry of the term for specific grounds such as defalcation, mismanagement, or gross fault. The bar also claimed that the board was not independent, because the board was under the control of a cabinet minister who evaluated the board's chair, and who could require information concerning the board's activities.
* Issue 🡪 Whether S. 23 of the *Quebec Charter* (which requires a tribunal to be “independent and impartial” when acting in a judicial/quasi-judicial capacity) was violated due to a lack of impartiality?
* Held 🡪 Yes
* Reasoning: Gonthier
  + The enquiry is **context-specific** 🡪 “... the informed person's assessment will always depend on the circumstances. The nature of the dispute to be decided, the other duties of the administrative agency and the operational context as a whole will of course affect the assessment”
  + A **plurality of functions** is permissible 🡪 “... a plurality of functions in a single administrative agency is not necessarily problematic [but must] not result in excessively close relations among employees involved in different stages of the process”
  + Here, there was a RAB on an institutional level due to:
    - The overlapping role of the Regie’s lawyers (can be involved in all stages of specific cases, from investigation to adjudication)
    - Role of prosecutor and adjudicator cannot be combined
    - The overlapping role of its chair (can initiate investigations,decide to hold hearings, and constitute and sit on panels)
  + However, legislation not invalidated, since the problem was not with the statute, but the manner of its implementation
* Ratio
  + **General Test** 🡪 “The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically – and having thought the matter thought – would have a reasonable apprehension of bias *in a substantial number of cases.”*
  + “There is no longer any doubt that impartiality, like independence, has an institutional aspect”

## Statutory Authorization

### *Brosseau v ASC (1989, SCC) 🡪 Provided that a particular decision-maker is not acting outside its statutory authority (and the governing statute is constitutional), an overlap in functions may not give rise to a reasonable apprehension of bias that would traditionally arise without stat authorization*

* Facts 🡪 Brosseau was a solicitor who prepared the prospectus of a company that later went into bankruptcy. The Alberta Securities Commission launched an investigation into Brosseau’s actions. Brosseau argued that the Commission suffered from institutional bias due to Chair's multiple functions, which allowed him to initiate investigations, prosecute people, and then act as a judge on the panel determining their case, i.e. he/she involved at both the investigatory and adjudicatory levels. The Commission disagreed – they argued that while not specifically authorized by statute, implicit authority for the investigation could be found in the general scheme of the Securities Act.
* Issue 🡪 whether the chair of the ASC was disqualified by RAB?
* Held 🡪 No, the conduct involved was statutorily authorized
* Ratio:
  + Administrative decision makers are created for a variety of reasons to meet a variety of needs.
  + In some instances, an overlap in functions (which is generally not permitted on account of bias) is a necessary element to fulfilling a decision maker's mandate.
  + Provided that the particular decision-maker is not acting outside its statutory authority (and the governing statute is constitutional), an overlap in functions may not give rise to a reasonable apprehension of bias.
* Reasoning: L’Heureux Dube
  + “If the investigation was without statutory authority, … then it is clear that [he] was attempting to act in the role of both investigator and adjudicator [contrary to the] rules against bias”
  + However, “the Act contemplates the involvement of the Chairman at several stages of proceedings”
  + As a general principle, a person is entitled to an independent, impartial decision-maker. In general, it is not permitted for members of an adjudicatory panel to also be involved in the investigatory stages of a proceeding, as this would give rise to a reasonable apprehension of bias.
  + However, statutory authorization for overlapping functions are an exception to this rule, subject to the statute being constitutional. Administrative bodies are created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature may decide that in order to achieve the ends of the statute, it is necessary to allow for an overlap in functions that would, in normal judicial proceedings, have to be kept separate. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to any reasonable apprehension of bias test.
  + Applying this to the case at bar, here the authorization is "implicit"; the 'Act contemplates the involvement of the Chair at several stages of the proceedings. The public interest role of the Commission could not be carried out without informal investigations/reviews of this sort. Securities acts are aimed at regulating the market and protecting the general public - this must be recognized in determining how to interpret their acts.
    - “It is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be considered "biased" form an integral part of its operations.”

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| Independence |

# Independence

* Focus on independence from external influences
* **General Test** 🡪 Whether a reasonable, well-informed person, having thought the matter through, would conclude that the ADM is sufficiently free of factors that could interfere with its ability to make independent decisions

## Factors to Consider Independence 🡪 The *“Valente”* Factors

* **Security of tenure**
  + “The essentials of security of tenure include: ... that the [ADM] be removable only for cause, and that cause be subject to independent review and determination by a process at which [he or she] is afforded a full opportunity to be heard. The essence of security of tenure ... is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner”: *Canadian Pacific v Matsqui Indian Band [1995, SCC]*
* **Financial Security**
  + Being able to alternate pay arbitrarily
  + “The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect [an ADM’s] independence”: *Canadian Pacific v Matsqui Indian Band [1995, SCC]*
* **Administrative independence**
  + Here, the concern is with institutional control, particularly in relation to matters that have a bearing on the adjudicative functions of administrative decision-makers.
  + Institutional control deals with the manner in which the affairs of an administrative decision-maker are administered – from budgetary allocations to individual case assignment.
* General points:
  + These factors are not fixed standards 🡪 they are just criteria that help direct the mind of the Courts
  + The standards of independence vary with the context
  + Courts look to actual practice, not just the statutory scheme

## *2747-3174 Quebec Inc. v Que. [1996, SCC] 🡪 important to look at actual practice and past legislation to determine if there is an independence concern; there is a spectrum of independence depending on ADM*

* Facts 🡪 Challenge to independence of the R:
  + Members appointed for two, three or five years
  + Maximum term of five years
  + Members may be dismissed for cause
  + Various points of contact between executive and the R
* Held 🡪 There was sufficient independence
* Reasoning: Factors Applied
  + **Security of tenure**
    - Fixed term appointments are acceptable for adjudicative tribunals
    - However, removal of tribunal members must not be merely “at pleasure” of the executive
    - Here, members could be dismissed only for cause and could challenge their dismissal in court
  + **Administrative independence**
    - “It is not unusual for an administrative agency to be subject to the general supervision of a member of the executive.”
    - Moreover, notwithstanding the many points of contact, there was no evidence that indicated that this involved the minister in day- to-day regulation and scrutiny of the R’s administrative functions. This role fell to the R’s chairman.
* Takeaways
  + The way the law is applied 🡪 court looks not just to requirements of legislation but digs into the practice of the regime as well
  + Highly adjudicative tribunals are required to have a higher level of independence, unlike those tasked with development and policy-making 🡪 spectrum of independence

## Statutory Authorization as Defence to Independence

## *Ocean Port Hotel Ltd. v BC (2001, SCC) 🡪 Statute can by express or implicit implication override the common law with claims of bias/right to be heard; there is no general freestanding constitutional guarantee of independence for ADMs exercising adjudicative functions (ADMs lack same independence as courts)*

* Facts 🡪 A police investigation and LCLC inquiry alleged that OPH committed five infractions under the Liquor Control and Licensing Act. The senior inspector of LCLC imposed a two-day suspension of OPH’s liquor license. LCB heard the claim. Stat scheme provided that members of the board can be dismissed “at pleasure”. They served only part-time and they were assigned to cases at the Chair’s discretion. On appeal, the hotel argued that the board required the same independence as a regular courts and the independence was constitutionally required, and the Board’s independence was insufficient here. They claimed that unwritten constitutional principle of judicial independence extends beyond regular courts to ADMs.
* Issue 🡪 Whether members of the Liquor Appeal Board are sufficiently independent to to render decisions on violations of the Act and impose penalties it provides?
* Held 🡪 Claim of insufficient independence fails due to statutory authorization
* Ratio 🡪 There is no general freestanding constitutional guarantee of independence for ADMs exercising adjudicative functions –claim of insufficient independence can fail due to statutory authorization. Statute can by express or implicit implication override the common law with claims of bias/right to be heard
* Reasoning: McLachlin
  + Why?
    - Statutory authorization – the conduct being complained about here is statutorily authorized
    - Statute trumps common law!
  + “This principle reflects the fundamental distinction between administrative tribunals and courts. [The regular courts] are constitutionally required to possess objective guarantees of ... independence. ... Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches...”
    - In some cases, however, there may be an importation of the Constitutional principle
  + “Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal’s process to comport with principles of natural justice ... Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle. ... However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. ... Ultimately, it is Parliament or the legislature that determines the nature of a tribunal’s relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction”
    - Here, the legislature’s intention that Board members should serve at pleasure “is unequivocal... Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence, however inviting it may be to do so

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| Substantive Review |

# Substantive Review

## Reminder: Four Major Components of Administrative Review

1. Preliminary/threshold issues
2. Procedural review
   1. The right to be heard
   2. The right to an independent, impartial decision maker
3. Substantive Review 🡪 where we are now
4. Remedy

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| Standard of Review |

# Standard of Review

## Introduction & Pre-Dunsmuir

* Whether there was an error from the ADM that requires court interference?
  + Concerns amount of discretion given to ADM 🡪 *Baker* –“ Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.”
  + Very unstable and subject to wild fluctuations in case law
* Present Dunsmuir era 🡪 new period of instability emerging
* Must understand previous eras to understand today’s position
* Concerned with outcome, not process

## Key theoretical ideas Underlying Standard of Review

* Parliamentary sovereignty/legislative supremacy
* The rule of law
* The separation of powers

## Substantive Review/Interpretation –Dunsmuir Tensions

* “Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.” **(*Dunsmuir*, para. 27)**
  + Highlights tensions between legislative supremacy, rule of law and separation of powers
  + Court highlights the tension specifically and this tension underlies the whole area of substantive review and captures why we see so much fluctuation and disagreement on substantive review in Canadian courts
  + Usually a purposive approach applied in Canadian law

## Substantive Review Recurring Concepts

* **Standard of Review** 
  + Refers to the standard of intensity courts apply in reviewing substance or outcome of ADM process
  + Question is that of deference
    - Less deference =stricter form of review
    - More deference =less strict
  + An issue warranting no deference from the reviewing court will be judged in terms of its “correctness”
  + An issue attracting deference will only be set aside if it is “unreasonable”
* **Privative clause**
  + Statutory provision which will usually be in the enabling statute which states that the ADMs decision is final and not open to review by the courts
    - Inserted by governments to try to prevent the courts from reviewing ADMs
    - GOAL 🡪 direct the courts to respect (at least in the eyes of the legislator) the greater expertise of the particular decision maker
    - GOAL 🡪 promote a prompter resolution of disputes
    - NOTE 🡪 in post *Vavilov* era these are ignored
    - Example: *Worker’s Compensation Act, 1979, SCC 1979*
      * s. 22(1) 🡪 “the board shall have exclusive jurisdiction to examine, hear, and determine al matters and questions arising under this act and any other matter in respect of which a power, authority or discretion is conferred upon the board…”
      * s. 22(2) 🡪 “The decision and finding of the board under this Act are final and conclusive and no proceedings by or before the board shall be restrained by injunction, prohibition or other proceeding or removable by certiorari or otherwise in any court”
* **Jurisdiction**
  + “Show me the legal power”
  + Central debates about standard of review 🡪 Speaks to the idea that an ADM must have the legal power to act
  + ADMs have no inherent jurisdiction 🡪 have to be able to point to legal authority that allows them to act (*Canadian Pacific Airlines v Quebecair*)
  + If ADM acts without authority, it has acted beyond its jurisdiction

## Two Step Analysis for Substantive Review

1. Determine the proper standard of review:
   1. Correctness
   2. Reasonableness
2. Apply the standard of review to determine whether the decision warrants interference by the court

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| Eras of Substantive Review |

## Eras of Substantive Review

1. Jurisdiction’s heyday pre-1979
2. Jurisdiction’s fall, deference’s rise
3. The pragmatic and functional approach
4. The Dunsmuir era
5. The Vavilov era 🡪 present era

### Jurisdiction’s Heyday: Pre-1979

* During this period the standard of review analysis turned largely on the notion of jurisdiction
  + If the issue was jurisdictional, the courts deferred to the ADM
  + If the issue was NOT jurisdictional, the courts did not defer to it
* Courts were NOT interested in deferring to ADM’s during this period
* Jurisdiction used to evade privative clauses
* Two techniques used to frame issues as “jurisdictional”:
  + 1) Frame as a preliminary or collateral question 🡪 *Bell v Ont (1971, SCC)*
  + 2) Accuse the ADM of asking the wrong question 🡪 *Metropolitan Life Insurance Co v International Union of Operating Engineers, Local 796 (1970, SCC)*
* Both cases widely criticized for interfering with decisions, being overly formalistic

#### Bell v Ontario (1971, SCC) 🡪 used preliminary question as framing for jurisdiction to get around privative clause

* Issue 🡪 whether board of inquiry had jurisdiction to hear human rights claims in relation to self-contaned dwelling units?
* Reasoning:
  + Court framed the issue of whether self-contained dwelling was within jurisdiction as preliminary question
  + Decision implied that courts had nothing to learn or gain from permitting board of inquiry to consider the meaning of the term first
  + Used preliminary question as framing for jurisdiction to get around privative clause

#### Metropolitan Life Insurance Co v International Union of Operating Engineers, Local 796 (1970, SCC) 🡪 courts framing ADMs as acting without jurisdiction because it asked the “wrong question”

* Issue 🡪 Labour legislation provides certification of union if 55% were members. LRB adopted a policy about union legislation and treated eligibility as only one factor in considering certification
* Reasoning:
  + LRB had acted without jurisdiction because it asked itself the wrong question –should have asked if employees were members of union at the proper date not whether they met the criteria
  + Union constitution was determinative of union membership

### Jurisdiction Fall, Deference’s Rise

* CUPE (1979) was major in changing the jurisdiction era into one of deference
* Acknowledges judicial respect for administrative decisions
  + Emphasizes privative clauses and delegation to ADMs
  + Expertise of ADMs
  + Importance of judicial deference

#### CUPE (1979) 🡪 a court should only interfere (by labelling as a jurisdictional error), an interpretation of the provision that is “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review”; acknowledges and gives weight to expertise of ADMs and legislative intent with privative clauses deferring to ADMs

* Facts 🡪 A public sector union, Canadian Union of Public Employees (CUPE), went on strike. Under the terms of the *NBPSLRA*, striking employees were prohibited from picketing and employers were prohibited from using replacement workers: “the employer shall not replace the striking employees or fill their position with any other employee” (New Brunswick Public Service Labour Relations Act, s.102(3)). Privative clause: every “award, direction, decision, declaration or **ruling of the Board is** **final** and **shall not be questioned or reviewed in any court**” (NB PSLRA, s.101). The employer complained that the union was picketing, and the union complained that the employer was filling the strikers’ positions. Both sides were acknowledged, and employer successfully sought judicial review of the board’s order against it, and union appealed all the way to the SCC.
* Issue 🡪 how is section 102(3)(a) to be interpreted, did the Board interpret it correcty?
* Held 🡪 appeal allowed; interpretation given to provision is proper
* Ratio
  + a court should only interfere (by labelling as a jurisdictional error), an interpretation of the provision that is “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review”
  + Acknowledges and gives weight to expertise of ADMs and legislative intent with privative clauses deferring to ADMs
* Reasoning: Dickson Majority
  + Adopts a much more deferential approach, emphasizing the expertise and experience of the board and the existence of the privative clause as reasons to defer to it
  + Urges caution in framing issues as jurisdictional: “courts should not “brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so”
  + Adopts “patent unreasonableness” standard of review for decisions that fall within an ADM’s jurisdiction:
    - Issue is: “was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?
  + Courts should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so
    - Judicial respect for administrative decisions
    - Marked the beginning of the modern era 🡪 but did not get rid of jurisdiction entirely

### The Pragmatic and Functional Approach

* Saw a bit of backtracking from CUPE case –backtracked on deference a bit
* Post-CUPE but pre-Dunsmuir
* Consolidated the post-CUPE cases

#### Pushpanathan v Canada (1998, SCC) 🡪 affirmed existence of three SOR; set out four factors to consider in SOR

* Affirmed the existence of three standards of review
  + Correctness
    - Least deferential
  + Patent unreasonableness (from *CUPE*)
    - Most deferential
    - Immediacy or obvious of defect warrants this rather than reasonableness simpliciter
  + Reasonableness simpliciter
    - An intermediate SOR
    - Not as obvious on face and requires more scrutiny =less deferential than patent

#### Four factors to consider in determining the appropriate SOR (Pushpanathan) 🡪 1) privative clause 2) expertise 3) purpose of Act/provision 4) nature of problem

* **1) The existence of a privative clause**
  + Two considerations:
    - Is there a privative clause covering the decision?
      * Yes 🡪 more deference (but not all privative clauses created equal)
      * No 🡪 neutral
      * No, and statutory right of appeal 🡪 less deference
    - What is the nature (strength) of the privative clause (strong or weak)?
      * “The stronger a privative clause, the more deference is usually due”
* **2) The relative expertise of the ADM and the courts**
  + Said to be the most important factor (eg. *Southam*)
  + Looked at relative expertise in relation to the particular issue
  + Factors weighing in favour of deference here:
    - Composition 🡪 specialized, with expertise
    - Subject 🡪 technical, complex (eg. Economic, financial, technical issues)
    - Specialized non-court-like procedure
* **3) The purpose of the Act as a whole and the provision at issue**
  + Purpose and expertise often overlap
  + If the act/provision establishes the rights, interests or privileges of particular individuals based on particular facts 🡪 less deference
  + But, if they were “polycentric,”(i.e. more interlocking interests) 🡪 more deference
  + Factors weighing in favour of deference here:
    - Statute/provision used broad, discretionary language
      * E.g. The ADM “may” do A, B or C “in the public interest”
      * E.g. The ADM should consider “all factors it considers relevant”
    - Where scientific or complex, technical issues involved
* **4) The nature of the problem** 
  + Became a key factor in Dunsmuir era
  + Questions of law 🡪 little deference (often correctness SOR)
    - But, other factors might suggest more deference (see *Southam*)
  + Question of fact 🡪 deference
  + Questions of mixed law and fact 🡪 depends on mix of law and fact
  + Discretionary decisions (added in *Baker*): deference
  + How to distinguish questions of law, fact, and mixed law and fact?
    - It’s tricky
    - Questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.” *(Southam, emphasis* added)
    - **Tip: consider how much impact the decision is likely to have in future cases**
    - The greater the potential impact, the more likely it’s a questions of law

#### CUPE (2003, SCC) 🡪 concurring judgment criticized the pragmatic and functional approach –lack of clarity and understanding of different SORs and reconsideration necessary

* Reasoning: Lebel (Concurring)
  + Criticized the P & F approach, and in particular, the three SORs:
    - Lack of clarity re: what patent unreasonableness entails and how to apply it, and so it often becomes blurred in practice with correctness review
    - The two standards of reasonableness are problematic
  + Argues reconsideration is seriously needed
    - “In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the “illegible” and the “patently illegible”. While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible – whether its illegibility is evident on a cursory glance or only after a close examination – the result if the same. There is little to be gained from debating as to whether the text is illegible simpliciter or patently illegible; in either case I cannot be read.”
  + NOTE 🡪 reconsideration came in dunsmuir

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| Dunsmuir Era |

# Dunsmuir Era

## *Dunsmuir v New Brunswick (2008, SCC) 🡪 new reasonableness standard (collapsed into two) and analysis of judicial review*

* Facts 🡪 Dunsmuir was a lawyer with the department of justice for NB, and held a position at pleasure. He was dismissed without cause being alleged and without a hearing. He challenged his dismissal, as he was entitled to do, before the arbitrator. Focus was on the decision of a labour arbitrator.
  + “Subject to the provisions of this Act and any other Act… [termination] shall be governed by the ordinary rules of contract”: *Civil Service Act*, s. 20
  + “Where an adjudicator determines that an employee has been discharged or disciplined for a cause…, the adjudicator may substitute such other penalty for the discharge or the discipline as to the adjudicator seems just and reasonable”: NB *Public Service Relations Act,* s. 97(2.1)
* Issue
  + What is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal?
  + What are the foundations of judicial review and the standards of review applicable in various situations?
* Held: Bastarache and Lebel 🡪 articulates new reasonableness standard; adjudicator’s decision held unreasonable
* Ratio 🡪 new reasonableness standard and analysis of judicial review
* Reasoning:
  + Criticism of difference between reasonableness simpliciter and patent unreasonableness 🡪 it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality was not clear enough 🡪 inconsistent with the rule of law
  + Looking to either the magnitude or the immediacy of the defect in a tribunal’s decision provides no meaningful way in practice of distinguishing between a patently unreasonable decision and an unreasonable decision
  + Judicial review is:
    - A) essential to preserve the rule of law [paras 20 – 23]; and
    - B) essential to preserve parliamentary supremacy
      * it performs an important role because courts have the last word on jurisdiction, and parliamentary supremacy is ensured because it is established by legislative intent
  + But, there is a tension between the rule of law and parliamentary supremacy. How to resolve it?
    - “Courts… must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures”
    - Rule of law maintained when courts have the last word on jurisdiction
    - Parliamentary supremacy maintained because intent decides the standard of review
  + The law relating to SOR needs (our) help:
    - Problems: difficulties distinguishing the two reasonableness standards; The theoretical problem of a patent unreasonableness standard
    - A “simpler test is needed”
    - Need a “holistic” approach

## *Dunsmuir* on Judicial Review Functions

* Majority highlights two key functions of judicial review:
  + Judicial review is essential to preserve the rule of law
    - “As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation.” (para. 27)
    - “By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.” (para. 28)
  + Judicial review is essential to preserve legislative supremacy
    - “In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy.” (para. 30)
  + Majority highlights a basic tension between the rule of law and legislative supremacy that underlies substantive review of administrative decision
    - “Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.” (para. 27)
* **How does it attempt to resolve this tension?**
  + “In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.” (para. 30)

## *Two Big Changes to SOR Analysis 🡪 1) collapsed into two SORs 2) Revises SOR Framework*

1. Collapses the three SORS into two, defines reasonableness
2. Revises the SOR framework

### 1) Three Standards of Review Reduced into Two 🡪 Reasonableness & Correctness (Dunsmuir)

* Pre-*Dunsmuir* 🡪 spectrum
  + Correctness: no deference to the ADM
  + Reasonableness simpliciter: middle ground
  + Patent unreasonableness: the most deference to the ADM
* *Dunsmuir*:
  + Gets rid of patent unreasonableness
  + Redefines reasonableness (and drops the Latin bit – simpliciter)
  + The result is two SORs: Reasonableness and correctness

#### Reasonableness

* A **deferential standard** animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions… 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.
* Concerned with two things:
  + (1) “Mostly… the existence of justification, transparency and intelligibility within the decision-making process” [focus here is on reasons]; and
  + (2) But also “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”
* It does not entail “subservience” or “blind reverence” to the ADM, but rather “respect”, which “requires of the courts ‘not submission but a respectful attention to the reasons offered or which could be offered in support of a decision’”
* Courts will give due consideration to the determinations of decision makers

#### Correctness:

* SOC must be maintained in respect of jurisdictional and some other questions of law 🡪 promoted just decisions and avoids inconsistent and unauthorized application of law.
* “When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer.”

### 2) New Approach to Deciding Appropriate SOR 🡪 Framework change

* Questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness

#### Two Step Analysis

1. Has the appropriate SOR been settled already?
   1. Does a **statute** indicate the appropriate SOR?
      1. Ex. BC’s *Administrative Tribunals Act*
   2. If not, has **case law** “determined in a satisfactory manner [the SOR for] the particular category of question”?
   3. If not, apply the **presumptions** based on the nature of the question
      1. Not the ambiguity in the decision as to where to consider this
      2. See below for presumptions
2. If the answer to (1) is no, **“proceed to an analysis of the factors making it possible to identify the proper standard of review**”
   1. Four factors (virtually identical to the *Pushpanathan* factors)
      1. The presence or absence of a privative clause;
         1. Gives a strong indication of reasonableness standard 🡪 evidence of intention to provide deference to ADM 🡪 NOT determinative
      2. The purpose of the tribunal (decide by interpreting the statute);
      3. The nature of the question at issue; and
         1. Fact, discretion, policy, and intertwined legal/factual issues automatically imply deference
         2. Interpretation of own statute or statutes closely related to ADM’s function
      4. The expertise of the tribunal
   2. “In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard” (para. 64)

#### The presumptions at step 1:

* “Generally” or “usually” reasonableness for:
  + Questions of fact
  + Questions of discretion or policy
  + Questions of mixed law and fact
* Questions of law? It depends
  + Question of law is of “central importance to the legal system… and outside the… specialized area of ‘expertise’ of the ADM will always attract a correctness standard
  + On the other hand, question of law that does not rise to this level may be compatible with reasonableness standard where the privative clause and expertise factors so indicate.
  + **Reasonableness**:
    - “**Usually**” for interpretations by the ADM of “its own statute or statutes closely connected to its function”
    - Maybe if the ADM has expertise applying an outside rule (eg. A common law rule)
      * If there is expertise and a privative clause, deference “will” be appropriate (para. 55)
  + **Correctness**:[Note: these categories are given wide application, they do most of the work]
    - For questions of “central importance to legal system” **AND** outside adjudicator’s expertise
      * Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers (*CUPE*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of res judicata and abuse of process – issues that are at the heart of the administration of justice
    - “Constitutional questions” 🡪 due to unique role of s. 96 courts as interpreters of Constitution
    - “True questions of jurisdiction” – narrow questions or *vires* [para. 59]
      * Whether the or not the tribunal had the authority to make the inquiry and decide a particular matter
      * Otherwise, it is *ultra vires*
        + Ex. *United Taxi Drivers Fellowship of Southern Alberta v Calgary* 🡪 whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licenses.
    - Questions re “jurisdictional lines between… competing specialized tribunals”

## Criticisms of Dunsmuir

* Criticized for approach adopted for determining the SOR
  + Role of contextual factors unclear
  + Scope of the presumptions, categories unclear
    - Particularly two correctness categories
      * 1) Questions of central importance to the legal system
      * 2) True questions of jurisdiction
* Criticized for how to engage in reasonableness review (how to apply it)
  + Disguised correctness review
  + Spectrum of reasonableness 🡪 in practice appears to be spectrum
  + Reviewing the reasons “which could be offered”
* Why are these criticisms important?
  + Explains why Vavilov gave a major reconsideration of this are
  + Helps explain why Vavilov changed certain aspects and why others did not

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| Criticism of Dunsmuir: Reasonableness Review |

### Three Criticisms: Reasonableness Review

1. Disguised correctness Review
2. Spectrum of reasonableness
3. Reviewing the reasons “which could be offered”

#### Disguised Correctness Review

* Improper application because it looks like a correctness review under guised of reasonableness
* Reasonableness is supposed to be deferential and properly done, should look at the ADM’s decision and reasons and determining if they are unreasonable –NOT by making conclusions about what appropriate decision is and applying it in contrast to ADM’s decision
* Problematic with reasonableness to formulate own conclusion and decision and contrast it to ADM –this is correctness review because if it does not match up it is more likely to seem unreasonable
* NOTE: this happened in Dunsmuir itself

##### ***Applied to Dunsmuir 🡪*** *reasonableness as correct SOR but SCC appears to be applying correctness guised as reasonableness*

* Majority decides on **reasonableness** as the SOR
  + Privative clause: Full privative clause – decision is final and shall not be questioned or reviewed in any court” 🡪 reasonableness
  + Expertise: Labour arbitrators chosen for expertise 🡪 reasonableness
  + Legislative purpose: Efficient alternative to courts 🡪 reasonableness
  + Nature of the question
    - It’s a question of law 🡪 does the PSLRA allow the adjudicator to consider if there was cause for D’s dismissal?
    - This is the arbitrator’s home statute 🡪 reasonableness
    - Not of central importance to the legal system
* Adjudicator:
  + NB invoked the CSA in terminating D
  + The PSLRA gives NB public service employees the right to grieve a discharge and allows the adjudicator to determine if there is a cause
  + The CSA is subject to the PSLRA
  + Therefore, I can look for cause, and order reinstatement if this was the real reason for the dismissal, and cause was actually lacking
    - SCC says this is unreasonable! 🡪 this treats a non-union employee as unionized
    - Is this true? 🡪 Adjudicators ruling left it open to ER to dismiss as long as adequate notice but this is subject to scrutiny by way of grievance
    - **Does this not seem like a reasonable decision among alternatives? Why then did the SCC find it unreasonable? Seems to show problem that correctness review being engaged in under guise of deferential reasonableness review**

#### Spectrum of Reasonableness

* Binnie J concurring in *Dunsmuir* questioned how reasonableness can be applied in different contexts, circumstances, etc.
* Worried a single application of reasonableness would lead to unreasonable judicial interference and so in application there will inevitably be a spectrum of reasonableness
* In later cases 🡪 SCC regularly argued there was NO spectrum of reasonableness and it is a single standard

##### ***Catalyst Paper Corp v North Cowichan (2012, SCC) 🡪*** *rejects reasonableness spectrum but says it is rooted in colour from context; identifies general indicators of unreasonableness in context of bylaws but test = only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside*

* Facts 🡪 As the value of property in the area around Vancouver went up, Catalyst Corps’ taxes went up while residential property taxes remained relatively stable. This was undesirable and Catalyst urged lower taxes. There is a gradual program in place for the Corp that is too slow so they sought recourse from the Courts. Filed for judicial review 🡪 argued that municipality should have only used objective criteria in determining tax rates, but municipality was concerned with broader social, political, and economic concerns.
* Issue 🡪 Is the taxing by-law reasonable? When can courts review municipal taxation bylaws ad what principles guide this review?
* Held: McLachlin
  + SOR =reasonableness –the by-law is reasonable
  + Agreement on SOR but disagreement on how to apply the reasonableness review
* Ratio:
  + Identifies several “general indicators of unreasonableness” in the context of municipal by-laws (para 21)
    - If they were found to be partial and unequal in their operation as between different classes
    - If they were manifestly unjust
    - If they disclosed bad faith
    - If they involved such oppressive of gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men
  + Test 🡪 “only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside” (para 24)
    - Task must be approached against the backdrop of the wide variety of factors that elected municipal counselors may legitimately consider in enacting bylaws
* Reasoning:
  + Reasonableness “takes its colour from the context” 🡪 essentially contextual inquiry (rejection of spectrum of reasonableness)
  + Two contextual factors considered here:
    - The statute that conferred the municipality’s by-law powers
    - Past decisions of the courts on the issue
  + Here, both support giving significant deference
  + Application here 🡪 bylaw is not unreasonable
  + Municipality not limited to considering “objective factors” re: tax rates.
  + Could also consider broader social, economic and political factors

##### ***Alta. V Alta Teachers Association (2011, SCC) 🡪*** *in some cases an ADM can omit reasons if there are 1) limited reasons required to satisfy duty of fairness and 2) absence of reasons not raised as issue before ADM; Show deference where a tribunal is interpreting its own statute and related statutes also within its core function and expertise*

* Facts 🡪 adjudicator assumed a power to extend inquiry limitation period. Remained undisputed until judicial review and works its way to SCC. Adjudicator did not provide reasons for issuing extension
* Issue 🡪 was the interpretation of the limitation date legit?
* Held: Rothstein 🡪 SOR is reasonableness –the Commissioner’s implicit decision was reasonable
* Ratio
  + 1) An ADM decision can omit reasons if
    - (1) There are limited reasons required to satisfy a duty of fairness, or
    - (2) The absence of reasons regards an issue that wasn't raised before the ADM. Such a decision still warrants deference on a reasonable standard, and does not violate Dunsmuir's concerns of transparency, justification, and intelligibility.
    - This should not be taken to dilute the duty to give proper reasons
  + 2) A question of jurisdiction can exist where a tribunal interprets its home statute regarding statutes of limitations.
    - Its interpretation is assessed on the reasonableness standard
* Reasoning:
  + Reviewing courts can consider the “reasons that could have been provided” in some cases (*Dunsmuir*)
    - Decision can be upheld if a “reasonable bases” for it is apparent
    - Can look at reasons offered on the question in other cases
  + Does this respect *Dunsmuir*’s concerns for justification, transparency, and intelligibility?
  + Appropriate where:
    - No or limited reasons are required to satisfy the duty of fairness; or
    - Absence of reasons concerns an issue that wasn’t raised before the ADM
  + Shouldn’t be taken to dilute the duty to give proper reasons
  + Courts should not “cast aside an unreasonable chain of analysis”
  + In some cases, it is appropriate to remit to the ADM for reasons
    - “Not necessarily” if a reasonable basis for the decision; should be upheld
    - More likely to be appropriate if there is no reasonable basis for a decision
  + “Show deference where a tribunal is interpreting its own statute and related statutes also within its core function and expertise, unless the interpretation concerns constitutional questions, questions of law that are both of importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, or the jurisdictional lines between two or more competing specialized tribunals true questions of jurisdiction are narrow and will be exceptional”

##### ***NL Nurses’ Union v BL (2011, SCC) 🡪*** *tension with Alta Teachers –Broader view in reviewing reasons omitted; the standard is whether the reasons “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within a range of acceptable outcomes”*

* Facts 🡪 Released the day after Alberta Teachers (same court reviewed the matter, did not consider Alberta Teachers). Union: Arbitration’s reasons did not match the decision reached**.**
* Issue 🡪 Whether the arbitrator’s reasons in this case satisfied these criteria and whether the reasons engaged procedural fairness.
* Held: Abella for unanimous court 🡪 SOR =reasonableness. Arbitrator’s decision as reasonable; appeal dismissed
* Ratio:
  + “Dunsmuir does not “stand for the proposition that the ‘adequacy’ of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result ... It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes” (para. 14).
  + **The standard: do the reasons “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within a range of acceptable outcomes” (para. 16)?**
  + Some courts read this decision as a decision must be unreasonable in reason AND outcome.
    - BUT Wright suggests that decisions that provide unreasonable reasons but reasonable outcome should be enough to qualify for judicial review
* Reasoning:
  + How broadly should this passage be read?
    - Can a “reasonable” decision be quashed if reasons are “unreasonable”?
    - Or does the “stand-alone basis” point foreclose this possibility?
  + Clear courts should assess reasons with outcome in mind
  + Cited in *Mission Institution v. Khela*: “A transfer decision that does not fall within the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” will be unlawful (Dunsmuir, at para. 47). Similarly, a decision that lacks “justification, transparency and intelligibility” will be unlawful (ibid.). For it to be lawful, the reasons for and record of the decision must “in fact or in principle support the conclusion reached” (citing NL Nurses’ Union)
  + **Seems to take a broader view than ATA of when courts can review the reasons that could have been provided**
    - “Supplement” reasons first, before “subvert[ing]” them
    - In doing so, the courts can “look to the record”
    - But, courts should not “substitute their own reasons”
  + Perfection is not required
    - Reasons do not have to be comprehensive
    - Explicit findings on “each element” are not required
* NOTE 🡪 Wright like ATA more because he is uncomfortable with the broadness of NL
  + ***Would this give judges the ability to explain away unreasonableness if you can supplement a reason?***

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| The Vavilov Era |

# The *Vavilov* Era

* SCC specifically granted leave of appeal for this case to provide clarity on SOR
* Leading decision on SOR replacing Dunsmuir
* Provides guidance on applying reasonableness SOR

## *Canada v Vavilov (2019, SCC) 🡪 new leading case on SOR*

* Facts 🡪 Vavilov was born in Toronto in 1994 –at the time of his birth his parents were posing as Canadian citizens. He had an older brother too. In 2010, his parents were arrested in USA where they were living at the time, for spying for Russia. Vavilov did not know his parents were Russian spies. He was 16 when they were arrested and he thought they were Canadian citizens. His parents were sent back to Russia. Vavilov and Timothy left the USA before his parents’ deportation on a planned trip to Paris and Russia. This case revolved around Vavilov’s efforts to renew his Canadian passport and return to Canada. The ADM (registrar) in charge of passports relying on the Citizenship Act, said Vavilov is not entitled to a passport and is not a Canadian citizen. Registrar reasoned his parents were representatives of Russia at the time of Vavilov’s birth so he is not a citizen. Did not provide reasons in interpreting citizenship Act but did really on 12 page report that included s. 3 of Citizenship act. Vavilov applied for judicial review. CA quashed the registrars decision and it went to the SCC.

***Citizenship Act,* RSC 1985, c. C-29**

**Persons who are citizens**

**3**(1) Subject to this Act, a person is a citizen if

(a) the person was born in Canada after February 14, 1977….

**Not applicable to children of foreign diplomats, etc.**

**3(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was:

**(a)** a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

**(b)** an employee in the service of a person referred to in paragraph (a); or

**(c)** an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

## Two Sets of Reasons from SCC in Vavilov 🡪 *1) choosing SOR 2) applying reasonableness*

* Reasoning: Majority (7 members)
  + Began by defining what it saw as the problem with the SOR and the goals in mind when reconsidering the SOR
  + Two problems:
    - Choosing SOR
    - Applying reasonableness SOR

### Problems with Choosing SOR

* Uncertainty
* Unprincipled 🡪 departed from theoretical underpinnings of the law
* Extensive criticism from scholars, courts, litigants, etc.
  + “It has become clear that ***Dunsmuir*’s promise of simplicity and predictability … has not been fully realized**” (para. 7).
  + “Certain aspects of the current framework are **unclear and unduly complex**. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby **undermining access to justice**” (para 21).
  + “This process has led us to conclude that a reconsideration of this Court’s approach is necessary in order to bring **greater coherence** and **predictability** to this area of law” (para 10).
  + “The principled changes set out below seek to promote the values of *stare decisis* and to make the law on the standard of review **more certain, coherent and workable going forward**” (para 22).
* Goal in Vavilov addressing choosing SOR:
  + “To make clear the law on choosing the standard of review more certain, coherent, and workable” (para 22)

### Problems with Applying Reasonableness SOR

* Perception of a Two Tiered justice system (para 11)
  + “The Court has heard concerns that reasonableness review is sometimes perceived as **advancing a two-tiered justice system** in which those subject to administrative decisions are entitled only to an outcome somewhere between ‘good enough’ and ‘not quite wrong’” (para 11).
  + “…Ensure that the framework it adopts **accommodates all types of administrative decision making**, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy” (para 11).
  + “…The need for this Court to **more clearly articulate** what that standard entails and how it should be applied in practice” (para 12).
* Goal in Vavilov in addressing reasonableness SOR
  + To “ensure that the framework it adopts accommodates all types of administrative decision making” (para. 11)
  + To “more clearly articulate what the standard entails” (para. 12)

## Underlying Principles

* SCC speaks at the outset of their reasoning briefly about the underlying theoretical principles
* Less reasoning about principles provided in Vavilov than was done in Dunsmuir
* Majority reasoning:
  + “The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: that judicial review functions to **maintain the rule of law** while *giving effect to legislative intent*. We will also affirm the need to develop and strengthen a **culture of justification** in administrative decision making” (para 2).
  + “Where a court reviews the merits of an administrative decision…, the standard of review it applies must reflect the **legislature’s intent** with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the **rule of law**” (para 23).
  + “The approach [to applying reasonableness] we set out is one that focuses on justification, offers methodological consistency and reinforces the principle ‘that reasoned decision-making is the lynchpin of institutional legitimacy” (para 74).
* What does this mean?
  + Reasoned decision making is the lynchpin of administrative decision makers
  + Captures what the court has in mind with culture of justification –ADMs must be reasoned and thus clarity and legitimacy are important

## Revised Framework *(Vavilov)*

1. Choose standard of review
2. Apply standard of review –new reasonableness standard outlined in Vavilov

## Choosing Standard of Review

### Presumption of reasonableness

* First stage of SOR analysis
* Maintained two Dunsmuir SOR 🡪 correctness and reasonableness
* **Starting point 🡪 presumption of reasonableness as the standard of review** 
  + **Two categories of rebuttal below**

### When to Derogate from Presumption of Reasonableness

1. **To give effect to legislative intent** 🡪 **two situations:**
   1. When a statute explicitly prescribes the applicable standard of review
      1. Apply the standard of review prescribed in the statute
      2. Example 🡪 BC Administrative Tribunals Act
   2. When the legislature has provided for a statutory appeal of an administrative decision *to the courts*, apply the appellate standards of review applied by the courts on regular appeals from the lower courts. Three options for SOR in appealing to courts:
      1. Questions of law 🡪 correctness
      2. Questions of fact 🡪 “palpable and overriding error”
      3. Questions of mixed law and fact:
         1. When the legal issue is readily extricable from the factual issue 🡪 correctness for the legal issue, “palpable and overriding error” for the factual issue
         2. When the legal issue is not readily extricable from the factual issue 🡪 “palpable and overriding error”
2. **When correctness review is required by the rule of law** 🡪 **three categories**
   1. For Constitutional questions
      1. Federal-provincial division of powers
      2. Relationship between legislative and other branches of government
      3. Scope of Aboriginal and treaty rights under s. 35
      4. Other constitutional matters that requires a final answer
      5. Challenged to the validity of laws
   2. For general questions of law of central importance to the legal system as a whole
      1. Requires two things:
         1. Questions must be of “fundamental importance”
         2. Questions must be of “broad applicability”
      2. Look for significant consequences for the legal system as a whole or other institutions of government, not just one context
      3. Examples of what qualifies
         1. When an administrative proceeding is barred by the doctrine of res judicata or abuse of process (*CUPE* [2003, SCC])
         2. The scope of the state’s duty of religious neutrality (*Saguenay (City)* [2015, SCC])
         3. Limits on solicitor-client privilege not limited to one context (*University of Calgary* [2016, SCC])
         4. The scope of parliamentary privilege (*Chagnon* [2018, SCC])
      4. Examples of what does **NOT** qualify 🡪 too specific, dealing with one issue, one ADM’s issue
         1. “Whether a certain ADM can order a particular type of compensation (*Mowat* [2011, SCC])
         2. When estoppel may be applied as a remedy on arbitration (*Norman* [2011, SCC])
         3. Interpretation of a provision prescribing time limits for investigations in a particular context (*Alberta Teachers* [2011, SCC])
         4. The scope of a management rights clause in a collective agreement (*Irving Pulp and Paper* [2013, SCC])
         5. Whether a limitation period has been triggered under securities legislation (*McLean* [2013, SCC])
   3. For questions related to the jurisdictional boundaries between two or more administrative decision-makers
      1. Why? 🡪 Rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict

### Notes on Choosing SOR: What has been abandoned since Dunsmuir

* **Justification** 🡪 “The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.” (para 53)
* Courts no longer need to engage in contextual inquiry so **four contextual factors in Dunsmuir and previous cases can now be ignored in choosing SOR**
* Expertise no longer plays a role in determining SOR
* True questions of jurisdiction abandoned as distinct category

## Applying the Standard of Reasonableness

* Broader presumption than Dunsmuir because it does not only apply to ADM’s interpreting home statutes –it is the starting point in ALL situations
* Starting points:
  + Burden on the party challenging the decision
  + Focus on the decision actually made by the ADM, not what the court itself would do
  + Reasons as the primary way to assess reasonableness (where required)
  + Consider two things 🡪 1) the reasons; and 2) the outcome
    - Flawed reasons can doom a decision, even if the outcome is okay – justifiable is not enough; the decision must be justified
  + A single standard that takes its colour from the context
  + Perfection is not required

### What is the Standard of Reasonableness?

* “The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are **sufficiently serious shortcomings** in the decision **such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency**. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.
* **What makes a decision unreasonable?** We find it conceptually useful here to consider two types of fundamental flaws.
  + The **first** is a failure of rationality internal to the reasoning process.
  + The **second** arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.
* There is, however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable” (paras 100-101).
* What does this mean?
  + Standard =lack of justification, intelligibility and transparency
  + Minor flaws are not likely to be sufficiently serious to be unreasonable
  + Emphasis on responsive justification 🡪 reasoning process and outcomes that make sense in the context
  + Flaws do not need to be categorized into two categories of fundamental flaws but can show types of decisions that might be considered unreasonable

### Two Categories of Fundamental Flaw

1. Failure of rationality
   1. A failure of rationality or logic can render a decision unreasonable
   2. A failure of rationality may be revealed where:
      1. The reasons provided fail to reveal a rational chain of analysis (para. 103)
      2. “Where the conclusion reached cannot follow from the analysis undertaken” (para 103)
      3. “If the reasons read in conjunction with the record do not make it possible to understand the decision-maker’s reasoning on a critical point” (para 103)
   3. A failure of logic may be revealed “if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise” (para 104)
2. Relevant factual and legal constraints
   1. Governing statutory scheme
      1. Purpose of the scheme
      2. Specific textual constraints
   2. Other relevant statutory or common law rules or principles
   3. Principles of statutory interpretation 🡪 must respect provisions “text, context and purpose”
   4. The evidence before the ADM
   5. The submissions of the parties
   6. The past practices and past decisions of the ADM
   7. The potential impact of the decision on the individual to whom it applies
      1. If impact is “severe…the reasons must reflect the stakes” (para 133)

### Related Issues Stemming from Reasonableness

* Application where no reasons are provided?
  + Look to the record to understand the decision reached
  + If not possible to identify the reasoning process, it is “perhaps inevitable that…the analysis will focus on the outcome” (para 138)
* Remedial discretion on judicial review?
  + Most often appropriate to remit if a decision is found unreasonable
  + However, may not be appropriate in some cases 🡪 If a particular outcome is inevitable, so remitting would serve no purpose
* Prior precedents on substantive review after Vavilov?
  + May need to request submissions from the parties on Vavilov’s impact

## *Canada v Vavilov (2019, SCC)* 🡪 *Application of SOR framework*

* Application to facts:
  + 1) Applicable standard of review 🡪 reasonableness
  + 2) Application of standard
    - “The **principal issue** before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov’s parents had been “other representative[s] or employee[s] in Canada of a foreign government” within the meaning of [s. 3(2)](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \l "!fragment/sec3subsec2" \t "_blank)(a) of the [Citizenship Act](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \t "_blank).”
    - In our view, it was not. The Registrar **failed to justify her interpretation** of [s. 3(2)](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \l "!fragment/sec3subsec2" \t "_blank)**(a) of the**[Citizenship Act](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \t "_blank) in **light of the constraints** imposed by the text of [s. 3](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \l "!fragment/sec3" \t "_blank) of the [Citizenship Act](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \t "_blank)considered as a whole, by other legislation and international treaties that inform the purpose of [s. 3](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \l "!fragment/sec3" \t "_blank), by the jurisprudence on the interpretation of [s. 3(2)](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \l "!fragment/sec3subsec2" \t "_blank)(a), and by the potential consequences of her interpretation. **Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that**[s. 3(2)](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \l "!fragment/sec3subsec2" \t "_blank)(**a) was not intended to apply to children of foreign government** representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter (A.R., vol. IV, at pp. 448-52), the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of [s. 3(2)](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \l "!fragment/sec3subsec2" \t "_blank)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of [s. 3(2)](https://qweri.lexum.com/calegis/rsc-1985-c-c-29-en" \l "!fragment/sec3subsec2" \t "_blank)(a).
    - Our review of the Registrar’s decision leads us to conclude that it was unreasonable for her to find that the phrase “diplomatic or consular officer or other representative or employee in Canada of a foreign government” applies to individuals who have not been granted diplomatic privileges and immunities in Canada. **It is undisputed that Mr. Vavilov’s parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar**” (paras 171-173).
* Held 🡪 Registrar’s decision was unreasonable
  + Why? She failed to take into account four relevant constraints:
    - The text of the *Citizenship Act*
    - International law 🡪 Registrar neglected principles of international laws/treaties that inform interpretation of the Act
    - Precedents 🡪 intended to apply only to parents granted diplomatic immunities, if Registrar considered this she would have had to grapple more with interpretation of the s. 3
    - Potential consequences of decision 🡪 taking away rights, citizenship, as fundamental right and could encompass a broader constituency of children of parents in any capacity visiting for business needs

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| Threshold Issues |

# Threshold Issues

1. Discretionary bars to relief (not examinable)
2. The reach of administrative law
3. Venue

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| Discretionary Bars to Relief |

## Discretionary Bars to Relief

* The existence of adequate alternative remedies
* Prematurity
* Mootness
* Delay (by the applicant)
* Misconduct (by the applicant)
* Waiver (by the applicant)
* Balance of convenience

### Discretionary Bars Notes

* Used to control access to their process 🡪 This might come up at the initial stage of the proceedings, or early on, that one of the discretionary bars is raised. Sometimes the court will decide to hear the entire application including arguments about bars, and when they release the decision, they will deny relief on the basis of a discretionary bar
  + Sometimes it’s not clear at the outset whether a bar applies, and so they will hear the whole thing before making a decision
  + As a matter of practice, if a preliminary application is brought on the basis of a bar, in the divisional court it is heard by one judge, and they for that reason are more uncomfortable deciding the issue, so they set a higher threshold to allow a three-member bench to hear the issue and make a decision (practical issue)
* First three grounds are concerned with timeliness, and the final three are concerned with the actions and behavior of the applicant for judicial review
* Grounds for refusing relief rooted in several ideas:
  + Desire to protect the integrity and functioning of administrative and judicial decision-making 🡪 Finite resources, want full factual record
  + The conduct of the applicant for relief 🡪 Equity – come to court with clean hands
* Countervailing concern
  + Immunizing decisions that are unlawful
  + Underlying concern of *Cardinal* – we don’t want to immunize unlawful decisions from judicial review

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| Amenability to Judicial Review |

## Amenability to Judicial Review

* Is judicial review available at all?
  + Or is this a private law actor that is not subject to an administrative law context? Maybe instead it’s a private remedy ex. Tort, contract
* This issue is dealt with at the very outset of our framework
  + NOTE 🡪 In the vast majority of cases it’s very obvious
* Is this sufficiently public to engage administrative law at all?
  + If it is exercising statutory power 🡪 then yes
  + The nature of the power in question, in particular stat power, that determined whether or not an admin law analysis and remedy would be available
  + This swept in most admin decisions
    - This eliminated the Crown prerogative. It also sometimes led to rejections when the body in question did not have a clear warrant for its existence in its statutes

## Statutory reforms

* Federal 🡪 *Federal Courts Act*
* Provincial (Ontario) 🡪 *Judicial Review Procedure Act*
* What about these Acts?
  + These statutes codified judicial review and spoke to the scope of the review
  + Look to these two statutes to determine where you apply, then engage in statutory interpretation to look for trigger provisions
  + Safe assumption you can carry into looking at this is if you have a particular ADM that engages rights privileges and interests, you can generally assume that judicial review will be available 🡪 Not so safe when government is engaged in what looks like private business action

### *Federal Courts Act*

* Federal Court has exclusive jurisdiction to hear applications involving any “federal board, commission or other tribunal” (s. 18(1))
* “Federal board, commission or other tribunal” is defined as:
  + “... any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867 [re provincial superior courts]” (s. 2)
* **S. 2 definitions:**
  + “Conferred by or under an Act of Parliament”
    - Includes subordinate federal legislation – e.g. regulations
  + “Conferred by or under ... [the] Crown prerogative”
    - Cleared up earlier interpretation that Crown prerogative could be excluded
  + Does **not** include corporations incorporated under federal legislation like the *Canada Business Corporations Act*
    - Otherwise every Federally incorporated corporation would be subject to JR
    - The idea comes from the idea of “sufficiently public”

### *Judicial Review Procedure Act (Ontario)*

* 2(1) On an application by way of originating notice... the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:
  + 1) Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari
  + 2) Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power
* Statutory power of decision is defined as follows (s. 1):
  + “Statutory power of decision” means a power or right conferred by or under a statute to make a decision deciding or prescribing,
    - a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
    - b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not, ...
      * Captures basically everything that Federal does.
      * This legislature didn’t have to clarify that an application for JR would only relate to those in statutory power because it was implied in the certiorari and mandamus orders sought

### Notes on Statutes

* Usually clear if a body delegated by statute or the Crown prerogative, and JR will be available.
* But this would sweep some stuff in that doesn’t seem to us that should be subject to JR, falling in the realm of public.
  + Ex. Related to situations where government is engaged in business activity
  + I.e. Procuring of goods and services,, or on their own through Crown corps, normal principles of contract law will apply to them. This is particularly true in the *Dunsmuir* era
  + Recently, courts have, on occasion subject government decision makers with admin remedies even though they play a somewhat private function with a broader public purpose.
  + They try to draw a distinction in virtue of the public goal
* Test 🡪 Is the decision **sufficiently public** to engage JR?

## *Air Canada v Toronto Port Authority (2011, Fed CA) 🡪 outlines factors to consider in whether something is sufficiently public; underlying Federal authority (creation by statute) is not enough to determine entitlement of JR, there must be something more*

* Facts 🡪 Toronto Port Authority is given power through the Marines Act. But this case shows that it’s not enough for them to be created by statute. TPA issued interpretative bulletins that allocated landing spots at Billy Bishop for Porter Airlines. They “grand-parented” the existing landing spots at Porter.
* Issue 🡪 Whether or not the bulletins were sufficiently public to attract JR under s. 18(1) of Federal Courts Act?
* Held (Stratas) 🡪 No, JR is NOT available –the use of the bulletins was **not sufficiently public** to engage an application for the JR
* Ratio 🡪 Crown prerogative and underlying Federal authority (creation by statue) is **not enough** to determine entitlement JR…there must be something more.
* Reasoning:
  + Adopts a factor based approach. The factors that must be considered in whetehr decision is sufficiently public. Whether one or more of these factors will tip the facts towards public depends on the facts of the case
  + **Applied Factors to the Facts in this Case 🡪 NOT SUFFICIENTLY PUBLIC**
    - The TPA was not a Crown agent for this purpose
    - The TPA was private in nature 🡪 operated by itself, financially independent
    - The TPA was not woven into the network of government
    - No statute constrains the TPA’s discretion, supplies decision criteria here
    - No evidence the TPA is controlled by the government 🡪 revenue generation was private, independently financial, etc.
    - Not an exceptional case where matter has attained public dimension
* This public part does NOT need to be enabled by statute (needs to be clarified by SCC)
* Colleagues concurred in outcome but not in the articulated factors, although they have been picked up in later cases anyway

**Factors:**

1. The character of the matter for which review is sought
   * is it a private/commercial matter? Or does it have a broader public purpose?
   * If public, more likely to engage public
2. The nature of the decision-maker and its responsibilities
   * Is it public, charged with public functions, and is the q related to the public functions?
   * If so, weighs in favour of public matter finding
3. The extent to which a decision is founded in and shaped by law vs. private discretion?
   * If the decision is authorized by or emanates directly from a public source of law like a statute or regulation, it weights in favour of applying JR
   * If power to act is given by something else, like a contract, it weighs against finding that the matter is sufficiently public
4. The body’s relationship to other statutory schemes or other parts of government
   * Is it an ADM woven into the fabric of government? Part of a network of government decision-making?
5. The extent to which a decision-maker is an agent of government or is controlled by it
   * Wright thinks this should be the most important factor (in his book with Peter Hogg) 🡪 if the body controlled by government
6. The suitability of public law remedies
   * In *Dunsmuir* we talk about the difference between private and public employees, we shouldn’t let public employees go off and seek JR just because they work for public entity
7. The existence of a compulsory power
   * Statute gives authority to compel or disallow an activity in a way that would not be available to private decision makers
   * Opposite 🡪 where the parties submit consensually to certain rules 🡪 weighs heavily against JR
   * This is the other engagement of the question of public function 🡪 private clubs or religious affiliations are they subject to admin law? (*Wall* was heard at SCC a couple of weeks ago, about a man who was shunned from Jehovah’s based on something he did, and he applied for JR)
   * Case law now goes both ways so hopefully this clarifies
8. Exceptional cases where the matter has attained a serious public dimension/effect
   * For example, Olympics, where they are a private entity, their choice of what sports to include might potentially be subject to JR
   * These are not determinative or exhaustive, and not all of them will be found in each case

## *Highwood Congregation v Wall (2018, SCC) 🡪 muddied waters on what is sufficiently public; voluntary private and religious organizations will not be amenable to JR absent something MORE*

* Facts 🡪 private actors, religious organization, engaged in activity that might seem public in nature. In this case, Wall was a Jehovah’s Witness and was “disfellowed.’ Many of his clients were fellow Jehovah’s witnesses and they were obligated to shun him. His business suffered and her sought JR of Highwood. Prior proceedings both held Highwood could be subject to JR because they were sufficiently public to warrant JR. Appealed to SCC.
* Issue 🡪 is the Highwood Congregation sufficiently public to warrant JR?
* Held: Rowe 🡪 disfellowship decision of congregation not subject to judicial review –congregation was not exercising state authority
* Ratio 🡪 voluntary private and religious organizations will not be amenable to JR absent something MORE; muddied waters on sufficiently public
* Reasoning:
  + “Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character” (para 14)
  + So when is a decision sufficiently public? 🡪 Rowe was **NOT** clear on this one:
    - … Judicial review primarily concerns the relationship between the administrative state and the courts (para. 13)
    - Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character (para. 14)
    - … Judicial review is about the legality of state decision making (para. 20)
    - The relevant inquiry is whether the legality of state decision making is at issue (para. 21)
    - … The Congregation in no way is exercising state authority (para. 22)
* NOTE:
  + Do Air Canada’s Factors still apply? 🡪 Rowe muddied the waters
    - Maybe not –that case “dealt with the question of whether certain public entities were acting as a federal board, commission or tribunal such that the judicial review jurisdiction of the Federal Court was engaged” (para 21)

## Post Wall 🡪 Wright’s Thoughts

* Wright thinks JR determination requires deciding two things:
  + 1) Whether JR is available at common law 🡪 Wall precedent
  + 2) Whether JR is available from court 🡪 interpretation of Federal Courts Act and Judicial Review Procedure Act
    - This is where Air Canada factors can be used
* Seems clear that voluntary private and religious organizations will not be amenable to JR absent something MORE
  + I.e. statutory authority to make decisions in relation to members
* Rowe in *Wall* did not question the result in Air Canada –agreed with the conclusion

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| Venue |

## Venue

* How do you know where to take your application for judicial review?
* ADMs that are established by, and making decisions grounded in, federal statutes are supervised by the Federal Court
* However, ADMs that are established by, and making decisions grounded in, provincial statutes are supervised by their respective provincial superior court
* But, there are exceptions – of course there are!

## Federal Venue

* “The *Federal Courts Act* gives the Federal Court jurisdiction to hear applications for judicial review involving any “federal board, commission or other tribunal” (s.18(1)).
* “Federal board, commission or other tribunal” defined in s.2:
  + Catches bodies or persons exercising or purporting to exercise “powers conferred by or under an Act of Parliament”
  + Catches bodies or persons exercising or purporting to exercise “powers conferred by or under… [the] Crown prerogative”

### Excluded from Federal Venue

* Decisions of the Tax Court of Canada
* Any body, person or persons constituted or established by provincial law, including those provincial administrative decision-makers exercising powers conferred by federal legislation (e.g., interprovincial marketing schemes)
* Provincial superior court judges
* **Other exceptions (added over time through interpretation)**
  + **Constitutional claims**
    - Federal and provincial superior courts share jurisdiction (*Canada v Law Society of British Columbia* [1982, SCC] (laws); and *CLRB v Paul L’Anglais* [1983, SCC] (decisions)
    - This extends to Charter claims 🡪 *Reza v Canada* [1994, SCC]
    - However, the provincial superior courts have the discretion to refuse to hear such claims in favour of Federal Courts: see, e.g., *Reza*
  + **Applications for judicial review for writ of *habeas corpus*** 
    - Used to review detention decisions of someone, and FCA does not give the Federal court the jurisdiction to issue habeas corpus writs. You have to go to the provincial superior courts
  + **Damages claims (e.g., breach of contract, tort)**
    - Federal Court and provincial superior courts have concurrent jurisdiction: s. 17, *Federal Courts Act*
    - It is not necessary to bring an application for judicial review first: see *Telezone v Canada* [2010, SCC]
      * AG argued that JR proceedings were a condition precedent to damages claimed from a Federal decision maker. This would limit claims to a 30-day limitation period, using a glitch that would shorten the limitation period for damages from 2-6 years. This was denied by SCC.

### Section 28 of Federal Courts Act

* Some things go straight to the Federal Court of Appeal (rather than Federal Div Court) on JR:
  + CRTC
  + Copyright Board
  + Canadian Transportation Agency
  + Competition Tribunal
  + National Energy Board

## Provincial Venue

* Inherent jurisdiction (not statutory, like the FC/FCA)
* Deal mostly with applications for judicial review involving provincial administrative decisions
* In Ontario, the Divisional Court
  + Division of the Superior Court of Justice (Ontario)
  + Generally sits in three-judge panels
  + See *Judicial Review Procedure* Act, s. 6(1):
    - **6**(1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court.

Application to judge of Superior Court of Justice

* + - (2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice

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| Remedies |

# Remedies

* Final step in administrative law analysis –if there is a problem, which remedy to request?
* Most common outcomes on judicial review:
  + The decision is upheld or restored
  + The decision is quashed
  + The decision is quashed and referred back to the decision-maker for reconsideration

## How do we get to outcomes?

* Remedies by administrative decision-makers **flow from statute, never the common law**
* Remedies on judicial review:
  + “Prerogative writs”
  + Roots in “inherent jurisdiction” of the “superior courts”, not statute
  + But, may be authorized, codified, and partly limited, by statute

## Possible Remedies: Prerogative Writs

* *Certiorari* (quashing order) (this is the most common remedy)
  + A quashing order nullifies a decision that has been made by a public body. The effect is to make the decision invalid. Such an order is usually made where an authority has acted outside the scope of its powers (*ultra vires*).
  + A quashing order may be combined with a mandatory order, ordering a decision-maker to reconsider an issue with directions (e.g., to observe a fair process in some way). Directions generally will not require a specific decision on the merits.
* *Prohibition* (prohibiting order)
  + A prohibiting order is similar to a quashing order in that it prevents a public decision-maker from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively, not retroactively, by telling a decision-maker not to do something in contemplation of a decision.
* *Mandamus* (mandatory order)
  + A mandatory order compels public authorities to fulfil their public duties. Whereas quashing and prohibition orders deal with actual or anticipated wrongful acts, a mandatory order addresses a wrongful failure to act.
* *Habeas corpus*
  + An order that requires the person(s) responsible for the detention of an individual to produce the detained person to the court so that the validity of the detention can be determined by the court. Where there is no justification for the detention or the detention is otherwise illegal, the court will order his or her release.
* *Declaration*
  + A declaratory order is a judgment that declares the law applicable to the parties but does not include any coercive order.

## Statutory Reform in Relation to Prerogative Writs in 1970s

* Statutory Reform in the 1970s
  + Ontario: Judicial Review Procedure Act
  + Federal: Federal Courts Act
* Both create a single ‘application for judicial review’
* Incorporate the old prerogative writs, but reduce risk
  + Now, indicate grounds on which relief is sought (e.g., breach of procedural fairness) and the relief sought (e.g., an order quashing the decision)