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| Threshold Issues |

**Threshold Issues**

**Amenability to Judicial review**

* Determine whether the decision is amenable to judicial review at all?
* Requires two things:
  + 1) Whether JR is available at common law
    - ***Wall*** precedent
    - “Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character”
    - Requires statutory authority but also something more and must be sufficiently public ***(Wall; Air Canada)***
  + 2) Whether JR is available from court
    - Interpretation of *Federal Courts Act* and *Judicial Review Procedure Act*

**Venue**

* Determine the appropriate forum
  + Provincial Superior Court (in Ontario, the Divisional Court)
    - *Judicial Review Procedure Act* 🡪 single application for judicial review, no longer writs
    - Inherent jurisdiction
  + The Federal Court (Federal Court or Federal Court of Appeal)
    - *Federal Courts Act* 🡪 application for cases of federal jurisdiction
    - For cases involving any federal board, commission or other tribuna**l (s. 18(1))**

**Standing** (**Not covered in this course**)

* For the purposes of this exam we will assume, \_\_\_\_ has standing to bring the case forward for judicial review
  + Personal standing
  + Public interest standing
  + Intervener status

**Discretionary bars to relief**

* Adequate alternative remedies
* Prematurity 🡪 Non-final decisions
* Mootness
* Delay (by the applicant)
  + Statutory time limits
  + Common law
* Waiver (by the applicant)
* Misconduct (by the applicant)
  + First three grounds are concerned with timeliness, and the final three are concerned with the actions and behavior of the applicant for judicial review
  + Used to control access to their process –if discretionary bar raised court can decide to hear the application or not and they can hear the application then deny relief on the basis of a discretionary bar

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| Procedural Review |

**Procedural review:**

* Focus here is on the procedure followed, not the decision reached
* The question to ask is whether the procedures used in making the decision in questions are fair.
* Two components to the duty of procedural fairness that will be evaluated in turn:
  + 1) The right to be heard
  + 2) The right to an independent and impartial decision maker

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| Right to Be Heard |

**The right to be heard (the ‘procedural rights’)**

The right to be heard means the applicant has the opportunity to know the case to meet, to try and meet that case and the right to challenge the information that the ADM has and try to present other information. Context is an important consideration in these matters and procedural rights might include notice, disclosure, oral hearings, right to counsel, right to call evidence and cross-examine and reasons for decisions. These considerations encourage better decision-making (i.e. respect for rule of law), encourage more legitimate decisions, foster public accountability and protect basic human dignities.

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| Source |

1. **The first step is determining the sources that might be engaged** (this is an initial step to help you marshal your sources and plot your strategy)
   * Statutory scheme 🡪 look to applicable statute(s) and procedures set out therein
   * Subsidiary legislation 🡪 binding procedural rules enacted pursuant to statute
   * General procedural statute 🡪 if an Ontario ADM is involved, consider whether the *Statutory Powers Procedure Act* is potentially engaged
   * Non-binding procedural guidelines/policies
   * The common law
   * Constitutional and quasi-constitutional sources
     + For both federal and provincial ADMs, consider whether the *Charter* s. 7 is potentially engaged
     + If a federal ADM is involved, consider whether the *Canadian Bill of Rights* (“BofR”) is potentially engaged

Note: strategize here, as per your role. If, e.g., the statute contains limited procedural rights, determine whether the common law is available as a supplement; but if, e.g., the statute provides insufficient procedural rights, and explicitly or by necessary implication ousts the common law; consider whether there is a BofR or Charter claim

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| Trigger |

1. **Of these sources, which are engaged?**
   1. **Taking into account your role and strategy, determine:**
      * Whether the sources you would like to invoke are actually triggered
      * The content implications of the sources that are triggered
        + 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 ***(Cooper)***
   2. **If the common law is being invoked (because there are no or insufficient statutory rights)** 
      * Is there a duty of fairness owed at common law? (Threshold/trigger)
        + *Cardinal*/*Knight* trigger 🡪 Consider if any of the trigger exceptions apply
        + Legitimate expectations as potential trigger

**Cardinal/Knight Common Law Trigger 🡪**The existence of a general duty to act fairly will depend on the consideration of three factors:

1. The effect of the decision on the individual’s rights =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*)**
   2. If so, the right to be heard is usually presumptively triggered
   3. It is a low threshold
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
   2. The nature of the relationship
      1. Decisions relating to public employed under a contract ***(Dunsmuir)***

**Exceptions to Cardinal/Knight Common Law Trigger**

**Nature of the Decision** 🡪 Where not triggered due to nature of the decision

1. **Legislative decisions or functions**
   * Do **NOT** trigger right to be heard ***(Knight)***
   * Applies to the passage of primary legislation, by parliament or province ***(Wells)***
   * SCC has not been clear in how far this goes
   * Duty of procedural fairness does not need to be express, but will not be implied in every case –it is always a question of interpreting the statutory scheme as a whole to see if the legislator intended the principle to apply ***(Inuit Tapirisat)***
   * Examples:
     + Municipal by-law (delegated law-making) does engage the right to be heard where it is targeted at an individual ***(Homex Realty)***
     + Rules of natural justice don not apply to legislative or policy decisions (i.e. ministerial decisions pertaining to policy) ***(Canadian Assn of Reg Importers)***
   * 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
2. **Decisions that are preliminary, or non-dispositive**
   * 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
   * As decision becomes increasingly final, threshold drops ***(Re Abel)***
3. **Decisions involving emergencies (Not assigned)**

**Nature of the Relationship** 🡪 where **NOT** triggered due to the 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***)
  + The law will no 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
  + Context important but there may be a minimal level of procedural protection require ***(Friends of Point Pleasant Park)***

**Legitimate Expectations Trigger AND Content**

* An expectation of a hearing arising out of express representations, a practice of holding such hearings or a combination of the two
* Where the representation said to give rise to the legitimate expectations are clear, unambiguous, and unqualified***,*** the government will be held to its word ***(Mavi; Agraira; CAP)***
* Proof of reliance is not a requisite ***(Mavi)***
* If conduct of public official leads individual to believe his rights would not be affected without consultation ***(Old St. Boniface)***
* What can generate legitimate expectations?
  + Actual representations 🡪 verbal promises, policies available to public, etc.
  + Pattern of conduct 🡪 adherence to specific process in past

**Constitutional & Quasi-Constitutional 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

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| Content |

1. **If the duty of fairness is triggered, what procedural rights are required?**

**General content** 🡪 Consider and apply the *Baker* factors to determine the general level of procedural protection required at common law

* Varies with context
* Spectrum from minimal to significant procedural protections –content question =level of fairness owed
* Minimal rights level 🡪 right to be heard, know case, and make case for self (can be written submissions)

**The *Baker* factors**

1. Nature of the decision being made and process followed
   * The more process required =more protection
   * The more the ADM resembles judicial decision making, more likely procedural protections will be closer to trial model
2. Nature of the statutory scheme and terms of the statute
   * 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
3. Importance of the decision to the individual(s) affected
   * 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. Legitimate expectations

* Procedure =required to be followed
* Outcome/result 🡪 fairness may require more extensive procedural rights that would otherwise be accorded (i.e. such as notice that the ADM intends to renege on substantive promise)

1. The choices of procedure made by the ADM itself
   1. Situation sensitive
   2. ADMs have better awareness of complexity of problems, better appreciation than courts of what an appropriate compromise in competing claims of fairness, efficiency, feasibility, etc. would be
   3. Courts should sometimes be deferential to agencies’ procedural choices

**NOTE** 🡪 use the five factors to place on the procedural spectrum, then from there use the specific content to decide what is required (i.e. notice, written submissions, etc.)

**Specific content** 🡪 Relate conclusion re general content to specific procedural issues raised, with references to other cases from class as analogous situations

**1) Pre-hearing**

1. **Notice**
   1. Test is adequacy 🡪 notice must be adequate in all circumstances to afford opportunity to present proof, arguments and respond to opposition
   2. Requirements may be prescribed in statute/rules
   3. Obligation to provide notice is ongoing
   4. Whether sufficient notice is given depends entirely on circumstances ***(Ontario Racing)***
   5. Severity (context) of case dictates notice; cannot be misleading and inadequate ***(Chester)***
   6. **Problems with notice:**
      1. Form
         1. Written or
         2. Oral
      2. Manner of service
         1. Personal service generally
         2. Public service for large, indefinite groups
         3. But notice must be provided with sufficient clarity for big groups ***(Central Coalition)***
      3. Time
         1. Must provide sufficient time to allow response
         2. Length varies with
            1. Nature of interests (significance)
            2. Nature of issues (complexity)
      4. Content
         1. Adequate notice to give those concerned a “reasonable opportunity’ to know and meet the case ***(Mayan)***
         2. Considerations:
            1. Who is proposing to make the decision?
            2. What is the nature of the decision to be made?
            3. When will the decision be made?
            4. Where will the decision be made?
            5. Why is the decision being made?
            6. How is the decision being made?
2. **Discovery**
   1. ADMs do not have an inherent authority to order pre-hearing discovery of information in the possessions of third parties
   2. Power to order discovery must be expressly or impliedly conferred by statute ***(Quebecair; Ontario HRC)***
   3. Efficiency and economic consequences are factors in disclosure ***(CIBA)***
   4. 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 ***(May)***
3. **Delay (by the ADM)**
   1. Two potential impacts:
      1. Undermining the ability to mount a case; and
      2. Other forms of prejudice (e.g. Financial and reputational harm)
   2. Relief can be granted but the bar is high ***(Blencoe)***
      1. Delays that compromise the fairness of a hearing
      2. Delay as an abuse of process

**2) Hearings**

* Some statutes may require oral hearings 🡪 i.e. SPPA s. 5.1(2)
* Can be oral, electronic, or written
* At common law may be required where credibility is an issue

1. **Disclosure**
   1. SPPA ss. 8 and s. 5.4
   2. Two major caveats
      1. The extent of disclosure required to satisfy the right to be heard varies with the context
         1. Spectrum 🡪 at the minimum relevance is sufficient (i.e. irrelevant info not needing to be disclosed)
      2. Disclosure may be denied, or restricted, due to competing considerations or privilege
         1. Due to competing considerations
         2. Due to claims of privilege
   3. **Exceptions as per second caveat** 
      1. Information from outside sources 🡪 concerns that information will harm the individual involved or compromise the quality of the information provided
      2. Protecting identity of outside sources 🡪 claims to disclosure of sources of information but of general rule beyond reasonableness (i.e. think informants in criminal context) ***(Khela)***
      3. Commercially sensitive information 🡪 disclosure may be limited or refused (i.e. information that is not otherwise available to the general public ***(Savik Enterprises)***
      4. Staff studies and reports 🡪 inside sources, inspection reports, etc. Considers if it would be consequential and has different considerations for public vs. ADM disclosure here. Balancing act b/c encouraging candour of reports but also do not want ADMs to rely on them and not have individual unable to meet case
         1. If summaries of info already brought forth, no disclosure necessary
         2. If new and relied upon it should be
2. **Right of Parties to Cross-Examination**
   1. At oral hearings general right to call and cross-examine witnesses
   2. However, the right is not absolute
   3. Not same procedures are regular courts except where statute says so ***(Innisfil)***
   4. Limitation in cross examination:
      1. Sexual harassment cases ***(Masters)***
      2. Investigatory context ***(Irvine)***
3. **Right to Representation**
   1. Not a general right but Charter s. 10(b) gives right to counsel on arrest
   2. Often required by statute (SPPA s. 10)
   3. Often recognized by common law by right to be heard but not absolute, discretion warranted to permit broad role for lawyers ***(Re Mens Clothing)***
   4. Fairness is flexible and role of counsel determined by characteristics of proceeding ***(Irvine)***
      1. But contrast certain characteristics require counsel (i.e. irreparable harm) ***(Re Parrish)***
   5. Factors to consider in determining if representation is required: ***(Stony Mountain)***
      1. Nature of proceeding 🡪 formality, complexity, questions of law
      2. Seriousness of consequences for party
      3. Party’s experience with the type of proceeding
      4. Whether later chances to correct errors are afforded
   6. Right to state funded representation 🡪 very narrow amount of cases where required

**3) Post-hearing**

* Reasons requirement is flexible as to the form of reasons and when they are required ***(Baker)***
* When looking at procedural fairness, only issue is whether reasons were provided at all, if there are flaws with the content/reasons that is addressed under substantive review ***(Nfld Nurses)***
* Flexible –reasons can be found in other places apart from formal reasons of court (i.e. transcript) ***(Unicity Taxis)***
* Reasons just have to answer the basic question of “why was this decision made?” ***(Wall)***
* Minimal standard of adequacy for reasons to get over hurdle of procedural fairness, low threshold ***(Wall)***
* Question to ask:
  + 1) When does the duty to give reasons arise?
    - Depends on context
    - Reasons required 🡪 important significance ***(Baker),*** stat right of appeal
    - No reasons 🡪 straightforward debt collection ***(Mavi),*** avoiding complicated process, no right of stat appeal
  + 2) What is the content of the duty to give reasons (i.e. when are reasons sufficient?)
    - Giving no reasons at all will not satisfy duty
    - Reviewing the contents of the reasons will be evaluated at substantive review stage

**3) Is there a claim for statutory authorization?**

1. Have some or all of the procedural rights been eliminated or restricted by statute?
2. Ignore if the Charter is the source; the Charter trumps, unless s. 33 is invoked

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| Duty to Consult |

**Duty to consult (for exam purposes, consider this only if there is some clear indication on the facts that Aboriginal/treaty rights might be engaged)**

* Is the duty to consult triggered?
* If so, who is required to take the *procedural* steps to satisfy it: the ADM or the Crown itself?
  + Consider here whether the execution of the duty has been delegated to the ADM
* If the duty is triggered, what is required to satisfy the duty, and has it been satisfied?

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| Right to Independent and Impartial Decision Maker |

**The right to an independent and impartial decision-maker**

* Second component of the duty of fairness (procedural review)
* Why important?
  + Issues of certainty and predictability
  + Broader notions of fairness –decisions impact individuals and interests
* Focus:
  + Usually on apprehension/perception
  + Perfection is not required
  + Context-specific
* Common law analysis

1. **Is there a duty of fairness owed at common law? (Threshold/trigger)**
2. Same trigger for the right to be heard
3. **If so, are there any bias/impartiality and/or independence issues raised?**
4. **Bias/Impartiality**
   1. Focus on internal influences on ADMs
   2. General test =reasonable apprehension of bias 🡪 what would an informed person, viewing the matter realistically and practically 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 & Liberty)***
   3. **Specific contexts:**
      1. Antagonism during hearing
         * ADM decision maker should not be hostile, cast judgment, etc.
         * Decisions that perpetuate stereotypes may indicate RAB ***(Baker)***
      2. Association between party and ADM
         * Nature (significance) of relationship 🡪 close enough to impact decision?
         * Timing and currency of relationship 🡪 how long do they know each other, ongoing?
         * Between ADM and parties or between ADM and others involved (i.e. witnesses, lawyers)
         * Need evidence to support claim of bias ***(Terceira)***
         * Context matters
           1. Labour arbitrations, often have interests that cross over so timing and involvement are important ***(Marques)***
           2. Personal connections –showing special relationship ***(Saks)***
      3. Prior Active Involvement
         * Nature of previous involvement
         * Extent of previous involvement
         * Examples
           1. Overlapping roles within particular ADM can raise RAB ***(Comeau)***
           2. Prior participation can raise RAB (***Committee for Justice)***
      4. Attitudinal Predisposition towards an outcome
         * Suggests ADM is not approaching issue with an open mind
         * **Closed minded standard** in municipal context ***(Old St Boniface)***
         * But concerns with closed minded standard as difficult to gauge openness of mind and would lead to posturing ***(Richmond)***
         * For a policy side tribunal ADMs need not be as impartial as courts but once hearing starts must keep opinions quiet and be capable of persuasion ***(Nfld Telephone)***
         * At hearing stage required standard for public inquiry falls between flexible and strict RAB standard ***(Pelletier)***
      5. Pecuniary/Material interest
         * Clearest cases
         * A RAB will arise if an ADM is a shareholder in a party to proceeding ***(Dimes)***
      6. Institutional Bias
         * Can arise 🡪 individual comments or institutional structures
         * Institutional bias =a well-informed person, viewing the matter realistically and practically –and having thought the matter through would have a reasonable apprehension of bias in a substantial number of cases ***(2747-3174 Quebec)***
      7. Statutory Authorization
         * 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 ***(Brosseau)***
5. **Independence**
   1. Focus on independence from external influences
   2. **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
   3. Important to look at actual practice and past legislation to determine if there is an independence concern; there is a spectrum of independence ***(2747-3174 Quebec)***
      1. ***Valente* factors**
         1. Security of tenure 🡪 ADM only removable for cause and is subject to independent review
         2. Financial security 🡪 right to salary and pension established by law
         3. Administrative independence 🡪 institutional control
6. **Is there a claim for statutory authorization?**
   1. Defence to independence
   2. Statute can be express or implicit implication to override the common law with claims of bias/right to be heard ***(Ocean Port)***
   3. No general freestanding constitutional guarantee of independence for ADMs exercising adjudicative functions ***(Ocean Port)***

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| Substantive Review |

**Substantive review**

* Focus on the outcome, not process
* Whether there was an error from the ADM that requires court interference?
* At this stage, underlying tensions between legislative supremacy, rule of law, and separation of powers. This captures why we see so much fluctuation and disagreement on substantive review in Canadian courts
* The *Vavilov* case is now leading case and provides guidance on SOR

**Two Step Analysis for Substantive Review (Vavilov)**

1. **Determine the proper standard of review:**
   1. **Correctness 🡪 three categories**
      1. For constitutional questions
         * Federal-provincial division of powers
         * Relationship between legislative and other branches of government
         * Scope of Aboriginal and treaty rights under s. 35
         * Other constitutional matters that requires a final answer
         * Challenged to the validity of laws
      2. For general questions of law of central importance to legal system as a whole
         * Two questions:
           1. Questions must be of “fundamental importance”
           2. Questions must be of broad applicability
         * Look for significant consequences for the legal system or other institutions, not just one context
      3. For questions related to the jurisdictional boundaries between two or more administrative decision-makers
         * Why? 🡪 rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict
   2. **Reasonableness 🡪 default**
      1. Presumption of reasonableness
      2. When to derogate from presumption of reasonableness:
         1. When a statute explicitly prescribes the applicable standard of review
         2. Where legislature provides for statutory appeal of ADMs to the courts. Three options for SOR when appealing to courts:
            1. Questions of law 🡪 correctness
            2. Questions of fact 🡪 “palpable and overriding error”
            3. Questions of mixed law and fact

When legal issues is extricable from the factual issue 🡪 correctness for legal issue, “palpable overriding error” for factual error

When legal issue is not extricable from factual issue 🡪 “palpable and overriding error”

1. **Apply the standard of review to determine whether the decision warrants interference by the court**
   1. **If reasonableness, apply *Vavilov***

**Reasonableness Test:**

* 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

**Standard of Reasonableness:**

* **Test** 🡪 sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility, and transparency
* What makes a decision unreasonable? **Two types of fundamental flaws:**
  + 1) Failure of rationality internal to the reasoning process
  + 2) When a decision is in some respect, untenable in light of the relevant factual and legal constraints that bear on it

**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)

**Constitutional validity and the substance of administrative decision-making**

1. Is there a question about the constitutional (Charter) validity of a statutory provision or decision?
   1. For exam purposes, you would not be required to answer this question, since this would require a familiarity with the relevant Charter (or other) case law
   2. You might, however, be required to consider the relevant provisions of the Charter or BofR that we considered under procedural review (which would be better addressed earlier under procedural review)
2. If so, does the ADM have the jurisdiction to consider it? (**Not considered in this course**)
3. If so, is the statutory provision or decision invalid?
   1. For exam purposes, you would not be required to answer this question, since this would require a familiarity with the relevant Charter (or other) case law
   2. You might, however, be required to consider the relevant provisions of the Charter or BofR that we considered under procedural review (which, as indicated earlier, would be better addressed earlier under procedural review)

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| Remedy |

**Remedy**

* Final step in administrative law analysis –if there is a problem, which remedy to request?
* Most common outcomes of 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

**Questions:**

1. Are there any statutory remedies available to remedy any problems identified?
2. If not, consider the prerogative remedies (address any constitutional issues separately):
   * Certiorari (quashing order) (this is the most common remedy)
     + Perhaps combined with directions
     + Nullifies decision
   * Prohibition (prohibiting order) 🡪 prevents ADM from acting beyond scope
   * Mandamus (mandatory order) 🡪 compels authority to fulfil their public duty
   * Habeas corpus 🡪 order to produce detained person
   * Declaration 🡪 declaratory order declare the law applicable to parties
3. If the duty to consult is triggered and violated, what should be the remedy, and does the ADM have the jurisdiction to grant the remedy requested (**not considered in this course**)?
4. If a question of *Charter* inconsistency is identified, what should be the remedy, and does the ADM have the jurisdiction to grant the remedy requested (**not considered in this course**)?

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| Conclusion |

**Conclude**

* **Remember** to offer a brief, overall conclusion, taking into account your role
* **Remember** also that you may not have all the facts in relation to a particular issue raised in a fact pattern (a regular occurrence in actual legal practice). For example, your fact pattern might call for an application of the *Baker* factors, but you might not have (enough) information allowing you to make a conclusion about one or more of the *Baker* factors. If so, make note of this, and offer a preliminary assessment on the basis of the facts you do have