**Fall**

20

Administrative Law Summary

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# Introduction to Administrative Law and The Administrative State

* Administrative law helps us understand what gives governments the legal authority to make decisions as well as the legal limits and procedural requirements that they must respect when they do make these sorts of decisions

## Introduction

* Defining administrative law
* Administrative law’s relationship to other areas of law
* The basics of the administrative state
* The avenues for redress against the administrative state
  + This would be where you/your client believes that there has been some sort of mal administration or a wrong committed by an administrative decision maker

## What is Administrative Law?

* “… 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.” (*Gus Van Harten)*
  + Captures the idea that administrative law is concerned with public programs and is an area of public law. It is not concerned with private relationships but with the empowerment and creation of public institutions and programs and the relationship between the individual and the state
  + Administrative law is concerned with the implementation and administrative of public programs, Administrative law is not generally concerned with the enactment of the statutes that create public programs but rather mire with the implementation of programs after those statutes are enacted
  + This definition doesn’t seem to take a clear position on what the focus of administrative law should be
* “…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.” (*Professor Coleen Flood)*
  + There is a reference to boundaries or limits. Administrative decision-makers (term used to refer to public decision makers that are delegated the authority to implement and enforce public programs) have no inherent power to make decisions that impact people’s lives, rights, or interests. Their authority to do so must be delegated to them by some legal source, usually that will be a statute but, in some cases, it might also be the royal prerogative.
  + Public actors must act pursuant to the law
  + Since they can only act with legal authority, they must always point to the source of their power to make that decision
  + Emphasis on boundaries emphasizes the idea that administrative actors cannot act without legal authority. They must be able to point to a legal source, either statute or the royal prerogative, that authorizes them to make the decision
  + **Note:** Delegations of authority to decision makers not only limit, they also empower. They enable administrative decision makers to do certain things and then, by conferring the power to only do those things, they also suggest limits or boundaries on the power of what administrative decision makers can do. Those limits and boundaries are determined by an instrument (either statute or the royal prerogative) that authorizes that authority to make a decision
  + The *legally empowered* language emphasizes the idea that administrative decision makers are not to step outside the boundaries of what they are legally empowered to do
  + Authority for an ADM to act can be delegated from two key places: (1) Statues; (2) The Royal Prerogative.
    - **The Royal Prerogative:** special rights, powers & immunities to which the Crown is entitled under the common law
      * It dates back to when the Crown (King or Queen) claimed absolute power to rule
      * Most prerogative acts now performed by federal/provincial cabinets on behalf of the Crown but in some cases, they are performed by Governor General who represents the Crown and the Lieutenant Governors who represent the Crown provincially
      * Most prerogative powers have been codified and severely curtailed by statute, but some prerogative powers do remain (ie. The powers of the Governor General to appoint the Prime Minister, to appoint Cabinet Ministers on the advice of the Prime Minister or Premier, to dissolve governments, to grant honors declare war, appointment ambassadors and issue passports)
  + This definition displays a traditional concern for statutory intent which is emphasized by the portion of the definition which states that administrative decision makers should not step outside the boundaries of what they are authorized to do
* There are vastly different perspectives as to what administrative law is and should be about
* These two definitions also subtly reveal some of the key tensions that underlie administrative law
  + Ie. In the first definition, it does not focus on the courts explicitly whereas the second definition does. This focus on the courts in the second definition reflects the traditional bias of courses on administrative law that administrative law is about the role that the courts play in reviewing administrative decision making in order to ensure that administrative decision makers do not overstep the limits of their authority (this function of the courts is called their **“*judicial review function”***)
  + The political process also regulates administrative decision making
  + Administrative decision makers also play a role in regulating their own behaviour
* These definitions also reveal a little bit about what administrative decision makers should be focusing on when they determine the limits on their legal authority to make a decision. These are a few views on this:
  + **Conventional view:** they should focus on statutory intent. The idea here is that the focus of administrative law should be on the intention of the legislature as expressed in the statute giving the administrative decision maker the authority to decide
  + Focuses on combination of efficiency, efficacy and accountability. The idea here is that the focus of administrative law is or should be about ensuring administrative decisions are made efficiently, effectively and in a democratic way
  + Another view focuses on human rights. The idea here is that the focus of administrative law is or should be on ensuring that administrative decisions respect fundamental human rights.

## Key Administrative Law Principle

* “Show me the legal power!”
  + Administrative decision makers must be able to show the legal source that allows them to make a particular decision. If they cannot point to a source that allows them to make the decision they made, that decision is legally unauthorized and invalid
  + The power to make these decisions can be either:
    - Expressed (expressly stated) (i.e. In a statute)
    - Implied (necessarily incidental to an expressed grant of power)
* In part, administrative law is about making sure that the decision makers actually have the legal authority to make the decision that they have made or are anticipating being made

## What is Administrative Law – Professor Wright’s Take

* The law of good governance
  + Meaning that administrative law sets out and is concerned with legal rules and principles that guide the implementation or administration of public programs where they are delivered
* Concerned with whether the decisions administrative decision makers make implementing (“administering”) public programs are:
  + **Constitutional:** must be consistent with the *Constitution*
  + **Fair procedurally:** meaning that they respect proper, fair procedural rules and principles
  + **Legally authorized substantively** (“show me the legal power”)
    - Often concerned with whether they are “reasonable”
* In determining whether a decision is legally authorized, courts will ask whether the decision made by the administrative decision maker was “reasonable”, not whether it is correct according to their own view of the proper interpretation of the particular statute
* The two definitions above focused heavily on the third point “legally authorized substantively” but did not really touch on ensuring the decisions are constitutional and fair procedurally

## Relationship of Administrative Law to Other Areas of Law

* Statutory interpretation
  + Much of administrative law involves determining whether an administrative decision maker was entitled to decide. This often involves the interpretation of some statutory instrument (often a statute).
  + Administrative law is about determining whether a law follows statute. In this sense, it is a branch of statutory interpretation
  + When interpreting a statute, we are looking at whether the statute granted the decision maker the legal authority to decide
  + Statute that delegates the power to make the decision should ALWAYS be your first stop in analyzing an admin law problem
  + Administrative law is sometimes thought of as a special branch of statutory interpretation
* Constitutional
  + Administrative law and constitutional law overlap considerably as they both speak to the power of public actors and institutions and the relationship between the individual and the State
  + Both speak to the power between actors and institutions and speak to the relationship between the individual and the state
  + But there is a helpful distinction to be made between constitutional and administrative law:
    - Constitutional law is concerned mostly with which institutions have the legal authority/jurisdiction to make laws
    - Administrative law is concerned with the power of ADMs to make decision implementing/administering those laws
    - If you want to challenge a law itself as invalid, you are thought to be in the realm of constitutional law. However, if you want to challenge a decision implementing or enforcing that law as invalid, then you are thought to be in the realm of administrative law
      * **Exception:** Administrative law is never about challenging the validity of primary laws, but it can be about challenging law in a generic sense when it is secondary legislation (regulations, municipal by-laws)
    - However, even if you are within realm of administrative law, you cannot ignore the *Constitution* or *Charter* because it can be used to challenge particular laws and particular administrative decisions implementing those laws
    - **Important Note:** If a law is constitutionally invalid, any administrative decision made implementing and enforcing that law will also be invalid. Although, there are legal doctrines that would protect decisions made in the past under unconstitutional laws. The opposite is not true. An administrative decision which contravenes a principle of administrative law is not necessarily also unconstitutional. The reason for this is that the entire body of administrative law has not been constitutionalized in nature.
* Private law
  + Administrative law is distinct from private law. The principles in these areas of private law apply with exceptions to the administrative decision makers.
    - Tort, Contract, Etc.

## The Administrative State: Basic Overview

* The administrative state is the aspect of the state that administrative law is concerned with regulating.
* 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

### The 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 practices 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, SCC].
  + Boards can be replaced with the term “administrative decision maker”
* Administrative law is pervasive, engaging almost all aspects of our lives
* Administrative state deals with most of the stuff that we encounter in our daily lives
* Examples:
  + Employment
  + Regulated Industries (utility companies, broadcasters)
  + Economic Activities
  + Professions and Trades
  + Social Control
  + Human Rights
  + Income Support
  + Public Services

### The Administrative State: Why? (Reasons for Delegation and Administrative State)

* There are at least 5 reasons we can point to for why legislatures delegate the power to implement and administer public programs:
  + Size and scope of government and necessity
    - Government is now pervasive, the sheer size and scope of the business of modern government means that decisions about the implementation of public programs will often have to be delegated unless the business of government is to grind to a halt or slow down significantly
  + Expertise and complexity
    - Much governmental decision making involves issues that are technical and complex in nature. Legislatures may need the expertise of experts to pursue a program efficiently and effectively
  + Flexibility, innovation, and experimentation
    - Delegating power to administrative decision makers allows greater flexibility in pursuing public policies in the face of new and unexpected social and economic developments
    - The legislative process can be cumbersome in nature and resistant to change. In contrast, administrative decision makers may find it easier to experiment with new, innovative solutions to complex, fast-changing problems
  + Speed
    - Certain issues of public concern may require a faster response than the legislature branch of government is able to manage (i.e. Public emergencies such as pandemics may require delegation of authority to make decisions fast)
  + Accessibility and access to justice
    - Important but often overlooked reason for delegating power to administrative decision makers
    - Commencing litigation in the courts to adjudicate disputes can be slow and expensive. This can pose significant barriers to those who lack the requisite resources to challenge decisions
    - Another reason power is delegated to administrative decision makers is to increase accessibility and therefore access to justice by reducing the complexity of the process and the law and thus the need for lawyers

### The Administrative State: Who? (Key Institutions/Players)

* **Legislature Branch :** plays an important role in the administrative state in 2 key ways: (1) it plays a role as the principal forum where public policies are explained, debated and ultimately approved by statute (the vast majority of public programs originate with a statute which will obviously have to be enacted by the relevant legislature) and (2) it plays a role in administering these public programs (ie. Cabinet Minister responsible for administering a particular program may be questioned about its administration in the legislature perhaps leading to a change in how the program is implemented or the governing statute that delegates the authority).
  + Canada is a federal state which means that in addressing any administrative law issue, you should keep in mind whether you are dealing with federal or provincial jurisdiction as the answer will have implications for the source of any applicable administrative law principles as well as the court or institution to which you should look to for redress
  + Almost all public programs must originate with a statute enacted by the provincial or territorial or federal legislature in order to create new legal rights and duties
    - **Federal Parliament** 
      * If somethings falls under a Federal statute, you will look at federal statutes to determine which statutes might be engaged and it will probably be the federal court you will look to redress any grievances
    - **Provincial legislatures**
* **Executive Branch:** plays a fundamentally important role in the administrative state. Executive power is vested by the *Constitution* in the Crown (Queen who exercises power federally through Governor General and provincially through Lieutenant Governors). However, Crown does very little without the advice of the PM and/or Cabinet. In practice, executive branch is controlled by Cabinet.
  + Federal
    - Crown (Governor General)
      * Power vests federally in the Crown but the Crown does very literally without advice of Cabinet
    - Cabinet
      * 1) Prime Minister
      * 2) Ministers
        + Those appointed to the Cabinet are elected MPs drawn from House of Commons
        + The formal executive branch of government federally is often referred to as ***“Governor in Council”*** (refers to Governor General acting by and with the advice of the federal Cabinet)
        + Cabinet is the key decision-making forum in Canadian government. It plays the primary role in determining the policies that will be pursued by a government and introduces bills to transform those policies into law. The Cabinet also leads and directs the Executive branch of government.
        + Cabinet plays a variety of important roles in thinking about the administrative state:

First, in some cases, it may be empowered by statute to supplement a statutory scheme with subsidiary or delegated legislation. These are usually called ***“regulations”***. Statutes that empower ADMs to act often include a provision that empowers the Cabinet to create regulations dealing with any number of issues and the statute will typically speak on the topics upon which regulations can be enacted

Can also play a role in providing a right of appeal from the decision of an ADM

I.e. In telecommunications context where certain decisions made by federal CRTC can be overturned by the Federal Cabinet on an appeal by a party

* + - * + Each Cabinet Minister is assigned a specific area of responsibility and will oversee the operations of any government departments that fall within their portfolio. These departments will be established and regulated by their ***“enabling statute”*** or “***home”*** statute

The Minister is accountable for the exercise of powers assigned to them or the official subject to their direct managerial control. Minister is also accountable for the exercise of powers assigned to administrative decision makers that are not subject to their direct managerial control if they fall within the general portfolio assigned to the Minister (independent or quasi independent boards, commissions or tribunals)

Minister may sometimes exercise discretionary powers that directly affect particular individuals (ie. Federal Minister of Justice decides whether to extradite someone in Canada to face criminal prosecution in another country)

Statutes often delegate authority to Ministers, however, in practice, these decisions tend to be made by other civil servants working within a government program

***Carltona Doctine:*** Where a statute includes a delegation to a Minister, there is an implicitly sub delegation from the Minister to the civil servants working under them

Doctrine does not have to explicitly delegate the power to the civil servants

* + - Various Administrative Actors (e.g. civil servants)
  + Provincial
    - The formal executive branch in provincial statues is often referred to ***“Lieutenant Governor in Council”***
    - Crown (Lieutenant Governors)
      * Power vests federally in the Crown
    - Cabinet
      * Premiers
      * Ministers
        + This works the same as it does federally except the first Minister of a province is obviously not the Prime Minister but rather a Premier
    - Various administrative actors (e.g. civil servants)
* **Other Administrative Decision-makers**
  + Municipalities (provincial)
    - Exercise powers that are delegated to them by their relevant provincial legislature
    - Many of these powers have a huge impact on our daily lives
    - Municipalities are granted the power to enact bylaws
    - Delegated statutory power to deliver and enforce municipal policies and programs
  + Crown corporations
    - Governments have incorporated separate corporate corporations to deliver specific public services
    - These corporations exercise statutory functions, they often enjoy independence from government to enable them to make commercial decisions without government interference but governments often exert considerable influence over them through the power over the purse and their power to appoint members of their boards
    - Decisions based on commercial principles, and legal relations with suppliers & 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
    - Eg. Canada Post, CBC
  + (Nominally) private bodies with public functions
    - There are otherwise private bodies that make decisions that have a public flavor and that we thus consider ADMs
    - They exercise powers conferred on them by provincial authority
    - 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
    - E.g. Children’s Aid Societies (responsibility for child welfare)
  + Indigenous governments
    - They have a huge impact on the laws of the individuals that live within indigenous communities across the country
    - There has been a long-standing dispute about the nature of the authority of indigenous governments
      * Conventional view outside Indigenous communities is that indigenous communities exercise power that is delegated to them by the federal government usually under the *Indian Act*.
        + Has been contested by members of Indigenous communities
      * Other view is that Indigenous communities do not exercise delegated power but that they rather exercise long standing inherent self-government powers that predate contact with European settlers
  + Independent administrative agencies (tribunals, boards, commissions etc.)
    - Canadian Radio Television and Telecommunications Commission, Human Rights Commission, Federal and Provincial Privacy Commissions and the Ontario Securities Commission
    - Similarities
      * All enjoy some measure of independence from political executive
        + Cabinet or Minister cannot interfere directly in their case specific decision making; however, governments can still exert influence in other ways such as through the power of the purse and the power to appoint their members
        + They are also often accountable to their Legislature for their overall, not case specific, content
      * They tend to be specialized
        + They tend to deliver only a program or part of a program in a particular policy area
        + They are not generalists in the way that a provincial Superior Court would be
    - Differences
      * Range of decisions: e.g. individualized/broader policy
        + Can range from more targeted individual focused decisions that might be made by a court (Immigration and Refugee Board) to ADMs that make more policy-based decisions that impact a larger group (ie. Energy Board that sets Hydro rates for a large geographic area)
      * Extent of resemblance to courts in their structure
        + To what extent do they observe the procedural elements of court or more informal procedures
      * Place in the decision process: e.g. final or investigative
        + Some only make recommendations to another ADM while others make the first and sometimes final decision on a matter
      * Potential impact on the decision involved
        + Some make decisions that have a tremendous impact on the lives of individuals (ie. Deportation or detention decisions) while others make decisions that seem more trivial in nature (ie. Whether you can add an addition or a deck to your home)
      * Composition
        + Some have members drawn from the regulatory area (ie. Provincial Law Societies that are constituted by lawyers) whereas others may draw from other parts of regulated activities (ie,. Labour Relations Boards often have members drawn from the employer and labour side with an independent chair).
    - Why delegate to independent administrative agencies as opposed to some other administrative decision maker who is more directly accountable to the government?
      * Depoliticize decisions
        + Because these agencies are insulated from pressures of politics it may be easier to develop better & more consistent policies without political influence that may lead to unfair results
        + This delegation allows governments to avoid responsibility for particular decisions
      * Expertise
        + The need for greater specialization in technical subject matter
        + Ie. Competition Tribunals, OSC etc.
      * Limits of formal, adjudicative courts
        + There may be a reluctance to enmesh courts in subject matter that is not subject to judicial review because of the nature of the issue and/or the volume of the decisions to be made
* Administrative decision makers- a review:
  + Cabinet (act collectively)
  + Ministers (individually, sometimes they act in groups of two or more but usually they work individually)
    - Civil servants (employed by government)
  + Municipalities
    - Delegated power by provinces
  + Crown Corporations
  + (Nominally) private bodies exercising public functions
  + Indigenous governments
  + Independent administrative agencies (boards, tribunals, commissions, etc.)
* Note: the role being played by the administrative decision maker is key to administrative law’s application
* The roles of the different actors…
  + It is helpful to think of these roles on a spectrum (left to right)
    - Policy making
      * Involves determining whether and how an issue will be addressed by government
      * In some cases, ADM play a role by enacting policies such as regulations and bylaws that flesh out policies that are delegated to them by their relevant legislature
      * Ie. Legislative Branch – enacts new laws and repeals old laws
      * Administrative decisions makers do not have primary legislative authority, rather, their role will be delegated to them. While they may play some sort of a policy making role, whether the government should become involved and how is not a decision made by administrative decision makers.
    - Implementation
      * Involves determining how results of the decisions of policy makers will be implemented in individual cases
      * Ie. Independent administrative agencies
    - Enforcement
      * Involves determining how the results of the decisions of policy makers will be enforced in individual cases
      * Ie. Independent administrative agencies
    - Adjudication
      * Involves determining how results of the decisions of policy makers will be adjudicated in individual cases
      * Ie. Independent administrative agencies
  + The roles played by these actors can sometimes be blurred

### The Administrative State: How? (Tools)

* General points about tools allocated to administrative decision makers
  + Usually based in statute
    - First place you should look in determining what an ADM can and cannot do is the statute establishing and regulating that decision maker
  + The tools delegated vary considerably
  + Discretion – the “ubertool”
    - Administrative decision makers are given discretion regarding when and how to use the tools they have at their disposable to carry out their regulatory tasks
    - This is the tool that can be used to facilitate all of the other goals
    - Often felt to be necessary because it allows ADMs to configure a particular program to respond to new or changing circumstances
  + Different from courts
    - Courts focus on one role (Adjudication), administrative actors can sometime adjudicate in way that closely resemble a court however they are often given a broad array of tools and even where they play and adjudicative role, they often do not function in the same way as courts with the same level of formality
* Four basic questions to consider always: Administrative law issues and statutes
  + The source of the legal power (authority) being delegated?
    - This will usually be a statute but it could also be subordinate legislation such as a regulation or a bylaw
    - Figure out which instrument delegates the authority for the administrative decision maker to make the decision
  + To whom is the legal power being delegated?
    - This might be any of the actors we identified earlier, you must look at the source of the delegation to identify the identity of the delegate
    - Delegate may be able to explicitly or implicitly sub-delegate the delegated power
      * Can be allowed explicitly by the statute
      * But can also be allowed implicitly
        + Civil servants can act for a Minister delegated the power to make a decision *(Carltona doctrine*)
  + The nature of the legal power being delegated
    - Spectrum
      * One extreme: broad discretionary power – look for the word “may”
      * Other extreme: duty – look for the word “shall”
      * Other possibilities on the spectrum –
        + Conditioned discretionary power – e.g., x “may” do y in the “public interest”

Public interest conditions the use of the power. If the decision maker made a decision that was not in the public interest, then the decision would be invalid

* + - * + Conditioned duty – e.g., x “must” do y if z happens
  + How is the legal power to be exercised?
    - Want to think about 2 things here:
      * Procedural requirements imposed on its exercise?
        + What procedural requirements must be observed by the ADM before it makes its decision?
      * Substantive requirements imposed on its exercise?
        + There are preconditions or expectations as to how power is to be exercised imposed by the statute itself. You will also want to look at the common law as the common law can impose additional limitations on the exercise of power

### The Administrative State: Limits? (Sources)

* The Constitution (e.g. Charter, s. 7)
  + E.g. s. 7 prescribed procedural obligations that must be satisfied in some cases by ADM’s
  + Also “quasi-constitutional” instruments (e.g., *Canadian Bill of Rights* (Federal))
* The statutory framework (primary source – key place to go in looking at whether an administrative decision is authorized)
  + Primary legislation: the “enabling statute” (or statutes)
  + Delegated legislation e.g., regulations
    - They still have binding legal effect and haver rules that apply generally rather than to a specific individual
* General statutes dealing with judicial review
  + Ontario: *Statutory Powers Procedure Act*
    - Prescribes certain minimum procedures for certain provincial statutory decision makers
    - Where it applies it proposes procedural requirements that must be respected by ADM’s in making decisions
* The common law (judicial decisions)
  + Very important source of administrative law principles as they articulate a variety of principles and rules that ADM’s must respect when making decisions in the absence of statutory language that overrides the application of the common law
* Decisions/reasons of administrative decision-makers
  + Some ADM’s offer reasons for their decisions which you can interpret and apply
  + First instance decisions, perhaps appeal decisions as well (depending on the context)
  + Non-binding, but can be treated as persuasive (see e.g., *IWA v Consolidated Bathurst* (1990) SCC)
    - Within an administrative body, individuals and panels do not generally bind other individuals or panels but legally their decisions do have persuasive effect
    - One caveat: the decisions of individuals and tribunals might have binding effect if a statute gives them that effect
    - In some administrative decision-making contexts, decision makers may give significant deference to the decisions of their colleagues in making particular decisions
* Policies and guidelines
  + Non-binding although the impact they have in practice may be quite significant
  + Guidelines may assist ADM’s and the individuals they regulate but providing them with guidelines about an issue
* In hierarchical order *legally:*
  + Constitution/*Canadian Bill of Rights*
  + Statutes
    - Primary legislation
    - Subsidiary legislation (must respect primary legislation)
    - General statutes
  + Common law
  + Decisions/reasons of ADMs
  + Policies/Guidelines
* In hierarchical order *practically:*
  + Policies/Guidelines
    - This is because in many contexts there are policies and guidelines in place that flush out not only particular substantive principles that should apply but also procedural principles
  + Statutes and/or decisions of ADMs (depending on the context)
  + Common law
  + Constitution

### The Administrative State: Limiting What? (Outputs)

* Individual administrative decisions
  + Most common object of scrutiny
  + Can be individualized or more general in focus (policy-based)
* Subordinate legislation
  + Can be federal or provincial
  + E.g. regulations – these are also objects of administrative law scrutiny and courts are also asked to determine whether the Cabinet or Minister acted in accordance with an enabling statute in enacting a particular subordinate legislation
* Policy guidelines
  + Might be challenged on the basis that they improperly fetter the discretion conferred on an ADM to decide
* Municipal by-laws
* Indigenous laws (e.g., band council by-laws)?
  + This would raise in turn the issue about whether an indigenous law resulted from delegated power or from inherent self-government powers
* Crown prerogative
  + Much less common now because in most cases the crown prerogative has been displaced by statute

## Avenues for Redress of Grievances

* Political and administrative redress
  + Legislative oversight of the administrative process
    - Can be done through individual legislative or legislative officers (e.g., Ombudsman)
  + Administrative remedies
    - Administrative decision makers often have internal mechanisms for dealing with grievances
    - E.g., appeals to administrative appeal bodies
    - These should be exhausted before you seek judicial review of a decision. Failure to exhaust may lead to an application for judicial review to be dismissed for failure to exhaust other possible remedies
* The courts: Three options
  + First, original jurisdiction and direct actions
    - Ordinary common law courts have the power and jurisdiction to review administrative decision making when it is challenged by way of a direct action over which the courts have original jurisdiction
    - Claim in tort, contract, etc.
  + Second, statutory rights of appeal
    - No automatic appeal; must be provided for in statute
    - Should always review the relevant statutes establishing and regulating that ADM to see if there is a statutory right of appeal from its decisions. If there is, check the grounds of appeal
    - The failure to review these grounds for appeal before seeking judicial review may result in dismissal for failure to exhaust other remedies
  + Third, applicants for judicial review
* Our focus: applications for judicial review

### Applications for Judicial Review

* “Inherent jurisdiction” of “superior” courts to review legality of administrative decision making
  + Constitutionally protected to some extent: *Crevier v Quebec* (1981) SCC
  + This precluded federal and provincial laws that have the effect of precluding judicial review for jurisdictional error
* Historically, this inherent power exercised through “prerogative writs”; but law technical and complex
  + Before the 1970s the prerogative writs were very important
  + Administrative law was all about trying to squeeze cases into one or more of the prerogative writs
* Reforms in the 1970s
  + A new, simplified single application for judicial review and clarified grounds on which available (replaced prerogative writs)
    - Ontario: *Judicial Review Procedure Act*
  + Some jurisdictions changed the court hearing applications
    - Ontario: Divisional Court (branch of the Ontario Superior Court of Justice)
    - Federal: Federal Court (newly created)
      * This is where it remains today
  + These reforms vastly simplified the procedure for judicial review.

## Administrative Law in a Nutshell

* You always start in the Parliament or Legislature which enacts a statute that delegates decision making to an ADM
* That decision maker then makes an individual decision that impacts an affected party (whether it is a person, corporation, organization etc)
* The party impacted may be perfectly fine with the decision made and in this case, they will let it stand. However, they might not be fine with it and they might seek to challenge the decision. In seeking to do this, they will have to take into account the various avenues for redress. The result of this process of seeking redress might be to see the decision sustained, affirmed or to have the decision be overturned
  + If it is overturned, the party challenging it might be satisfied.
  + If the decision is sustained, it is possible we come full circle if the impacted party looks to Parliament or the Legislature as a potential form of redress

# Introduction to Administrative Law: Underlying Principles and Debates

## Underlying Theoretical Principles and Tensions

* Three key principles that underlie administrative law
  + The rule of law
  + Parliamentary (or legislative) sovereignty (or supremacy)
  + The separation of powers
* Other key principles
  + Honour of the Crown: engaged when the adminsitrative state, the Crown, interacts with Indigenous peoples in Canada
  + Human rights
  + Access to justice
* Other key ideas
  + Jurisdiction
  + Fairness
  + Reasonableness
  + Etc.

## First Key Underlying Principle: Rule of Law

* *Constitution Act* 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
* But what does it mean?
  + An “essentially contested concept” (Jeremy Waldron)?
  + Definitions of the rule of law can be placed on a spectrum between thin/thick
    - Thin definitions – emphasize formal/procedural legal requirements without taking aim at the substance or content of the laws themselves
      * Example: Principle of legality – “show me the legal power”!
        + This is the idea that all exercises of public power must find their source in a valid law. Any exercise of public power that is not authorized by public law is a violation of this basic tenant of the rule of law
      * Common justification – prevents arbitrary public decisions
        + It does this by limiting the ability of public officials to act according to their own personal whims. The idea here is that law will be a constraining force on arbitrary decision making
    - Thick definitions – emphasize substantive requirements, they go beyond formal procedural requirements
      * They speak to the rule of law not just in a formal procedural sense but also to the actual content or substance of law.
      * Example: all laws must respect certain individual rights (Trevor Allan)
* Lon Fuller (Harvard)
  + Rule of law requires seven basic principles to be respected:
    - Publicity
      * Laws should be publicly available so that individuals can access them and understand them
    - Prospectivity (non-retroactivity)
      * Laws should specify how individuals ought to behave now and, in the future, rather than prohibiting behaviour that occurred in the past
    - Clarity
      * Laws should be sufficiently clear in their drafting that they can be understood and followed by individuals that are subject to them
    - Generality
      * Laws should contain generally applicable rules, not rules that target individuals or organizations
    - Consistency
      * Laws should, across the entire statute book, be not contradictory. One law should not prohibit what another law permits creating confusion among those that are subject to them
    - Stability
      * Laws should not change in their substance so frequently as to create confusion about the substance of the law
    - Capability of being obeyed
      * There should be a congruence between what laws provide and how they are enforced so that individuals can conduct themselves properly to avoid legal issues
  + For Fuller, the virtue of these principles is that they permit individuals to predict legal response to their behaviour by government officials. Thereby, allowing them to avoid legal problems and maximize their own individual freedom
  + Principles may be called of good administration or legal craftsmanship
  + **Note:** These seven principles do not preclude particular substantive outcomes, but they do engage more than thin definitions with the content of the law. They do not rule out these outcomes all together but they just require those outcomes to be pursued in a particular way

#### Roncarelli v Duplessis, 1959 SCC

**Facts:** Roncarelli owned a restaurant in Montreal and was a Jehovah’s Witness. At the time, the Premier of Quebec was Maurice Duplessis. Duplessis and his government was hostile to Jehovah’s Witnesses and viewed them as dangerous to the established order and anti-Catholic. Hundreds of Jehovah’s Witnesses were arrested during this period for distributing religious pamphlets in violation of municipal bylaws. Roncarelli posted bail for hundreds of his fellow Jehovah’s Witnesses using his restaurant as security for the bail posted. Roncarelli’s actions drew the attention of the Duplessis government. At the time, Edward Archambeau was the chairman of the provincial Liquor Board. Archambeau cancelled the liquor license for Roncarelli’s restaurant. For doing so, Archambeau had been in contact with Duplessis. Duplessis was not only Premier of Quebec but was also the Attorney General of Quebec. Archambeau reached out to Duplessis to seek his advice. Duplessis said that Roncarelli’s liquor license should be cancelled. The cancellation of Roncarelli’s liquor license for his restaurant caused his restaurant to close. Roncarelli sued for damages.

**Issue:** Court had to examine the actions of both Archambeau and Duplessis

**Held:** Damages awarded.

**Analysis:** Rand J. - Majority of SCC agreed with Roncarelli and ordered Duplessis to pay damages

* The rule of law is a “fundamental postulate of our constitutional structure”
* What does the rule of law entail here?
  + One reading: decision advances a **thin** take on the rule of law
    - How? It endorses the principle of legality
      * Show me the legal power!
    - Duplessis acted without legal power by telling Archambeau to cancel Roncarelli’s liquor license, so damages owed
      * This overstepped Duplessis’ legal authority because under the governing statute, *Quebec’s Liquor Control Law*, the power was delegated not to Duplessis as Premier or AG but to the Chairman, Archambeau
    - If this reading is the right one, then the decision stands for the fact that the rule of law requires every official act to be authorized by law
    - Duplessis had no inherent powers, he could not rely on his high office or his judgement as to the demands of the public interest as a justification for his act. Only a valid statute would authorize the cancellation of the liquor license and the statute here gave that power to someone else
  + Another reading: it advances a **thick** take on the rule of law
    - Under this reading, Duplessis violated the rule of law not because he acted without authority but because he violated certain substantive ideas associated with the rule of law
    - 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
    - How?
      * Rule of law requires purpose underlying the legal power to be respected; there’s no such things as an “absolute” discretionary power
        + Here, the discretionary power granted to the provincial liquor board seemed to be very broad and unfettered. Justice Rand suggest there is no such things as absolute, unfettered discretion and that grants of legislative power are always given for a particular purpose and any actions taken under them must keep with those purposes
      * Rule of law prohibits bad faith exercises of public power (i.e. an intention to cause harm)
        + Idea here is that where a public official acts in bad faith using public power with an intention to harm an individual or organization that this fails to respect the rule of law
* Key Passage in Rand J.’s decision:
  + “… there is **no such thing as absolute and untrammeled “discretion”,** that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; **no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.** Fraud and corruption in the “Commission may not be mentioned in such statutes, but they are always implied as exceptions. **“Discretion” necessarily implies good faith in discharging pubic duty; there is, always a perspective within which a statute is intended to operate;** and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted. 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.”
    - We see here the idea that even broadly conferred legislative powers are conferred for a purpose and need to be exercised consistently for that purpose
    - We also see that good faith is required when public officials make decisions, acting in bad faith would be acting unlawfully
* Duplessis could be seen to have acted unlawfully for 2 reasons:
  + (1) Because he acted based on irrelevant considerations, not ones that were relevant to the purpose of the delegation. Idea here is that Duplessis acted with an intention to prevent Roncarelli from continuing to post bail for other Jehovah’s Witnesses, a purpose that was not relevant to the grant of authority to the Commission to cancel liquor licenses
  + (2) Duplessis also acted unlawfully because he acted in bad faith with an intention to harm Roncarelli and his business.
* If the second reading (above) is correct, exercises of power that purport to respect the formal requirements of the law can still be unlawful if they fail to respect certain underlying substantive requirements like exercising public power consistently with the purpose of the power granted and making sure not to act in bad faith
* **Significance of distinction between thin and thick reading:** If Archambeau had made the decision without consulting Duplessis, his decision would still have been unlawful since he seemed to be motivated both by irrelevant considerations and bad faith
  + On the thin reading, provided it could be said that the decision of the Chairman fell within the scope of the power delegated it would be lawful
  + However, on the thicker definition, there would be problems because even if the decision could be said to fall within the formal terms of the law, it would not be consistent with substantive requirements imposed by the rule of law including the requirement to keep with the purpose of grants of authority and to refrain from bad faith exercises of power
* There is an important limitation to note on the thick reading of the decision – the decision seems to contemplate that these two substantive limitations (acting inconsistently with the purposes of the powers granted and acting in bad faith) can be overwritten by clear statutory language.

#### Quebec Secession Reference [SCC, 1998]

**Facts:** In this case, the Court was asked to consider the legal validity of a potential unilateral act of secession by Quebec from Canada.

**Issues:** (1) Can Quebec seceded unilaterally from Canada under Constitution? (2) Under international law? (3) Which prevails if they conflict?

**Analysis:** Case contains a discussion about the rule of law

* Says the Constitution includes written and unwritten parts, including unwritten constitutional principles
* Identifies four unwritten constitutional principles:
  + Federalism
  + Democracy
  + **The rule of law**
  + Respect for minorities
* Defines the rule of law (para. 71); says it requires:
  + “…that the law is supreme over the acts of both government and private persons. There is, in short, one law for all.”
    - No one is above the rule of law, everyone is subjected to the rule of law
  + “’the creation and maintenance of an actual order of positive laws.’”
    - This preserves and embodies the more general principle of normative order
    - This is the idea that in order to have a rule of law you need to have law. Laws are indispensable to an organized and ordered society
  + “…[that] the exercise of all public power must find its ultimate source in a legal rule… the relationship between the state and the individual must be regulated by law.”
    - This is the “show me the legal power” mantra. All exercises of public authority must have their source in a valid legal rule
* The important thing for our purposes, aside from the definition, is the nature of the definition that it provides
  + The focus of the Court’s definition is on form rather than content. The Court seems to adopt a thin conception of the rule of law

## Second Key Underlying Principle: Parliamentary Sovereignty

* “Whereas the Provinces… have expressed their Desire to be federally united…, **with a Constitution similar in Principle to that of the United Kingdom…”**: *Constitution Act*, 1867, Preamble
  + This language has been understood to import into the Canadian context fundamental Constitutional principles underlying the Constitutional order in the UK including the principle of parliamentary sovereignty
* Parliamentary sovereignty is a byproduct of the ancient struggles that occurred between the British Monarchy and the Westminster Parliament. It ensures that the power of the Monarch is subject to the control of the Legislative branch of government.
* Parliamentary sovereignty has come to be known as a fundamental guarantee of a democratic system of government because it ensures that the people, through our elected representatives, have the unlimited power to make change and unmake the laws that govern us. The democratic link is that the legislators are elected by the people
* Parliamentary sovereignty has 2 key ideas:
  + Parliament/legislature can make or unmake any law, and no other body can invalidate them
    - This protects democracy because it allows the people to decide upon the laws that govern us. If we don’t like a law, we can push for that law to be changed or repealed.
  + Parliament/legislature cannot bind itself for the future
    - Legislature cannot tie it’s hands now by purporting to prevent itself from legislating. If a later law contradicts n earlier law, the later law is understood to take precedence over the earlier law. This also protects democracy because if the people vote out one government the new government is not bound by it’s predecessor
* Why is it important?
  + Democracy supporting
  + Ensures ultimate public power rests with “the people”
* There are 2 key limitations on parliamentary sovereignty
  + Procedural (“Manner and form”) rules to make law
    - The legislature must follow its own procedural rules in order to make law
    - A law is not a law if it does not satisfy the procedural requirement that must be observed to make a valid law
  + The Constitution – the Constitution itself must be respected when laws are enacted. The Constitution is supreme and it invalidates laws that are in consistent with it
    - Now constitutional supremacy?
    - Is this the exception that swallows the “rule”?

## Third Key Underlying Principles: Separation of Powers

* Captures the idea that the three branches of government in Canada are allocated particular government functions and that each branch of government must respect the functions of the other branches. The separation of powers is understood to respect that:
  + The legislature make the laws that govern us
  + The executive branch implement and enforce the laws that govern us
  + The court settled disputes about and interpret and apply the laws that govern us
* Concept used in two ways
  + Descriptively: as an account of what is
  + Normatively: as an account of what should be
* Descriptively
  + No strict separation of powers between legislative and executive branches of government in Canada
  + The legislature and executive branches are “fused” because the executive branch is accountable to and formed from the legislative branch of government
    - But, … judicial independence
      * This is constitutionally protected in Canada. There is a clear separation of powers between the legislative and executive branches on one hand and the judicial branch on the other hand
    - Also, generally accepted allocations of responsibility
      * I.e. The executive branch of government has no inherent authority absent some grant of legal authority which usually comes from statutes enacted by the legislative branch
* Normatively
  + Concept invoked to criticize and prescribe
    - I.e. Critics of the Charter say it is illegal because it allows the courts to make decisions which, in a democracy, should be made by democratic representatives
  + Administrative context
    - Used to defend judicial involvement – to ensure ADMs respect legal limits
    - Used to criticize judicial involvement – courts lack expertise to scrutinize decisions of ADMs

## Implications of These Principles for Administrative Law

* A spectrum of views
  + One end: classical liberal view of administrative law and the administrative state
  + Other end: functionalist view of administrative law and the administrative state
  + There are also various views that lie on the spectrum between these two polar opposites

### The Classic View: A.V. Dicey (1835-1922)

* Suspicious of administrative decision-making and the administrative state
* Emphasized two ideas
* First, emphasized parliamentary sovereignty– which he defined by reference to two key ideas:
  + Omni-competence
    - The legislative branch had the power and has the power to enact whatever laws it chooses so long as those laws are enacted in accordance with the prescribed legislative procedures (i.e. 3 readings)
    - Since he was in the UK he was not concerned with issues unique to Canada’s Constitution such as the division of powers
  + Legislative monopoly
    - The idea that all government power should be channeled through the legislative branch in order to subject it to democratic approval before hand and then subject it to democratic scrutiny after the fact
* Second, emphasized the rule of law, defined to include 3 ideas:
  + First, that all governmental action must be authorized by law; no one should suffer except for a “distinct” breach of the law.
    - This is essentially the principle of legality. It is our mantra “show me the legal power”
  + Second, that government and citizens alike must be subject to the general law of the land; no special treatment for government
    - This is also one of the ideas embraced by the SCC in defining the rule of law in the *Secession Reference*
  + Third, that it properly fell to the ordinary common law courts to determine whether administrative decision-making was valid
    - If authority had been delegated to an administrative decision-maker it fell to the courts to ensure that the sovereign will of the legislature was respect
    - For the courts not to intervene would have accorded to an administrative decision-maker a legislative power that had not actually been delegated to it
* The separation of powers is the one concept that is not emphasized by Dicey. But, the idea is implicit in how Dicey understand parliamentary sovereignty and the rule of law. In his view, only Parliament should make laws (legislative monopoly) and it was the rule of the courts to ensure that administrative decision-makers did not exceed their delegated authority (implicit in these ideas are separation of powers arguments)
* Administrative decision-making was problematic:
  + Because it didn’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
  + Because it didn’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)
    - This discretion would enable public official to restrict individual rights
  + Because 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
    - He thought that administrative decision-making was problematic because it accompanied a growth in the size and nature of government and it imposed a threat to the individual rights of contract and property
    - They also often tried to supplant the common law courts which Dicey thought were better
* Dicey’s scholarship had a profound effect on Canadian administrative law which for time led courts to adopt a similarly suspicious attitude toward administrative decision making which as evidenced by their reluctance to interfere with administrative decision making

### The Functionalist Critique (Willis, Laskin, etc.)

* Defended administrative decision-making
  + They were more hospitable to administrative decision making and welcomed the new welfare and regulatory state that was emerging at the time in response to the Great depression
* They we called “functionalists” because they emphasized the function of administrative decision-making
* Challenged the descriptive assumptions underlying Dicey’s claims about the nature of law
  + E.g. legislative branch did not wield all public power and that many other institutions had some forms of public power and in Canada’s Parliamentary system, it was the executive branch that controlled the legislative branch
  + Argued judging involved considerable discretion which undermined one of Dicey’s key arguments which was that when the courts interfered with adminsitrative decision-making, they were merely giving effect to the will of Parliament
* Challenged the normative assumptions underlying Dicey’s claims of adminsitrative state and adminsitrative decision making
  + Embraced administrative decision-making as necessary and desirable
    - For them, administrative decision-making as an inevitable and necessary consequence of the growing welfare and regulatory state
  + Questioned Dicey’s assumptions that the courts were well placed to review adminsitrative decision-making
    - Thy argued adminsitrative agencies were often more accessible than the courts and often had more expertise than the courts to deal with the issues they were called upon to deal with
  + Pointed out that Dicey seemed to overlook the democratic pedigree of delegated adminsitrative decision-making
  + Argued Dicey’s rue of law concerns could be addressed in other ways other than conducting an assault on adminsitrative decision-making
    - i.e. by making adminsitrative decision-making more transparent through a requirement for written reasons
    - They said the rule of law could be protected without laying down rigid rules. Statutes could accommodate adminsitrative flexibility while also constraining decision-making
* They said it wasn’t true that legislatures had a monopoly on decision-making and they said Dicey’s hostility to adminsitrative decision making was in itself undemocratic because it failed to respect the choice of elected accountable governments to delegate power to adminsitrative decision makers
* Their prescriptions?
  + Don’t presume adminsitrative decision-making is bad
    - Instead they should be given wide discretionary latitude in order to get things done in the public interest respecting the will of the democratically elected legislatures that delegated powers to the ADMs
  + Don’t force ADMs to be courts, either:
    - Procedurally; or
      * This would unduly hamper the ability administrative decision makers to discharge their statutory tasks of
    - Remedially
      * A broader degree of remedies should be available to adminsitrative decision makers
  + Balance 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 and accepting of procedural approaches that do not replicate those of the court’s
* But, do they now defer too readily in some cases?
* Should courts try to encourage adminsitrative decision-making that is more democratically transparent and accountable by encouraging or requiring public participation in adminsitrative decision making?
* Should courts try to encourage administrative decision-making that respects basic human rights?

## Overview of the Course

* Adminsitrative law can be divided into four major components
  + Threshold issues
    - I.e. whether a particular adminsitrative decision is one that is even amenable to review, principles of administrative law and whether the individual who wants to challenge the decision has the legal standing or authority to do so
  + Two grounds for review
    - Procedural fairness review
    - Substantive review
  + Remedies available if there is found to be a defect on either procedural or substantive grounds

### First Ground of Review: Procedural Fairness Review or The Duty of Fairness

* Were the procedures used in making a decision fair?
  + Focus is on the procedure followed in coming to the particular decision, not the decision reached or the outcome
* The duty of fairness has two components:
  + The right to be heard; and
    - Involves a consideration of whether a particular adminsitrative decision engages the procedural rights protected by the right to be heard and if it does whether the request procedural rights were afforded to the impacted parties
  + The right to an independent and impartial decision-maker
    - Key issue here is whether an adminsitrative decision-maker acts without bias and with the requisite level of independence from others in making a decision

### Second Ground of Review: Substantive Review

* Issue here is the actual decision reached – the “substance” of the decision, rather than the process followed in reaching it
* Question is whether the adminsitrative decision-maker made an error of the kind and magnitude that the court is willing to interfere with it, or whether it will defer to the ADM
* Courts apply two standards of review when reviewing the substance (outcome) of adminsitrative decisions:
  + Correctness: was the decision correct?
    - This is an unforgiving, exacting standard of review
    - When this standard of review is applied, the question is whether the particular decision made by the ADM is correct, in other words was it the decision that the courts itself would have reached in the particular context
  + Reasonableness: was the decision reasonable?
    - This is a less exacting and more forgiving standard of review
    - The question here is whether the particular decision is justified on the facts and law. Whether it is reasonable, not whether it is correct
  + The questions as to which standard of review to apply is often framed in terms of how much “deference” or “respect” the reviewing court will and should show of the particular ADM. If the court decides to be deferential to the ADM it applies the reasonableness standard of review. If the court decides it will not show any deference to the ADM it will apply the correctness standard. The application of the correctness standard is more likely to result in the decision being invalidated than a reasonableness standard
  + The current approach the courts use to determine the standard of review and then to apply reasonableness as the standard of review when it is the appropriate standard of review was set out by the SCC in 2019 in *Vavilov.*

### Background Questions to Consider in All Cases

* The context: who, where?
  + Who made the decision? Which decision-maker made the decision?
  + Where does the legal authority to make it come from?
  + If statute, consider the questions from week 1 Part II, Slide 12
* The procedure: how?
  + How was the decision made, procedurally?
* The substance (outcome): what, why?
  + What was the decision made?
  + Why was it made? (look to reasons, record of proceeding etc.)
* Remedy?
  + What remedies (avenues for redress) might be available, *and of use*?
    - Consider the options from week 1 Part III, Slide 3
* Consider all these questions when answering an exam question! Not a full list though!

# Procedural Fairness: Introduction, Sources, Triggers

**Topics**

1. The basic role and purposes of the duty of procedural fairness;
2. The two basic components of the duty of procedural fairness: 1) the right to be heard; and 2) the right to an independent, impartial decision-maker.
3. The general analytical framework that should be applied in assessing a claim involving the right to be heard;
4. The primary sources of the right to be heard; and
5. The triggers for the right to be heard, including:  
   a) The trigger to engage the common law right to be heard, and its exceptions; and  
   b) The trigger to engage the primary constitutional and quasi-constitutional procedural rights.

\*\*\*Draft Decision making rubric tree – see sample rubric

## The Duty of Fairness

* The duty of fairness:
  + 1) The **right to be heard** (captured by the latin *audi 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 the judge of their own case\_

## The Right to be Heard: Introduction

* Protects various procedural rights
* Entails the opportunity to:
  + Know the case to meet; and
  + Try to meet that case
* The procedural right 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 the process, not outcome (or substance)
* The procedural rights serve several purposes
  + The idea is that well informed decisions are better decisions in substance. There is also concern about rule of law.
  + Encourage better decisions
    - Including respect for the rule of law
    - Procedurally fair decisions are less likely to display the arbitrariness that is antithetical to rule of law
  + Encourage more legitimate decision
    - People more likely to accept decision if given the opportunity to be hear. Decisions can reinforce public confidence in the decision and decision makers
  + Foster Public Accountability
    - Admin decision makers are more likely to be careful if their decision-making processes are not secret/ open to scrutiny
  + Protect basic human dignity interests
    - Ensure indv. are treated with basic respect
  + Important to note that there are other considerations and, in some cases, can weigh against robust procedural safeguards
    - Ex. Efficiency (robust procedures can cause delays), Efficacy (by conferring procedural protections the nature of a particular decision may be undermined), Cost (safeguards can be costly)
* Four questions involved (**Is the right to be heard engaged**?):
  + What **sources** of procedural rights might be engaged?
    - Identify any source of procedural rights on exam\*\*\*\*
  + Of these sources, which are engaged (**Trigger** question)
  + Were the required procedural rights provided (**Content** question)
    - What procedural rights should have been provided?; and
    - Were they in fact provided?
  + Is there a claim for **statutory authorization**? (have some or all of the procedural rights been eliminated or restricted by statute?)
    - Ignore if Charter is the source; the Charter trumps, unless s.33 is invoked

### The Right to be Heard: Sources

Where procedural rights owed come from?

* The enabling statute(s)
  + Eg. Competition Ac., R.S.C. s.12(3)
  + Delegate power to administrative decision maker to make a decision
  + **Always check the enabling statute first**
* Delegated legislations (regulations, rules, etc.)
  + Legally Binding
  + E.g. RCMP Public Complaints Commission Rules of Practice, SOR/93-17
    - Regulation enacted pursuant to the Royal Canadian Mounted Police Act s.45.33
* Policies and guidelines
  + Legally non-binding
  + Hard vs soft law
    - Relied on by ADMs
    - Relied on by courts under *Baker*
    - Some AMDs treat as soft law as hard law
  + E.g. Immigration and Refugee Board Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division
    - Guideline issued by the Chairperson of the IRB under Immigration and Refugee Protection Act, S.C. 2001, c.27, s.159(1)(h)
* General procedural statutes
  + Ontario: *Statutory Powers Procedure Act*
    - Some provinces enact statutes which provide for basic minimum rights
  + But also:
    - British Columbia: *Administrative Tribunal Act*
    - Alberta: *Administrative Procedure and Jurisdiction Act*
    - Quebec: *An Act Respecting Administrative Justice*
* The common law
  + May be a ‘source’ of procedural rights where none of these other sources are engaged on the facts, or they are silent
  + May also **supplement** the procedural rights in these sources
* *Mavi v Canada (2011, SCC)* – General Approach of Courts to Engrafting Common law protections
  + “…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)
* Constitutional and quasi-constitutional instruments
  + Where might these be useful?
    - If legislation expressly or impliedly denies a procedural right(s)
    - 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. Does not apply if expressly overridden
    - Two key provisions
      * Section 1(a)
      * Section 2(e)
  + Constitutional sources: The Charter
    - Key Provision
      * Section 7

## The Right to be Heard: Triggers

### Procedural Rights: The Trigger Questions

* Statutes, regulations, rules, etc
  + Consult their language to see if engaged
  + May require interpretation
* General procedural statutes
  + SPPA has its own trigger
  + Consult its language, cases interpreting it
* Charter, Canadian Bill of Rights
  + Have their own triggers
  + Consult them, and cases interpreting them
* Common law
  + Has its own trigger

### The Common Law Trigger: Development

* Historically,
  + 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, approach was criticized because judicial and quasi judicial decisions were difficult to differentiate from administrative decisions
* Now, with several exceptions, the right to be heard applies where an administrative decision affects an individual’s ‘rights, privileges, or interest’
* Duty of fairness now applies to a much broader range of admin decisions than it used to and the issue is now which procedural are required to satisfy the duty rather than whether procedural rights are required at all
* Cardinal Knight Trigger

#### Nicholson (1979, SCC)

**Facts:**

* “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.”

* Employment ended without hearing and appeal
* Police could dispense of services of any constable within the first 18 months of employment
* Nicholson was summarily dismissed after 15 months of service. Never given any reasons for or notice of. No procedural protections were afforded to Nicholson

**Issue:** Whether summary dismissal was permitted without any procedural protections at all?

**Held:** Court splits 5-4 Yes some procedural protections

* Martland J. (dissenting)
  + Takes conventional view, the decision was ‘purely administrative’ in nature. As a result there was no legal duty to confer any procedural protections such as explaining the decision or providing an opportunity to be heard. In essence, Nicholson got nothing.
* Laskin C.J. (for majority)
  + Nicholson doesn’t get the full procedural protections provided to those with more than 18 months of service (oral hearing and an appeal)
  + But, Nicholson was still entitled to be treated ‘fairly’. This meant that, before Nicholson was dismissed he was able to give:
    - Reasons required
    - Also an opportunity to respond (orally or in writing)
* Decision is important because:
  + What it has to say about judicial vs quasi judicial classification applied up until this point and adopted by Martland.
  + Laskin C.J say (for the majority)
    - “I accept… ‘ that 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” (citing *Bates v. Lord Hailsham* (1972) 1 W.L.R. 1373, 1378)
      * General duty of fairness exists in quasi-judicial and administrative decision areas
    - “… 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 serious consequences for those adversely affected, regardless of the classification of the function in question.”
    - The mere existence of procedural rights for a certain class of people will not preclude the common law operation of procedural rights for another class of people. However, the scope of the protections given may affect the scope of protections given at common law. The procedural rights under statute operate as a ceiling. Nicholson entitled up to the ceiling, but not the ceiling. Creates a range for procedural rights for another class of people.

Questions arising from *Nicholson*

* Would the judicial/quasi-judicial and administrative dichotomy be abandoned totally?
* What is the trigger for the new ‘general duty of fairness’ in the “administrative... field’?
* What procedures would be required to satisfy it? (Laskin mostly left it to the police board to decide)

Two developments

-No two level of requirement, now a sliding scales

-the trigger for procedural rights is identified and what the right to be heard requires should it actually be triggered

### The Common Law triggers

* Currently two triggers for procedural rights
  + The Cardinal/Knight trigger (this class)
    - *Carinal v Director of Kent Institution (1985, SCCC); and*
    - *Knight v Indian Head School Division No. 19 (1990, SCC)*
  + The legitimate expectations trigger (later lecture)
* The **Cardinal / Knight trigger**
  + “the existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual’s rights”
* The **Cardinal Knight trigger in practice**
  + The **effect of the decision = presumptive trigger** (most important trigger)
  + The other two factors operate more as exceptions
    - The nature of the decision; and
    - The nature of the relationship
  + \*\*The three part trigger from Cardinal/ Knight does operate to exclude application of common law right to be heard in some cases, but in many cases the duty is triggered and the issue is the content of the procedural rights that are required. **IF the decision of the ADM impacts an indv. rights, privileges and interests than the duty will often be engaged. This is quite a low bar to be satisfied.** Though it is low, it shouldn’t be assumed to be engaged, there are exceptions
* The Effect of the decision (CK)
  + Focus on the effect of the decision: (*Baker*)
    - Does the decision of an administrative decision-maker “affect the rights, privileges, or interests of an individual”?
      * If so, right to be heard usually presumptively triggered
      * Rights privileges or interests has been construed broad enough to capture almost any admin decision that affects the individual

### The Common Law Trigger: Exceptions

* Second Prong
  + Where not triggered due to **nature of the decision**
    - Legislative decisions or functions
    - Decisions that are preliminary, or non-dispositive
    - Decisions involving emergencies (don’t need to know for class)
* Third prong
  + Where not triggered due to nature of the relationship
    - Decisions relating to public employees employed under a contract *Dunsmuir v NB* (2008, SCC)
* **Legislative Decision Exception**
  + Do not trigger the right to be heard
    - *Knight* (“decisions 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?
    - Is it the nature of the institution, the nature of the decision or some combination thereof
  + Some case examples
    - *Inutuit Taapirisat* (1980, SCC) (cabinet decisions)
    - *Homex Realty* (1980, SCC) (delegated lawmaking (by laws))
    - *Canadian Association of Regulated Importers* 91993/93 F.C./ Fed C.A) (broad policy decision of an administrative decision-maker

#### Can v. Inuit Tapirisat (1980, SCC) – scope of legislative decision exemption as applied to Cabinet

* Facts:
  + Cabinet allowed to overrule the CRTC “on its own motion,” “at any time,” and according to ‘its own discretion” (*National Transportation Act*, s. 64)
  + Involved CRTC, which allowed Bell to raised telephone rates without attaching condition to improve service in underserved communities. Inuit appealed CRTC to governor in council (in effect, the Cabinet). The Cabinet refused to overrule the CRTC. In this decision, it heard from CRTC, Bell, Civil servants, but refused to hear from Inuit Tapirisat. They sought a declaration that they deserved a hearing
* Issue? Whether the right to be heard was triggered?
* Held? No (per Estey J)
  + The Right to be heard is not triggered by cabinet’s decision
  + Estey emphasized that the relevant legislation authorized the fed cab to overturn the CRTC. This authorization is legislative action in it’s purest form. He also emphasized second the various practical difficulties if the duty of fairness is triggered by undermining cabinet’s decision-making function distracting cabinet from their primary function
  + “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 discharging a function with reference to something akin to a lis (dispute) or where the agency may be described as an ‘investigating body’ … Where however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the rest of subject matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be though to arise” (Estey J.)
  + Suggest that where a decision does impact a particular indv. in a particular way, then the right to be heard may actually be engaged. The door is left slightly open to be heard by cabinet on a narrow range of cases
* Cabinet (decision) doesn’t trigger right to be heard
* Compare:
  + *Desjardins v Bouchard* (1983, Fed. C.A.) (Individualized **cabinet** decision relating to criminal pardon **does** trigger the right)
  + *Baker v Canada* (1999, SCC) (individualized decision of a **minister** relating to an immigration matter **does** trigger the right)
* What about **delegated lawmakers(ing)**?

#### Homex Realty v Wyoming (1980, SCC) – deals with delegated law making

* Facts: Passage of municipal by-laws is generally exempt from duty of fairness as an extension of the exemption granted to parliament and provincial legislatures. Municipality (Wyoming) was in quarrel with particular developer which didn’t want to pay cost of installing services like sewers. Municipality passed by-law restricted developers ability to sell property in the development seemingly to force developer to satisfy municipal development conditions.
* Issue: Whether the right to be heard was triggered? Engaged duty of fairness.
* Held? Yes! (5-2) (Estey J for majority) (Dickson concurring with 2)
  + The enactment of the by-law triggered the right
  + Clear on evidence that motivation for passing by-law was in relation to its dispute. Can’t couch actions in a form to exempt itself from duty of fairness. As a result the right to be heard was engaged.
  + This suggests that the nature of the decision rather than the identity decision maker that determines scope of exception
  + Estey J (majority)
    - Got around the legislative exemption by framing decision (enacting the by-law) as ‘quasi-judicial’ rather than ‘legislative’
  + Dickson J (concurring)
    - The focus should not be on labels, but the nature of the decision
    - If as here, a by-law was ‘aimed deliberately at limiting the rights of one indv.” then the right to be heard would be engaged

### Common law trigger: Exception Legislative Decisions

* What about decisions that are policy-based or general?
  + *Knight* (“decisions of a legislative and general nature…. Entail no duty (of fairness), in contrast to decisions of ‘a more administrative and specific nature’”)
  + What does this mean?
    - The implication is that where a decision effects a broad spectrum of the public, that claims to procedural rights will be hard, even if claim involves sort of decision maker like energy board who we typically think of more subject to administrative law principles. The line b/w general policy decisions which would be exempt and specific admin decisions which would not be exempt is difficult to draw. This is exemplified in *Canadian Assn,. of Regulated Importers v Canada (1993/94)*

#### Canadian Assn. of Regulated Importers v Canada (1993/94)

* Federal Court of Appeal, per Linden JA
  + A ministerial decision to change the quota 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 quota was a ‘policy decision’
* Compare trial decision, per Reed J
  + Holding the decision did engage the right to be heard
  + 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
* Key takeaway
  + **Precise boundaries of exception are not entirely clear, but a few broad principles are available**
    - If the decision is made by particular inst. That are associated to legislative functions like cabinet or municipality, consider the possibility that the exemption applies.
      * Legislatures likely exempt from duty of fairness, but *Homex* shows municipal councils are not exempt as a class
      * Even if decision is made by inst. that resembles a more typical ADS like a tribunal, consider possibility that legislative exemption applies. If the decision is policy based and general in nature impacting a broad group rather than administrative and specific. Decision more admin and specific if it focusses on a specific group of indv. and particular set of facts related to that indv. and group.

### The Common Law trigger: Exceptions Non-dispositive decisions (not final decision)

* 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 (191979, Div. Ct/ ONT. C.A.)

* Facts: Advisory Review Board in Ontario which reviews and makes recommendations to Lt. Gov. for those detained in mental health wards. Lawyers for some patients asked for disclosure of files kept by inst. in which their clients were kept, esp. reports to be submitted to Advisory Review Board for client cases. Request also give to chairman and refused on both instances.
* Issues: Is the right to be heard triggered
* Held: Yes. Why?
  + The ‘proximity between the preliminary and final decision’
    - Evidence clear that reports were not binding on board or Lt. Gov., but no question that reports were heavily influential. Decisions of board were treated with de facto finality by Lt. Gov.
  + The ‘exposure of the person investigated to harm’
    - Decision regarding detention is the only chance to avoid life in incarceration

### The Common Law Trigger: Exceptions

* Second Prong
  + Where not triggered due to **nature of the decision**
    - Legislative decisions or functions
    - Decisions that are preliminary, or non-dispositive
    - Decisions involving emergencies (don’t need to know for class)
* **Third prong**
  + Where not triggered due to **nature of the relationship** b/w decision maker and indv. impacted
    - Ex. Decisions relating to public employees employed under a contract *Dunsmuir v NB* (2008, SCC). Right to be heard not triggered in this instance.
      * Exception where there is not contract of employment (don’t worry about)
    - If terms of employment of public employees are governed by contract then the duty will not be triggered, only ordinary private law contractual remedies would be available

### Procedural Fairness

* Intro
* Sources
* **Trigger**
  + Common law trigger
  + **Constitutional/ quasi const. triggers**

### Quasi-Const. Sources: The CDN Bill of Rights

* General trigger points
  + Applies to every ‘law of Canada’, which includes:
    - Existing and future federal legislation
    - Any ‘order, rule or regulation enacted under them’; and
    - All administrative decisions taken under and of these (s.5(2))
  + Does not apply to provincial laws or decisions
* As with the charter, there might be difficult question engaged about whether the target of an admin complaint has a sufficiently public character to be subject to CDN bill of rights (don’t need to worry about for course, but good to be aware of)
* Section 1(a)
  + Guarantees the “right of the **individual** to life, liberty, security of person **and enjoyment of property,** **and the right not to be deprived thereof except by due process of law**.”
    - Difference from s.7 of charter which confers the right to ‘everyone’ vs ‘individual’. Word everyone in s.7 excludes corporations (*Irwin Toy v Quebec SCC)*. Undecided if word ‘indv’ which is to include corps.
  + Why still relevant?
    - Include corporations?
      * *Canada v Central Cartage (1990, FED CA)* says no, doesn’t include corps
      * No SCC decision yet
    - Property
* Section 2(e)
  + Protects the right of a ‘person’ to a ‘**fair hearing** in accordance with principles of fundamental justice for the **determination of his rights and obligations**”
  + Why still relevant
    - Corporations seemingly yes (CB pg 177)
    - Broader trigger than the Charter , s.7

### Constitutional Sources: The Charter

* Four questions
  + First, does the Charter apply at all?
  + Second, has a Charter provision been violated?
  + Third, if so, is the violation justified under s.1? (*Oakes*)
  + Fourth, if so, what remedy should be granted?
* **General threshold question (question 1)**
  + Section 32(1): Charter applies to legislatures, governments
    - Interpreted to have narrower scope in some contexts than admin law principles
      * For ex. uni and hospitals not subject to charter, but important to note that uni and hospital have been subject to admin law principles in admin law contexts
        + Important to note that in some situations admin law has broader reach due to narrower interpretation of s.32(1)
* **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** (see below)
    - In order for s.7 to be engaged, life, liberty, or security of person must be engaged

### The Charter, s.7

Narrower than s.1 of CBR and s.2(e) of CBR

* Two step test for infringement of s.7:
  + First has the claimant been deprived of his or her interest in (right to) “life, liberty, OR security of the person”; and
    - This is s.7’s internal threshold questions
  + 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 a s.1 analysis
  + Note: if an indv. decision, rather than a law, is challenged, it isn’t clear whether a full s.1 Oakes
* *Signh v Canada* – Wilson J (for 2) decided case under s.7 and Betts J and 2 others decided on s.2(3) of CBR. Created 3-3 split

#### Singh v Canada (1985, SCC)

Facts: Complainants were refugee claimants already in Canada. Minister of immigration acting on advice of advisory committee has determined they were not refugees and therefore subject to deportation. Committee precursor to board. Indv. not given opportunity to present case. Statutory scheme provided possibility of in person hearing, but only at appeal board and board, on basis of written submissions, decide claimant needed to attend oral hearing. Creating a number of barriers to oral hearing. App was not referred to hearing. Appellants applied to Fed CA for judicial review. After SCC heard oral arguments, it asked for further submissions on whether statutory scheme was consistent with CBR s.2(e).

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
  + The statute was sufficiently clear to preclude reading in additional common law procedural rights
    - Step 1: s.7 of the Charter was triggered
      * The term ‘everyone’ includes ‘every human being who is physically present in Canada,’ not only citizens
      * The appellants ‘security of the person’ was engaged, because there was **a threat of** physical punishment or suffering
      * Here the Immigration Act conferred certain statutory rights in instance where indv. were to be removed to country where their life is threatened. The potential wrongful denial of this statutory right amounted a threat of physical punishment of suffering. V broad interpretation of s.7. Not an actual threat by state itself to engage s.7, but rather the potential wrongful denial of statutory right that might lead to removal to a country where life or freedom is threatened
    - Step 2: ‘Fundamental justice’ was denied by the provisions
      * Procedural fairness is a ‘principle of fundamental justice’
      * At a minimum, procedural fairness requires (including for s.7):
        + The decision-maker act in good faith, without bias; and
        + The opportunity to know, and meet, the case to be met
      * “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”
      * Here, there was an inadequate opportunity to know and meet the case
    - Section 7 was violated; the violation was not saved by s.1
* Beetz J (writing for 3) – The Scheme violated s.2(e) of the CBR
  + No decision on s.7
  + Beetz doubted whether s.7 was engaged

### Admin In-person Class- oct 26

1. Investigative process- director investigation of issue including directors undercover investigation
2. Proposed refusal to issue the license and resulting decision nto regfuse

Another old distinction that is drawn in cases that is still present is when what is being alleged is a prospective right, privilege or interest, the courts tend to deny that the common law is engaged.

ONCA 1978 Re Webb

Investigagtive power under s.11 so broad, factor 5 of Baker may be in facour of decision, but question is whether factor 5 focuses on indv. Decision makers or just general policies of decision maker. Answer is both .

Baker Case

Legitimate expectations: is this a procedural issue or a substantive one (tough argument)

Choices by the decision maker – no clear evidence that director has any particular expertise, might argue that this is neutral Close to the bottom end of the procedural spectrum – result of Mavi level procedural entitlement. Could say there is statutory authorization

What different about this context from the investigative context that raise procedural standards given the nature of the decision.

Issues

-notice

-reasons

# Week 5- Module 4: Procedural Fairness: The right to be Heard General Content and Legitimate Expectations

## Administrative Law Procedural Fairness: General Content and Legitimate Expectations Part 1

**Topics For Week 5 – bold is topic in this lecture**

* **General Content**
  + **Intro**
  + **Common law- baker factors**
  + Charter, s.7
* Legitimate Expectations
  + Trigger
  + Content
* Statutory authorizations
* Consequences of a breach of procedural fairness

Part 1

* General Content
  + Intro
  + Common law- baker factors

## The Right to be Heard

* Four questions involved:
  + What **sources** of procedural rights might be engaged?
  + Of these sources, which are engaged? (**Trigger question**)
  + Were the required procedural rights provided (**Content** question)
    - What procedural rights should have been provided?; and \* core of content question
    - Were they in fact provided?
  + Is there a claim for **statutory authorization**? (have some or all of the procedural rights been eliminated or restricted by statute?)
    - Ignore if the Charter is the source; the Charter trumps, unless s.33 invoked
* How common law determines the content of procedural rights owed in the context of common law being triggered

### General Content at Common Law

* This ‘content’ will vary with the context
* Content falls on a spectrum
* Use the *Baker* factors to place on the spectrum
* Range from min rights to max rights
* Course focussed on common law and charter s.7
* Focus on common law because the codified procedural rights are so variable in content that it is difficult to provide an accurate overview. Also common law can be source of additional procedural rights even when other codified sources are triggered and applied
* Where s.7 engaged, the procedural rights under the common and s.7 are generally the same. S.7 been interpreted to guarantee at least the level of protection available at common law.
  + Great deal of overlap between common law and charter guarantee under s.7
* Focus on two sources should not be taken to suggest that other sources of procedural rights are unimportant. In practice the codified sources, enabling statues, regulations, may actually be more important in practice than the CL (common law)
* **General Content of procedural rights at common law**
  + In *Nicholson* and later cases like *Cardinal/Knight* SCC extend situations in which CL duty of fairness would be engaged in relation to admin decision making. The extension of DOF to wider range of decision making was facilitated by making the content of duty flexible and context specific. Before then the DOF or natural justice was engaged, admin decision makers had to provide the full range of procedural rights. Under the old distinction, it was effectively an on off approach. Under the new approach the content of procedural rights owed will vary from context to context. Asa result the content required under DOF ranges on a spectrum.
    - Minimum🡪 max rights
  + Archetype of the fair process is the criminal trial, only full procedural rights will do. Must be informed of offence, tried within reasonable time, all evidence and disclosure met, council representation, written decisions etc..
  + In admin, a lower standard typically suffices
  + Overarching consideration in all cases is that indv. must know the case they have to meet and have the opportunity to meet the case. That is the thrust of the Right to be Heard.
  + For example, oral hearing may not be needed in all admin contexts, sometimes written notice and accepting written submissions is sufficient, sometimes less like a standard questionnaire
  + Sometimes oral hearing required, where it is required, the nature of the hearing may also vary from informal interview with rep of admin decision maker to more formal proceeding more similar to judicial trial
  + **Takeaway: huge variety of way rights to be heard can be satisfied depending on context. The overall concern is the indv. has the right to know the case and opportunity to meet the case against them.**
* Wright - Variation justified due to the context of the decision and the type of decisions vary dramatically, there is no one size fits all for procedural fairness and right to be heard.
* **How to determine content of procedural case: leading case is *Baker 1999 SCC***
  + *Baker* like *Oakes* in terms of importance, pulling together post-*Nicholson* case law determining content of procedural rights owed

#### Baker v Canada: Statutory Context

Note: Immigration laws have changed a lot since 1999!

Case dealt with permanent resident

* “Permanent resident”
  + Not a citizen
  + Granted permission to live and work in Canada without time limits
  + Can apply for citizenship after 3 years
* **S.9(1) of the *Immigration Act***: applications for permanent resident status **must** come from **outside Canada**
* **S.114(2)**: Governor in Council (effectively the fed cabinet) may authorize the Minister (of Citizenship and Immigration) to:
  + (a) exempt a person from a regulation under the Act; or
  + (b) facilitate the admission into Canada of anyone
* S.2.1 ***Immigration Regulations***:
  + The Minister may ‘exempt any person from any regulation… of the Act or otherwise facilitate the admission to Canada of any person **where the Minister is satisfied** that… admission should be facilitated owing to the existence of **compassionate or humanitarian considerations**.”
    - H+C apps

Facts:

* Mavis Baker was Jamaican ctzn who entered Canada and overstayed visa by 11 years. Ordered to be deported and had 4 children who were natural citizens (born in Canada). After 4th child had serious mental health problems and applied for social assistance. Applied for discretionary H+C exemption. Claimed mental health issues would worsen in Canada, had two dependent children, and emotional hardship
* Request denied by senior immigration officer, Officer Caden
* Caden acted on advice of office Lawrence, junior officer who reviewed request.
* No reasons provided, but on request, was given written notes the junior officer gave to senior officer. Caden’s decision based on the notes.
* Baker sought JR (judicial review)
* Argued invalid based on procedural and substantive grounds (review discussion of challenging admin law decision)
* **Focus on procedural aspect of decision**
* Baker argued requisite procedural rights not provided, she argued she or her children and father were entitled to oral interview, notice to children and fathers of interview, right of children and father to make submissions, rights of fathers to make representations
* Authors notes gave rise to reasonable apprehension of bias
* Decision to deny was upheld in JR at Fed Court
* Went to Fed Appeal and was dismissed
* Went to SCC

Issues:

1. Decision faulty on procedural grounds?
2. On substantive grounds?

Held?

* Decision by L’Heureux-Dube J// Iaccobucci adopted bulk of Dube’s decision with exception of relevance of admin law
  + On 1: No on the right to be heard, but yes on reasonable apprehension of bias
  + On 2: Yes
* Our focus here: procedural Stuff

An Aside- Carltona Doctrine

* A curiosity: the authority to refuse Ms. Baker’s H+C request is given to ‘the minister’ pursuant to s.2.1
* But the letter to baker was signed by Immigration Officer ‘M. Caden’ who was not the Minister
  + How did it come to be that Officer Caden could lawfully make decision on behalf of minister?
    - Answer was **Carltona Doctrine**: Under doctrine, where power or duty conferred by statue on a minister, there is an implicit power of Minister to subdelegate to an officer

Setting Content of Right to be Heard at common law

* Dube used the case to explore the purpose of the duty of fairness
* **Content of procedural rights is ‘eminently variable’ and context-specific\*\*\*\*\*\*\*\*\*\***
  + Emphasized existence of duty of fairness and it being triggered does not in itself determine the applicable requirements. The concepts of procedural rights is variable.
* The purpose of the procedural rights
  + “…to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker”
* All analysis should strive to reach the purpose laid out above

**Baker Factors:** Five Factors for determining content at common law:

Determining general content of participatory rights under the right to be heard at common law

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 individuals; and
5. The procedural choices of the agency itself.

* No one factor more important than others, some criteria can support a higher level of procedural protection and others support a lowering one. Courts must conduct a balancing exercise of the factors to place the case on the procedural spectrum and determine the rights that ought to be afforded.

First Factor: The nature of the decision and the process followed;

* Two requirements:
  + The nature of the decision
    - Economic policy requires less protection
    - If decision affects the interests of a single indv. then more protection may be req.
    - Social and economic policy for a large group would require less protection
    - This is in essence the judicial/quasi-distinction being brought into the *Baker* analysis as one of several factors to determine procedural rights owed
  + The process followed in making it
    - IF the process follow prescribed for replicates the sorts of protections we associate with a formal trial, this will indicate greater procedural protections would be required
    - Ex. Two part decision structure (1) investigation and recommendation (2) review by tribunal. The two part process prescribed by statute should indicate a higher level of procedural protection should be provided for.
* 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… resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required…”
* Factors are not used to deny procedural protections altogether, rather define the content of the particular procedural protections

Second Factor: nature of the statutory scheme/terms of the statute;

* Non-dispositive decisions (= less) vs. final decisions (= more)
  + Non-dispositive investigation and report requires less protections, but final would require more, but where adverse decision would result from report with no opportunity for input, a higher level of procedural protection may be required. Higher protection for de facto final investigatory decision
* Statutory right of appeal? = more (particularly reasons)
  + But ‘no appeal procedure’, decision determinative? = more
  + In order to be meaningful, some procedural rights, like written reasons may be required in order to effectively appeal and provide insight to appealing body
  + How to reconcile these two ideas?
    - When referring to existence of stat right of appeal (a type of process would be required, reasons would be required)
    - Whereas when no appeal procedure required, that will just increase the level of procedural protection in a more general sense
* Discretionary exemption (= less) vs general rule (=more)
  + Wright doesn’t agree with this, discretionary exemption may have an important impact on indv. more so than application of general rule itself.

Third Factor: ‘the importance of the decision to the indv. or indvs affected’

* “The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections”
  + This was the consideration that was neglected in *Nicholson* in the quasi-judicial/judicial distinction
* (Non-exhaustive) examples of ‘important decisions’
  + “…right to continue in one’s profession or employment”
  + Deprivation of liberty
  + Removal of children from custody
  + Deportation
  + However decision to deny driver’s license or building permit to build a deck would attract less attention as it is less important and likely to have less of an impact on their lives

Fourth Factor: “The legitimate expectations of the person challenging the decision”

* Expectations not of the decision maker, but the person challenging the decision
* This means a person may have been led to believe they had a right to certain protections, even if that right is not actually afforded. If this belief is legitimate, this will be taken into account when assessing the content under the right to be heard.
* Legitimate expectation of process= more procedural rights
* Legitimate expectation of outcome = more procedural rights
  + But note: not entitled to the outcome itself

Fifth Factor: ‘the choices of procedure made by the agency”

* Courts are conscious of a couple of things
  + Don’t want to place an unmanageable burden on ADMs
  + ADMs may also have a better idea about the ability and feasibility of particular procedural rights
* “(while not determinative) weight must be given to the choice of procedures made by the agency itself and its institutional constraints”
  + Given via the statue, allowing ADM to enact particular rules
* When should this happen?
  + “…particularly when the statue leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances”
* Note: this involves deference to the choices of administrative decision makers as well as legislatures.
  + This is unlike 2nd Baker factor which involves deference to legislative choices alone

General Comments

* Dube cautioned that “the list of factors is not exhaustive”: *Baker*
* “**In determining the content of procedural fairness a balance must be struck**. Administering a ‘fair’ process inevitably slows matters down and costs the taxpayer money. On the other hand ,the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on ‘erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion” *Mavi (2011, SCC), para 40*

|  |  |  |
| --- | --- | --- |
| Factor | Analysis | Result |
| Nature of the decision | Not like a judicial decision at all; involves discretion, multiple factors | **Less Process** |
| Nature of the statutory scheme | An exception to a general scheme, so less, but no appeal route so more | **Less/more process** |
| Importance of decision | Really important- deportation | **More process** |
| Legitimate expectations | No legitimate expectation arose  -argued by Baker that had legitimate expectation that she would be allowed to stay on the basis of gov’t ratifying Rights of Children (keeping children together with parents)  - shows that simple ratification of int’l agmt is not enough to create legitimate expectation | **Neutral** |
| Choice of procedure | The statute gives the Minister lots of flexibility as to how to assess H+C decisions; oral hearings not always held by immigration officers | **Less Process** |

Result of Case

* The duty of fairness owed is not merely ‘minimal’
* But, no hearing is required, ‘particularly because several factors point toward a more relaxed standard”
* What is required
  + No hearing required (several factors point to a more relaxed standard)
  + A Chance to make written submissions, with supporting documentation; and
  + Written reasons for ministers decision were required
    - Here this req. was satisfied by provision of Officer’s notes
    - Reasons did not have to be created by senior officer, where the junior officers reasons were the ultimate basis
* Some factors pointed in favour of more, some in less, this is not unusual, it is quite common under Baker analysis
* The factors were balanced with each other to place procedural reqs on a spectrum
* Paper hearing satisfy right to be heard on the basis on where this case fell on the procedural spectrum

## Procedural Fairness: General Content and Legitimate Expectations Part 2

**Topics For Week 5 – bold is lecture content for this lecture**

* **General Content**
  + Intro
  + Common law- baker factors
  + **Charter, s.7**
* Legitimate Expectations
  + Trigger
  + Content
* Statutory authorizations
* Consequences of a breach of procedural fairness

### The Right to be Heard

* Four questions involved:
  + What **sources** of procedural rights might be engaged?
  + Of these sources, which are engaged? (**Trigger question**)
  + Were the required procedural rights provided (**Content** question)
    - What procedural rights should have been provided?; and \* core of content question
    - Were they in fact provided?
  + Is there a claim for **statutory authorization**? (have some or all of the procedural rights been eliminated or restricted by statute?)
    - Ignore if the Charter is the source; the Charter trumps, unless s.33 invoked
* How common law determines the content of procedural rights owed in the context of common law being triggered

This lecture focussed on third question (assuming you gathered soruces and determined s.7 is triggered) how to we determine at stage 3 of analysis, what particular rights flowing from s.7 are required?

#### Baker v Canada (1999, SCC)

-baker also used in context of s.7 to determine req. of fundamental justice where issue is procedural protection is required to satisfy procedural fairness as principle of fundamental justice. However the application of the Baker framework in this context has proven constitutional because if the procedural choice of ADMs are taken into account, considerations of efficiency and cost are allowed to define content of constitutional guaranteed rights and for some, these considerations are rarely relevant or determinative in defining const. rights and freedoms

**Five Factors** for determining content at common law:

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 individuals; and

5) The procedural choices of the agency itself.

Suresh as example of how to apply Baker framework to determine level of content of procedural reqs. Required in some circumstances

#### Suresh v Canada (2002, SCC)

Facts: Suresh was refugee who applied for landed immigrant status. Minister issued security certificate under s.53(1)(b) to the effect that Suresh was a danger to public. Alleged that Suresh was a member of militant group Tamil Tigers, who engaged in terrorist activities. Securities certificate became basis for deportation order. Had option to make submissions and file material with minister before SC issued, but not provided copy of immigration officer’s report which formed the basis of the securities certificate so he was unable to respond to the points made in it. Immigration officer report was based on material provided by CSIS that wasn’t disclosed to Suresh. Suresh challenged on const. and admin grounds.

Issue: Whether minister had breached s.7 by failing to provide adequate procedural safeguard

Held: unanimously yes, collectively written by court

* The minister breached s.7
* Procedural fairness is principle of fundamental justice
* Applied the *Baker* factors to determine the procedural ‘ingredients of fundamental justice’ for s.7 purposes
* “… the principle of fundamental justice demand, at a minimum, compliance with the common law requirements of procedural fairness.” But the requirements under s.7 are not ‘identical’ to the common law (para 113) Huh?
  + Presumably this means they provide a floor, but not a ceiling?
  + S.7 will not require less, but might require more procedural rights than the common law. The common law is the floor for procedural protection where s.7 is concerned.

|  |  |  |
| --- | --- | --- |
| Factor | Analysis | Result |
| Nature of the decision | Resembles judicial proceeding because it involves particular indv. on particular set of facts, but discretionary (decision involving national security), balancing factors | **Neutral** |
| Nature of the statutory scheme | A ‘disturbing lack’ of procedural protections in the scheme; no appeal; decision is determinative. Need for strong procedural safeguard, lack of parity of treatment is issue as other aspects of act provide higher protection. | **More process** |
| Importance of decision | Really important- deportation with a risk of torture | **More process** |
| Legitimate expectations | International Instruments (para 119). Discussion of legitimate expectation, but court doesn’t say explicitly. In Baker, said ratification of intl treaties they say not rise of legit expectation. However here, it is only reasonable to support right to support procedural safeguard in face of ratifying Act against torture. This creates tension b/w this case and Baker. Is the diff caused by s.7 analysis vs common law? | **More process?** |
| Choice of procedure | Discretion left to Minister to determine procedures; appropriate to respect this in national security cases. Since minister free to choose procedures under act, they must be allowed to evaluate future risk and security concerns, leading to deference to minister. | **Less Process** |

Outcome

* Procedural protections to not require minister to have oral hearing and complete judicial process, in other words we are not at the top end of the spectrum, however it does require more procedure required than the act itself and more than Suresh received.
* As a result, s.7 of Charter held to be infringed.
* A person facing deportation to possible torture:
  + Must get **disclosure**, subject to claims of privilege (like national security) ;
    - Indv. informed of case to be met
  + Must be given the chance to make **written submissions**;
  + Must be allowed to **challenge** the Minister’s information; and
    - Ability to present evidence where issues as to validity arise
  + Must be given **written reasons** for the decision, which must be responsive to issues raised
* **Holding Only where there is a risk of torture/ ‘similar abuses’** and imposes on indv. involved to establish real possibility of torture
* **Suresh shows application of Baker factors in determining content of s.7 where it is held to be triggered**
* Application is controversial because of its consideration of discretion because of the seeming irrelevance of that aspect with regard to constitutional rights. Interesting in later s.7 decision, the court has not explicitly cited the Baker factors and employed some other sort of analysis that employs other factors without recognizing Baker explicitly. The court has not explicitly exclaimed the use of Baker

## Procedural Fairness: General Content and Legitimate Expectations Part 3

**Topics For Week 5**

* General Content
  + Intro
  + Common law- baker factors
  + Charter, s.7
* **Legitimate Expectations**
  + **Trigger**
  + **Content**
* Statutory authorizations
* Consequences of a breach of procedural fairness

**Five Factors** for determining content at common law:

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 individuals; and

5) The procedural choices of the agency itself.

### Legitimate Expectations

* 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 and
    - Ex. Where ADM makes verbal representations about procedure to be followed or an outcome achieved
  + A pattern of conduct
    - Ex. Where Adm has consistently adhered to procedural protections in the past in making a type of decisions
* Two potential impacts on regular common law right to be heard analysis
  + Impact as a trigger for common law procedural rights
    - So, two potential triggers for common law procedural rights
      * The *Cardinal/Knight* trigger; AND
      * Legitimate expectations
        + Operates as alternative to Cardinal/Knight trigger
        + Consider when and where procedural rights engaged even if Cardinal/Knight is not satisfied as legitimate expectations can give rise to procedural rights
        + Can also alter content of procedural rights, giving rise to greater procedural entitlements if a legitimate expectation about a particular procedure to be followed, this LE may increase the amount of procedural rights required.
        + Note that in LE where it is arises in regard to outcome, it will not directly affect procedural rights req. it will fall to court to determine what procedural rights should be accorded in light of a LE of outcome
    - Impact on the content of procedural rights owed

### The Right to be Heard

* Four questions involved:
  + What **sources** of procedural rights might be engaged?
  + Of these sources, which are engaged? (**Trigger question**)
  + Were the required procedural rights provided (**Content** question)
    - What procedural rights should have been provided?; and \* core of content question
    - Were they in fact provided?
  + Is there a claim for **statutory authorization**? (have some or all of the procedural rights been eliminated or restricted by statute?)
    - Ignore if the Charter is the source; the Charter trumps, unless s.33 invoked
* **In context of 4 q, LE can play a role at stage two in determining which sources are engaged and also at stage 3, in determining which procedural rights ought to be provided. Keep both these roles of LE in mind when thinking about these questions**

#### Reference re C.A.P. (1991, SCC)

* (when procedural rights arise from LE and when they arise, what impact do they have on level of procedural protection req.)
* Legitimate expectations (when procedural rights arise from LE and when they arise, what impact do they have on level of procedural protection req.)
  + Can only generate procedural rights (not substance outcomes!)
  + Cannot arise in relation ‘to a body exercising purely legislative functions’ (defined to include ‘a purely ministerial decision, on broad grounds of public policy’)
  + Cannot prevent the federal executive from introducing legislation that amends legislation without provincial consent
* Issue was fed statute that authorized fed to enter interprovincial agmt to share costs of social assistance programs. Fed Statute provided that these agmt could be terminated by fed and prov executive branch via mutual consent or 1 years notices. Statute silent on authority of fed parliament to amend unilaterally. Fed introduced bill to limit its contributions as part of fed deficit reduction plan. Did without prior notice or consultation with provinces. BC challenged the fed decision. Reference required SCC to determine whether the fed was precluded from introducing the bill by virtue of the LE arising from the initial fed statute that the amendments would only be made with consent of prov. Or with notice.
* Held, Sopinka J.
  + NO, the fed was not precluded from introducing the bill by virtue of a LE arising
  + Two argument as to why:
    - First emphasized that LE can only generate procedural entitlements not substantive entitlements as to a particular outcome
    - If argument for consent was accepted, the prov. Would be given a veto over fed legislation allowing them to insist on a particular outcome by refusing to consent to other changes.
    - LE cannot arise as to outcome and req. for consent are substantive outcomes because they allow for insistence on a particular outcome
    - LE cannot arise in relation to a body exercising purely legislative functions and he cited *Inuit Tapirisat*. Restraint on executive branch of gov’t in introducing legislation is the same as a fetter on parliament itself.
    - **Key note: how broad he defines legislative functions. Doctrine of LE had no application to purely legislative functions. Sopinka defined legislative function broadly to involve ministerial decision or legislative authority. This dramatically limits the situations where LE could apply.**
      * IF LE cannot arise in relation to ministerial decisions, then its role in triggering procedural rights where none otherwise exist would seem to be cut back significantly
      * Can generate procedural protections in three situations:
        + 1)Administrative decision maker other than minister that is exempt from right to be heard by virture of broad public policy exception
        + 2) Exemption for non-dispositive decision apply
        + 3) *Dunsmir* exception related to public employees
      * If decision maker involved a cabinet minister and decision is on a broad public policy issue, then CAP suggests legitimate expectations will not rise

#### Canada v Mavi (2011, SCC)

Facts: Case dealt with family sponsors for immigration. CDN citizens can sponsor family members to immigrate to Canada are required to undertake that they will reimbursed and prov. Gov’t if family seeks social assistance during the period of the undertaking. Family members sought to avoid payment either temporarily of permanently of cost of providing social assistance. Argued they were owed duty of fairness that fed govt was in breach of

Held: Stat framework manifests duty to recover, but includes discretion as to how costs were to be repaid. In this context a duty of procedural fairness was owed to family sponsors. The content of this duty was fairly minimal and indeed these minimal req. had been met by the gov’t

1. The duty of fairness applies, but the content of it is ‘fairly minimal’
2. These ‘minimal’ requirement were met

Applying Baker factors a balance must be struck, some factors weigh in favour of more process, but some weigh in favour of less process.

|  |  |  |
| --- | --- | --- |
| Factor | Analysis | Result |
| Nature of the decision | Straightforward debt collection; and sponsors undertake obligations in writing, and understand – or should – the financial consequences | **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 decision | Significant – sponsorship debts can be large, accumulate quickly | **More process** |
| Legitimate expectations | See below | **See below** |
| Choice of procedure | Not addressed |  |

Example of where Baker factors lead situation to be placed on lower end of procedural spectrum.

* What was the gov’t required to do?:
  + To provide notice to a sponsor
  + To afford the sponsor an opportunity to explain in writing, any circumstances that militate against collection
  + To consider any relevant circumstances; and
  + To notify the sponsor of its decision
* However, reasons are NOT REQUIRED
* Shows requirements of lower end of spectrum, on the lower end we need notice, written explanation, and notice of decision

Back to legitimate expectations- when do they arise?

* “where a government official makes representations within the scope of his or her authority to an indv. 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 gov’t may be held to its word, provided the representations are procedural in nature and do no conflict with the decision maker’s statutory duty. **Proof of reliance is not a requisite**.”
* Passage reveals two things
  + Representation from Adm is sufficient to raise LE if clear, unambiguous and unqualified
  + Proof of reliance is not required
  + Another important part is that the representation being made must be within the scope of the authority of the particular indv. If outside the scope, a LE will not arise
* When are gov’t representations sufficiently ‘clear, unambiguous and unqualified”?
  + ‘…a gov’t representation will be considered sufficiently precise for purpsoses of the doctrine of LE **if had they been made I nthe context of a private law contract, they would be sufficiently certain to be capable of enforcement”**
    - We see a private law contract level of specificity be imported into admin law in context of LE
    - **Undertaking signed by sponsors indicated govt would not take enforcement action if default source is result of abuse or in other cirucmstances**
    - **This wording created LE, it wasn’t open to gov’t to proceed without notice and without permitting sponsors to make case for deferral or other modification of enforcement procedures.**
* Why is this standard satisfied here?
  + See para 72, noting the language of the undertakings, discussed immediately above

### The Precise Role of Legitimate Expectations

* If the LE arose in relation to process, does this create an entitlement to (at least) the particular process?
  + If so, does it make sense to treat LE as merely on factor among many as Baker does?
  + Isn’t the LE 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, it is 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?
* LE even if giving more process, may be counter balanced by other Baker factors, or if LE acknowledged, then maybe LE sepearte from Baker

#### Canada v Mavi (2011, SCC)

* What does Mavi say about this (above) issue?
  + Treats LE separately from the Baker analysis
  + Also this
    - “**Where a gov’t official makes representations within the scope of his or her authority to an indv. about an administrative process that the gov’t will follow, and the representations said to give rise to the LE are clear, unambiguous and unqualified, the gov’t may be held to its word**, provided the representations are procedural in nature and do not conflict with the ADMs statutory duty. Proof of reliance is not a requisite
  + Suggests an entitlement, if relevant, to the particular process?
    - But, LE here related to an outcome, not a process, so case doesn’t resolve clearly.

#### Agraria v Canada (2013, SCC)

Facts: Agraria was Libiyan ctz and resident of Canada found to be inadmissible to the country on national security grounds due to membership to ‘alleged’ terrorist group (as classified by Citizenship and Immigrataiton Canada). Immigrations and Refugee Act allows for relief which Minister can grant if indv. presence in the country is not contrary to national interest (national interest not defined). Minister had prepared no binding guidelines outlining process and grounds for acceptance. Agraria applied and app was denied. Minister decision focussed exclusively on group links. Applied for Judicial review. Agariria argued the guidelines had created a LE both that a particular procedure would be followed and that a particular outcome would be reached

Issue: Did a LE arise? For procedure and outcome

Held: Yes, but that LE that arose were fulfilled (Lebel J)

* Here guidelines created clear, unambiguous, unqualified procedural framework. The process that was to be followed described in para 98 and as a result Agraria can expect that his app would be dealt with in accordance with the process set out.   
  Why were guidelines sufficient to create LE?
* Guidelines published by citizenship and immigration Canada and were used by the relevant official in the decision maker and they created competent procedural code for dealing with an application.
* Rejected LE as to outcome because the minister implicitly considered the relevant factors in making the decision
* A LE re process arose from a CIC guideline, but was satisfied on the facts

Takeaways:

* LE are somewhat difficult to generate as demonstrated by CAP but not impossible as shown by Mavi and Agaira
* From Agraria, no binding guideline can impact procedural process itself

Addressing role of LE in context of Agraira (discussed previously above)

* Agraira on this:
  + “**This doctrine (LE) 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 common law duty of fairness.** If a public authority has made representation about the procedure it would 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 indv., **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**”
  + “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 LE as to process are determinative.
* This decision does not resolve the whole issue and sends conflicting signals on the precise role of LE

## Procedural Fairness: General Content and Legitimate Expectations: Part 4

**Topics For Week 5**

* General Content
  + Intro
  + Common law- baker factors
  + Charter, s.7
* Legitimate Expectations
  + Trigger
  + Content
* **Statutory authorizations**
* **Consequences of a breach of procedural fairness**

### The Right to be Heard

* Four questions involved:
  + What **sources** of procedural rights might be engaged?
  + Of these sources, which are engaged? (**Trigger question**)
  + Were the required procedural rights provided (**Content** question)
    - What procedural rights should have been provided?; and \* core of content question
    - Were they in fact provided?
  + Is there a claim for **statutory authorization**? (have some or all of the procedural rights been eliminated or restricted by statute?)
    - Ignore if the Charter is the source; the Charter trumps, unless s.33 invoked

Statutory authorization is the fourth question in right to be heard. Consider whether claim for SA considering whether all or some of the procedural rights you have claimed have been restricted or limited on the basis of statute.

### Question 4: Statutory Authorization

* Biggest issue- interaction b/w enabling statutes vs common law
* Courts usually reluctant to find CL DOF including RTBH to be excluded either explicitly or by necessary implication
* 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) para 39
* If statute is silent, the duty of fairness will apply (if triggered)
  + Silence in statute will not be interpreted as excluding
* If a statute is not silent, apply the test
  + question of whether procedures provided exclude the common law by necessary implication
* Explicit req. in relation to particular procedural right might be read to exclude common law requirements
* Examples
  + *Singh* (common law excluded)
    - Statue overrides and displaces common law
  + *Nicholson* (common law only partly excluded)
    - We see that CL not completely excluded, stat rights in relation to 1 category persons didn’t operate to exclude CL entirely in relation to another category of persons. CL would not be implied to entitle Nicholson to the same level of protection to the first category. The statute establishes a ceiling.
* Need to look at the nature of the procedural protection provided and the decision being made. If statute sets out clear procedural guidelines, that may be interpreted to displace the CL by necessary implication. But if set out for another category of persons, but not the category at issue, there may be procedural protections available
  + Interpretation and fact dependent, no overarching rule
* **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
  + Must check enabling statute

### Result of Procedural Defects

* General rule: Invalidations
  + “Denial of the right to a fair hearing (will) render a decision invalid,” whether or not it appears a different decision would have resulted:
    - Not for a court to deny relief on the basis of specfulation had the appropriate safeguards been observed
    - *Cardinal v Direcotr of Kent Inst. (1985,SCC)*, para 23
* But see:
  + *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board (1994, SCC)* (“**exceptional**” exception)
    - Court said it may be justifiable to disregard breach of natural justice where demerits of claim are such that it would be hopeless. Court refused to render decision in breach of procedural fairness on the basis it would be practical and non sensical because the particular Adm would have no alternative except to deny the application in question.
    - Court emphasized the circumstances in which the decision would be upheld while in breach of procedural fairness are exceptional.
    - Cardinal is good law and the Mobil exception is to be rare as procedural defects generally render a decision invalid
* 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
    - Factors to consider:
      * Likelihood that reconsideration would lead to diff outcome
      * Even if outcome reached is likely the same, or if seems that outcome is same whether there is some benefit to client to get ADM to change procedures and would benefit from a different procedure followed in future cases. (multiple kicks at the can?)

# Procedural Fairness: The Right to be Heard – Specific Content: Pre-Hearing and Hearing Stage

### Specific Content

* Examples of possible procedural rights:
  + 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
* The basic standard where the right to be heard is engaged is that an individual’s whose rights, privileges or interests are engaged by adminsitrative decision-making is **entitled to know and to meet the case.** How to satisfy this varies depending where the case falls on the spectrum which will depend on the application of the *Baker* factors.
* The top of the procedural spectrum: the criminal trial is the gold standard of procedural fairness. The procedural standards required in the criminal justice context are not required in the adminsitrative context. However, where some cases fall at the top end f the spectrum then the procedural rights owed are close to those that we would see in a criminal trial
* The bottom end of the procedural spectrum: Where applying the *Baker* factors it is held that you are at the bottom, then you are entitled to some sort of notice of the decision to be made along with an opportunity to have and provide information that will be relevant to the ADM as it makes it’s particular decision (*Mavi)*. Where a case falls at the bottom of the spectrum, it is typically the case that the ability to have and to provide information will happen in writing, not orally through a full oral hearing.
* There is flexibility, not just between particular situations as to where they fall on the spectrum, but also within particular situations as to the particular rights required. Notice is usually required where the right to be heard Is triggered at common law but what is required to satisfy a notice requirement will also very depending on where the situation falls in the procedural spectrum. For a situation at the bottom of the spectrum, it will often be able to satisfy the notice requirement with more flexible notice details but a case at the top end will typically involve a more detailed, fulsome notice being required.
* Precedent is also important in determining where a situation falls on the spectrum so you don’t always have to recreate the wheel

## Pre-Hearing: Notice

* If the right to be heard is engaged, then notice is usually required of the decision to be made by the ADM even if you are on the bottom of the spectrum. This is a bare minimum entitlement because without notice the other procedural rights cannot be exercised effectively or even at all
  + i.e. a person’s ability to participate in a hearing will obviously be undermined if they are unaware of the time and date of the hearing and the issues that may be addressed during the hearing
* the purpose of a notice requirement is to alert persons’ whose interests might be affected by the decision so that they can take steps to protect their interests
* General common law rule
  + “Notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present proofs and arguments, and to respond to those presented in opposition”: D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*  (1998+), 2000
  + “Adequacy” is context-specific
    - The requirements will be more rigorous the nearer the decision falls to the top end of the procedural spectrum
      * i.e. in a case involving professional discipline (such as an allegation of malpractice before the Law Society which involved potential threats to career and reputation), general notice will generally be required and provided so the allegations of wrongdoing will be laid out in a document that clearly specifies the nature of the wrongdoing alleged, reference to the particular provisions of the statutory regime being relied upon as well as any possible consequences of an adverse finding
        + The notice doctrine will generally contain full details of the process to be followed in making the particular decision along with a statement of the person’s procedural entitlements throughout the process
        + This material will usually be served personally on the person if possible
      * i.e. – at the bottom end of the spectrum – a public hearing into a matter like hydro rates that may affect the public at large or at least a broad section of the public. At this lower end, less extensive notice will usually be required. This means that not everyone in the group will often need to be served personally and notice may come in the form of a broad public announcement online or in a newspaper.
        + The proposed action will often be described in fairly general terms with a description of how those potentially affected can acquire further information and have an opportunity to be heard
  + Requirements may be prescribed in statute/rules
    - Where they are, these requirements MUST be satisfied if they are binding and probably should be satisfied even if it is in a guideline or policy that is not binding
    - However, where the requirements of notice are not set out in these sources, it will be the common law that determines the requisite notice requirements
  + Obligation to provide notice is ongoing
    - If a new issue arises after notice has been provided, the party will need to be notified of the new decision to be made. If people are taken by surprise by the direction of the hearing their ability to participate is compromised unless given notice and time to respond

### What Form Should Notice Take?

* Options:
  + Written; or
  + Oral
* Written notice is the “norm” at common law even if written notice is not strictly required it may simply be advisable for ADM’s to provide it to avoid any dispute as to whether appropriate notice was given under the circumstances

### How Notice is Given?

* Generally, personal service unless the context suggests that notice should be given in come other way
  + Personal service is notice that is personally given to the impacted individual
  + Ordinary mail may be utilized to effect or achieve personal service but to be certain that a party received notice, it may be advisable for an ADM to send notice by registered mail or for the notice to be physically delivered to the impacted person
* Exception:
  + For large, indefinite groups, public service may be permitted (generally in these situations we will be closer to the bottom of the procedural spectrum). Public service can include advertisements in newspapers or on the web
    - But notice must delineate the area with sufficient clarity so that the individuals affected can determine if they will be impacted by the decision: see *Re Central Coalition and Ontario Hydro* (1984, Div Ct) (“Southwestern Ontario” insufficient in the circumstances)
      * This was a case dealing with the location of hydro lines and in the notice given, which was a public notice, the geographical marker “Southwestern Ontario” was used. This was held by the court not to be sufficiently clear to delineate the geographical area that would be impacted by the decision. The description was potentially misleading in relation to the relevant geographic area which would be the are around Barrie
      * Compare *Re Joint Board* [1985, Ont CA] (“Eastern Ontario” sufficiently clear to delineate the area)
        + Here, the term “Eastern Ontario” was held to be sufficiently clear to delineate the area that might be impacted by the proposed decision and no one argued otherwise.
      * What is appropriate will depend on the particular common usage and understanding in the community of articular geographical markers. “Southwestern Ontario” not being understood to be sufficiently clear to incorporate the area around Barrie but “Eastern Ontario” being understood to be sufficiently clear to capture a particular geographical area.

### When Notice Must be Given?

* Must provide adequate time to allow a response
* What is adequate will vary with context; look at:
  + The nature of the interests involved; and
    - More important interests are likely to require a longer period of notice
  + The nature of the issues involved
    - Complex issues are likely to require a longer notice period while less complex ones will require a less extensive notice period
    - i.e. matters which are complex or which may significantly affect important interests may require advanced notice.
* Where notice is inadequate because it is achieved shortly before the proceedings are to begin, the defect can be cured through an adjournment of the particular proceedings that is long enough to allow the impacted party to prepare

### What is the Content of the Notice?

* 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?; and
    - This would include the allegation of wrongdoing involved and the statutory provisions underlying it
  + How is the decision to be made?
    - What is the procedure to be followed in making the decision?
* Note: what is required to satisfy and answer these questions will vary in the context

#### R v Ontario Racing Commission, ex parte Taylor (1970, Ont. H.C.), aff’d (1970, Ont. C.A.)

**Facts:** Taylor was a horse trainer. A veterinarian gave one of Taylor’s racehorses medication that, unbeknownst to him, contained a prohibited substance He was questioned by stewards from the Ontario Racing Commission, the Ontario ADM that governs the racing industry, about a positive test for the prohibited substance. The stewards who investigated the positive tests showed him the ruling which was that the horse was not to race again until a case had been considered by the Racing Commission. After a hearing by the Racing Commission Taylor was suspended as a horse trainer and fined. He challenged he sufficiency of the notice that he had been given of the hearing, arguing that it was not clear from the notice itself that it was actually his conduct that was going to be at issue in the hearing which might then in turn lead to his suspension. The content of the notice here was that it advised Taylor that an investigation and ruling of the stewards had been referred to the Commission and placed on the agenda for September 2nd, that the stewards had made an investigation into the positive result of a horse trained by Taylor and that “the matter has been placed on the agenda for this particular date and your presence is required to provide an explanation for this positive test. You have the privilege of being represented by counsel t this hearing and introducing witnesses on your behalf if you wish.”

**Prior Proceedings:** High Court: notice insufficient to alert Taylor that the hearing would look into his actions and the possible consequences of a possible finding against him (i.e. suspension)

**Held:** Ontario Court of Appeal: notice sufficient but better if had:

* Set out that the hearing would concern Taylor’s behaviour; and
* The possible consequences of the hearing

**Reasons:**

* “…whether a notice given in any particular case is sufficient depends entirely on the circumstances of the case.”
* Court emphasized that a man of Taylor’s “knowledge and expertise” must have relaxed that he could be adversely affected by the decision of the Commission

**Key Takeaway:**  Notice how clearly context specific the analysis is and how the notice requirements are clearly tailored to the particular context so much so that the notice requirement is held to be satisfied because Taylor was held to be an individual that has knowledge and expertise to know enough that his behaviour would be at issue and the decision might have implications for him.

## Pre-Hearing: Delay

* Two potential impacts of administrative delay:
  + Undermining the ability to mount a case; and
  + Other forms of prejudice (e.g., financial and reputational harm)
* Can relief be granted for either/both of these?
  + Yes for both, but…

#### Blencoe v BC [2000, SCC]

**Held:**

* Bastarache J (majority of 5)
  + No breach of s.7; liberty and SOTP not triggered
  + No remedy at common law for the delay either. The delay was not sufficient to give rise to a denial of fairness or an abuse of process warranting the granting of a remedy
* LeBel J (for dissent of 4)
  + Delay engaged common law principles
  + No need to consider s. 7 – and undesirable to do so!

**Reasons:** Bastarache J (majority)

* 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 the fairness of the hearing or the ability to respond to the case to be met (lost witnesses or evidence, etc.)
    - There actually needs to be clear evidence that the ability to respond has been undermined
  + Here, this has not been established by Blencoe
    - Blencoe asserted that 2 witnesses died and the memories of many witnesses might have faded. The court’s response was that these were mere “vague assertions” and that proof of prejudice had not been demonstrated to be of sufficient magnitude to impact the hearing’s fairness.
* 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?
    - “Where 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
    - “…few lengthy delays will meet this threshold”; the delay must have been “unreasonable or inordinate”
      * The threshold is set very high. The delay must have been so oppressive as to taint the proceedings for it to meet this threshold
    - 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, although the Commission took longer than is desirable to process the complaints, the delay did not rise to the level of an abuse of process
    - Why?
      * There was no extended period without activity during the proceedings
      * The various steps necessary to protect the respondents in the context of human rights complaints take time and so more lengthy proceedings periods are to be expected in this adminsitrative context
      * Blencoe did not actually press for earlier dates
      * Blencoe was, himself, responsible for part of the delay since he brought forward allegations of bad faith. The Commission could not be held responsible for the delay that resulted from Blencoe’s decision to bring forward these allegations.
      * Other data drawn from other human rights Commissions show that these complaints took time, noting that the time to process the complaint here was not out of line with the processing time taken in other jurisdictions dealing with similar complaints

**LeBel J (dissent – 4 judges)**

* LeBel held that the delay was unacceptable
* Three factors relevant to complaints of adminsitrative delay
  + The time taken compared to the inherent time requirements of the matter, including legal complexities and factual complexities including the need to gather evidence;
  + The causes of delay beyond the inherent time requirements; and
    - This might include whether the affected party contributed to or waived parts of the delay and whether the adminsitrative body used as efficiently as possible those resources it had available to it
  + The impact of the delay
    - The prejudice and other sorts of harms of real people impacted by the ongoing delay
    - This may include a consideration of the efforts by various parties to minimize various impacts by providing information or interim solutions
* Here, applying these factors, the delay was unacceptable. The appropriate remedy was not a stay, but an order to expedite the case
  + Looking at the first factor, the case falls within a relatively less complex legal category and there was little factual complexity. Despite this lack of complexity, the Commissioner was “slow at every step of the process”
  + Referring to the second factor, the court conceded that Blencoe caused some of the delay that resulted but in doing so, he did not become responsible “for the sheer inefficiency of the Commission in dealing with the matter”. For example, the Commission could not explain a 5-month delay where nothing seemed to happen.
  + Finally, court said that while the delay did not undermine Blencoe’s ability to respond to the allegations, he and his family had suffered serious harm in other ways including a loss of reputation and career
* LeBel said that where there is an unacceptable delay, a stay of proceedings would be inappropriate, and the Committee was not to stay the proceedings in this context but rather to make an order to expedite the case. Why?
  + There were important interests apart from those of the person complaining of the delay that had to be considered (such as the 2 women filing the claims of sexual harassment). A stay would deprive the complainants of the right to have their complaints heard. The proper remedy was an order for an expedited hearing coupled with a costs award.

**Significance:** This case sent a message that it is going to be difficult in other settings where procedural standards are not as robust to justify intervention on the part of a court due to delay. It seems to be a high threshold to establish delay giving rise to a remedy from a court on judicial review.

## Hearing Stage

### What is a “hearing”?

* Oral hearing
  + Might be more informal
  + Refers to a face to face encounter with the ADM or their delegate and where relevant, any other party or parties
  + Often demanded but are not always required in the adminsitrative context
  + There are some good reasons for not granting them such as the cost and delay that would result
  + Generally provided where a stricter standard of procedural safeguard is thought to be required. They may or may not resemble a formal court like hearing.
* Written hearing
  + Might be more formal
  + Takes place purely in writing, with no opportunity to meet in person with the ADM or any other party
  + Often has few of the trappings of a formal court hearing
* Electronic hearing
  + Might be formal or informal
  + Takes place through an electronic medium

## Hearing Stage - Oral Hearings

* When are they required?
  + If the enabling statute governing the ADM requires one
    - Where this is the case an oral hearing will have to be conferred
  + Where oral hearings are required depends on the context and circumstances but there are some circumstances where courts are more likely to hold that oral hearings are required:
  + Common law?
    - More likely required if *Charter/Bill of Rights* provisions are engaged
      * This demonstrates the weight that the courts are placing on the interests at stake (i.e. life, liberty and SOTP)
    - More likely required if credibility is at issue
      * Expressed by Wilson in *Singh*. This reflects the traditional view of the common law that decision-makers need to be able to see and hear from a person face to face to make informed decisions about their credibility. But, even here, this isn’t a firm requirement.
  + *Masters v Ont.* (1994, Div Ct): no oral hearing was required, even though credibility was an issue; note on investigative stage
    - Case involved a complaint of sexual harassment against Masters who was Ontario’s Agent General in NYC. The court relied in part on the fact that the stage in relation to which an oral hearing was argued for was investigative in nature and also that the final decision to reassign Masters to another job was made directly by the Premier. The concern in this case is that the requirement to confront one’s harasser and be subject to cross-examination will act as an unacceptable obstacle to formal complaints.
  + *Khan v University of Ottawa* (1997, Ont CA): an oral hearing was required, credibility was the key issue, and impact was significant
    - Khan was a law student at University of Ottawa and she sought judicial review following the dismissal of her appeal from a failing grade. The exam she failed was Evidence. She didn’t do well on her other exams but if she had passed her Evidence exam she would have passed her year in law school. Her appeal was considered and rejected first by the Faculty of Law by the examinations committee and then on appeal by the university’s Senate Committee. The issue was whether the appellant had submitted a booklet at the end of the examination that subsequently went missing. The appellant received no notice of the Faculty of Law’s Examinations Committee meeting and was not given an opportunity to appear before it. She appealed the Law Faculty’s decision to dismiss her appeal in writing to the Senate Committee but did not appear before that Committee. The issue that arose on judicial review was whether the Faculty of Law’s Examinations Committee denied her procedural fairness by failing to grant her an oral hearing. In this case, the CA divided 5-2. Laskin said that an oral hearing was required by the Faculty of Law’s Examinations Committee meaning an opportunity to appear in person before the Committee and an opportunity to make oral representations to it in order to assess her credibility. An oral hearing was required because of the impact of the decision. A university student threatened with the loss of an academic year because of a failing grade is entitled to a high level of procedural protection because the effect of a failed year may be very serious delaying and maybe even ending an entire career. Laskin also placed importance on the fact that an issue of credibility w
    - as involved. The Committee accepted that the failure to grade a 4th booklet would have entitled the appellant to rewrite her evidence exam and thus, the existence of this 4th booklet was the central issue. The only direct evidence of this booklet was the appellant’s word and the decision to deny the appeal demonstrated that the Committee doubted her credibility as to the booklet’s existence. The Committee should not have made this adverse finding about her credibility without the opportunity for an oral hearing to allow her to appear face to face so the Committee could have assessed her credibility in person
    - This decision shows that if a decision will have a significant impact and turns on findings of credibility, an oral hearing is more likely to be required.
    - The dissent in this case highlighted a few reasons why an oral hearing should not be required:
      * The burden this would place on the university to hold oral hearings in these situations
      * The evidence showed that the appellant was afforded the opportunity to make submissions and took advantage of the full opportunity to do so
      * They denied that an issue of credibility was involved. There were no allegations that the appellant was dishonest.
      * Suggested that the majority overplayed the potential impact of the decision. The appellant, at most, would be required to prolong the completion of her education by 1 semester until she had satisfied the requirements for graduation from her law school.
  + Other examples:
    - *Nicholson* – Laskin left it up to the Board of Commissioners of Police to decide whether an oral or merely a written hearing was required in determining whether Nicholson was properly dismissed as a police officer
    - *Baker-* Court held that an oral hearing was not required for humanitarian and compassionate decisions in the immigration context. It could not be said that an oral hearing is always necessary to ensure a fair hearing and the consideration of the issues evolved and that the flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. Baker was provided the opportunity to put forward in written form through her lawyer, information about her situation and this was enough given that several of the *Baker* factors pointed to a more relaxed standard of procedural fairness to satisfy the requirement of fairness
    - *Mavi –* This case dealt with the collection of debts from family sponsors. No oral hearing was required.
    - *Suresh* (s. 7 *Charter* context) – Even under s.7, an oral hearing was not held to be required in determining whether a deportation order should be issued notwithstanding that Suresh might be facing deportation to torture. The national security context in this case was thought to weigh against a finding of the case falling at the top end of the procedural spectrum.

## Hearing Stage- Disclosure of Information and Evidence

* Disclosure relates to the requirements to provide information relating to a particular adminsitrative decision to the parties and others affected by the decision.
* Generally speaking, where the duty of fairness and the right to be heard is triggered, a party is entitled to adequate disclosure of the case to meet because effective participation requires that those affected are aware of the issues and the nature of the evidence. Without that, they would be forced to speculate and might not only may their speculation be off base, but it may slow down the process
* Disclosure is usually required
  + *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”
* Key issues is usually how much disclosure is required in the circumstances to satisfy the right to be heard
* It can be misleading because disclosure must usually be made before a decision has been made and before the hearing has been held if possible. So, in some cases, disclosure will actually accompany the initial notice of a decision which has to give sufficient particulars of the decision to be made. In other cases, disclosure might be provided separately but prior to a decision being made
* How do you know when disclosure is required?
  + There will often be requirements in statute or an ADM’s procedural rules or guidelines setting out the timing for disclosure which may or may not accompany the notice itself. Even if the timing is not defined in this way, it must usually be given, as a general rule, far enough in advance to enable a particular party to know and meet the case
* The information that might be at issue can take a variety of forms such as:
  + Information and evidence in the classic sense whether it is written documentary evidence or orally provided evidence or information
  + The names of complainants which may be withheld in some cases
  + The names of witnesses who will testify
  + The essential issues to be considered in relation to the issue
  + The types of actions that may be taken
* Two major caveats regarding the statement that disclosure is always required in the adminsitrative context
  + The extent of the disclosure that is required by particular ADM’s varies with context
  + Disclosure may be denied, or restricted, due to competing considerations or privilege
    - There are various exceptions to disclosure that may be engaged. Even though it is generally required, in some situations it may not be required in whole or in part due to competing considerations

**First Caveat**: the extent of disclosure required varies

* It’s all about the context (yes, context again)
* In civil proceedings, the bar for disclosure is high. The *Rules of Civil Procedure* require that all relevant evidence in either parties possession be disclosed whether or not the party intends to rely upon it in a later trial
* In criminal proceedings, the bar for disclosure is also high. The SCC’s decision in *Stinchcombe* requires the court to disclose to the accused all relevant material in their possession which includes not only the Crown intends to introduce into evidence but also evidence that is relevant that it does not intend to introduce
* In *May*, the SCC affirmed that the criminal law standard does not apply to adminsitrative decision-makers and it is limited to the criminal context. However, it also said disclosure is a general requirement in the administrative context. The extent of the disclosure falls along a spectrum.
* Think of a spectrum of disclosure (yes, a spectrum again!)
  + *Verbal* notice of the decision, along with a summary of the gist of the facts
    - This is if it falls on the bottom of the spectrum when applying the *Baker* factors
  + *Written* notice and a summary of the facts
  + *All information that will be “relied upon” by (put to) the ADM*
    - This is typical (as pay *May* [2005, SCC])
  + All relevant information, even if not relied upon by (put to) the ADM
    - This is where it would fall at the top of the spectrum when applying the *Baker* factors
    - This would be closer to the standard that applies in the civil and criminal contexts
* The general requirement is that disclosure for the case to be met which generally entails that all information that is, or will be, put to the ADM be disclosed
* Information must be relevant for disclosure to be required. But, not all relevant information must necessarily be disclosed.
  + Relevance is a minimum(but not necessarily sufficient) threshold to be crossed for disclosure to be required
    - Irrelevant information need not be disclosed under any circumstances
    - If information is relevant, it MAY need to be disclosed depending on the extent of disclosure required in the situation and the nature of the relevant information involved
* How much disclosure is required will turn on a variety of considerations
* Some considerations for deciding extent of disclosure: -**not a strict test**
  + Role of the ADM (nature of the decision they are making)
    - More disclosure will be expected where the role of the ADM is to adjudicate individual disputes on a particular set of facts
    - Less disclosure will be required where the particular ADM is managing competing interests or making broader policy decisions that impact a larger group
  + Extent of the formality prescribed for the proceeding in the statute
    - An ADM that is required to conduct a formal court like proceeding may have greater disclosure obligations than those that are permitted to conduct more informal adminsitrative proceedings
  + The nature of the interests at stake
    - A person whose interests will be directly affected by the decision will often be entitled to greater disclosure than an intervener in a decision
    - If important interests are at stake for that individual (i.e.. Their liberty, property or right to practice a particular profession), more disclosure will generally be required
  + The knowledge and expertise of the party
    - If there have been ongoing discussions and the issue have been clearly defined (i.e. from a formal prior investigative stage), it might be acceptable to assume knowledge of the issues involved and the level of disclosure required might be lower
    - If the particular party has a level of expertise relating to these issues then the level of disclosure might be less (especially if the information relates to things that would be thought to fall within the expertise of the particular type of party involved)

**Second caveat:** Disclosure may be denied, or limited:

1. Due to competing considerations
   * Information is collected by the ADM from outside sources
   * Where an individual is seeking to identity of sources (informants)
   * Commercially sensitive information
     + Where an ADM has collected information from a business or other parties (i.e. competitors) and there is concern about releasing that information because it is commercial sensitive
   * Internal information created by the ADM itself (e.g., staff reports)
     + When an ADM has material because a member of the ADM has created it themselves
2. Due to claims of privilege (not addressed in this course)
   * These might be statutory claims of privilege- privileges that arise from statute or well established historical privilege recognized under the common law such as solicitor client privilege

*Information from Outside Sources*

* One situation where disclosure may be resisted due to competing interests is where information is collected about an individual by the ADM from an outside source.
  + i.e. medical reports prepared by a doctor
* Arguments for disclosure here:
  + Individuals have a right to know what governments know about them even if the information comes from an outside source
  + Disclosure would increase the effectiveness of the participation of the individual involved enabling them to respond to the information
  + Disclosure would improv the quality of the information provided because the individual could expose weaknesses in it
* Concerns might arise about whether disclosure will:
  + Harm the individual involved
  + Encourage litigation
    - If medical records were disclosed, individuals may seek to pursue litigation against their doctors
  + Compromise the quality of the information provided
    - Worried about the possibility of disclosure from outside sources being vague in the information they include in their reports. Their candid views may be undermined and sacrificed.
* Examples
  + *Re Napoli and Workers’ Compensation Board* [1981, BC CA]
    - **Facts:** Involved the appeal of a decision granting Napoli limited worker’s compensation benefits of 5%. The BCCA said that the provision of summaries of information contained in Napoli’s worker’s compensation file (which include information in relation to his previous claims and medical/expert reports) was insufficient to satisfy the rules of natural justice.
    - **Held:** BCCA said the contents of the file itself should have been disclosed. The summaries involved alleged, without identifying the particular source, that Napoli was making up his injury and the court held that without full disclosure, Napoli would not have been able to counter this allegation because he did not know the source of it.
    - **Reasons:** The court rejected the argument that disclosure may lead doctors to doctor their results. On the contrary, disclosure of this type of information would be more likely to encourage doctors to act with greater care and diligence.
  + *Re Abel* [1981, Div Ct/Ont CA]
    - **Facts:** This case involved the detentions of those being detained after being found NCRMD. Ontario Div. Ct. held that the Advisory Review Board who made recommendations to the Lieutenant Governor about whether to release detainees erred by not considering whether to disclosure to Abel the reports created and submitted to the psychiatric institution to which Abel was detained. The Board claimed that it actually just outright lacked the jurisdiction to disclose these reports. However, the court said that this mean the reports must necessarily be released since there may be circumstances militating against full disclosure. The Board could, in some situations, refuse disclosure where the reports would cause grievous harm to the administration of the hospital and the patient. The court send this matter back for reconsideration. This decision of the Div. Ct. was later affirmed on appeal.
    - Compare *Re Eaglestone and Mosseau and Advisory Review Board* [1983, Div Ct]
      * Here, the Divisional Court refused to interfere with a Board decision refusing to order disclosure. It emphasized concerns about the safety of the authors of the relevant reports and the health of the patient. However, again, disclosure was not refused entirely. Disclosure was permitted to the particular patients legal counsel on an undertaking by the legal counsel that the information would not be revealed to the patient himself in order to allow for some level of disclosure.

*Outside Information and National Security*

#### Charkaoui v Canada [2008, SCC]

**Facts:** Charkaoui was a PR who was designated a threat to Canada’s national security in a security certificate. He was then detained by the government. Legal proceedings were commenced by Charkaoui before a federal court judge to assess the legality of the security certificate and counsel for the government, as part of these proceedings, that they failed due to an oversight to disclosure to Charkaoui a summary of 2 interviews he had with CSIS officers in 2002 before his initial detention. After receiving this information, Charkaoui requested that he be provided, not just the summary of the interviews but the complete notes of the interviews. The judge was then informed by the government that these notes had been destroyed pursuant to an internal CSIS policy which required the destruction of all notes after they had bene transcribed into a report. Charkaoui alleged that his right to procedural fairness had been violated. He sought a stay of the proceedings as well as a quashing of the security certificate under which he was held which would have led to his release.

**Issue:** whether there was a duty of disclosure from CSIS at issue in these proceedings?

**Held:** Le Bel and Fish JJ – Yes, there was a duty of disclosure. Court held that the liberty and security interests of Charkaoui protected under s.7 were triggered due to his detention. In addition, they held that fundamental justice imposes a duty of disclosure attuned to bona fide national security concerns.

**Reasons:**

* Disclosure “beyond the mere summaries…. provided by CSIS to the ministers and the designated judge is required” to satisfy s. 7
  + Was not just enough to keep and disclosure the summaries, all of the information was required
* The proper procedure
  + CSIS must retain all of its operational notes, not “mere summaries”, and to disclosure them to the minister and designated judge; and
  + The designated judge should exclude any evidence where disclosure might post a national security threat, and summarize the rest for the person held under the security certificate
* Why are the full notes and not just the summaries required?
  + Access to the original documents is useful to ensure that the value of evidence can be assessed effectively. Otherwise, the designated judge has access only to summaries prepared by the state which means that it will be difficult to verify the allegations
* Here, this duty of disclosure was breached, but no additional remedy was required beyond affirming the duty of disclosure
  + By adjourning the hearing and granting a postponement to allow Charkaoui to prepare his testimony and defense, the judge had averted any prejudice that may have resulted from the delay in disclosing the evidence. Additionally, this was an appeal from an interlocutory judgement, not a final decision, and it would be premature for the court to determine how the destruction of the notes affected the reliability of the evidence. This issue should be left for the judge to consider in making the ultimate ruling.

**Takeaway:** The court recognized a duty of disclosure in the national security context due to the nature of the interest at stake and the potential consequences of the decision. The court rejected claims that the duty of disclosure shouldn’t be recognized because the decision was merely adminsitrative, not criminal, in nature. Court is concerned to protect *bona fide* national security concerns, precluding disclosure to the named person unless the judge has confirmed it is ok to do so. The case also raises concerns about protecting information relating to national security from disclosure. Implicit in the case is the fear that those that provide information to CSIS might be revealed, jeopardizing lives relationships and national security. However, this shows another situation where disclosure might be made but limited in order to protect competing interests.

*Protecting the Identity of Sources*

* These situations raise concerns about competing interests because on the one hand, there is the right of the individual to know the identity of those disclosing information about them so that they can challenge the accuracy of the information and highlight any ulterior motives. On the other hand, individuals might be discouraged from coming forward if their identities are revealed (i.e. victims of workplace harassment may be reluctant to come forward)
* One setting where these concerns have been prominent is in the prison setting where demand for disclosure are often met with the argument that disclosure would inhibit information gathering techniques of the police and prison authorities by leading to threats to health and security

#### Mission Institution v Khela [2014, SCC]

**Facts:** Khela was a federal inmate serving a life sentence for 1st degree murder at Kent Institution in BC. After 3 years at this facility, a maximum-security facility, he was transferred to Mission Institution which was a medium security facility. In 2009, an inmate was stabbed at Mission Institution. About 1 week after the stabbing, the security intelligence office at Mission Institution received information implicating Khela in the incident. A security intelligence report was completed which contained information that Khela had hired 2 other inmates to carry out the stabbing in exchange for 3 grams of heroin. As a result, Khela was involuntarily transferred back to Kent Institution. After the warden reassessed his security classification, Khela challenged his transfer including on procedural grounds.

**Issue:** whether the decision to transfer him was procedurally unfair due to inadequate disclosure.

**Held:** Lebel J- Yes, disclosure was inadequate. He held that the transfer back to Kent Institution was unlawful because the decision as procedurally unfair on disclosure grounds.

**Reasons:**  The enabling statute in this case which governs federal prisons and allows for inmate transfers requires the disclosure of all of the information that was considered in deciding to transfer an inmate or at least a summary of information before a final decision as made. The court conceded that the statute contains exemptions from this disclosure requirements, including where the safety of the person is jeopardized. But, if a non-disclosure decision is later challenged in court, the onus would be on the prison authorities to prove there were reasonable grounds for non-disclosure. Therefore, the burden is not on the party seeking disclosure, but rather on the party resisting disclosure (prison authorities). To meet their burden, the prison authorities would have to do two things: (1) the information that was not disclosed would need to be submitted to the reviewing court in a sealed Affidavit along with the reasons why the information was not disclosed and (2) where anonymous tips are relied upon, the prison authorities also needed to explain why they were considered reliable. Here, it was clear that the warden, in making the transfer decision, considered information that she did not disclosure to Khela. She also did not give him and equate summary of the information. Therefore, the withholding of this information was not justified under one of the exemptions. The disclosure exception was never invoked, plead, or proven and so there was no basis to find that the warden was justified in withholding the information based on one of the statutory disclosure exemptions. As a result, the warden’s decision did not meet the statutory requirements relating to procedural fairness. Here we see that while the identity of the informants is not disclosed, alternatives are worked out to protect the right. Even though this was a statutory case, there is no reason to believe that the result would have been different if the court had been applying common law principles rather than interpreting the relevant enabling statute.

**Ratio:** The relevant authorities will be permitted to rely upon secret information without revealing it’s identity to affect persons, provided they have subjected the information in question to alternative verification techniques ensuring reliability.

*Commercially Sensitive Information*

* Examples:
  + Secret formulas
  + Programming information
  + Sensitive financial information
* Disclosure may be refused or, more likely, limited
  + Courts have sometimes allowed for the information to be shared with counsel on the undertaking that they will not reveal this information to their clients
* Limited case law
* Often dealt with in statutes, rules of practice

*Staff Studies and Reports*

* Examples:
  + Inspection reports of firms under regulatory supervision
  + Reports summarizing evidence and submissions at a hearing
* ADM’s often resist disclosure of this kind of information and they tend to point to:
  + Concerns about politicization – the idea that this would expose agencies to partisan-public scrutiny
  + Concerns about workability – the idea that perhaps even drafts of reports would have to be made public if the reports themselves had to be made public
  + Concerns related to information gathered from outside sources about the compromising of the candour and the value of the advice received by members of staff
* Central dilemma is how to reconcile the needs of procedural fairness with the need for full use of whatever expertise the ADM can actually muster
* Cases against disclosure
  + *Toshiba Corporation v Anti-Dumping Tribunal* (1984, Fed CA) (failure to disclosure two reports prepared by staff relied upon by the Tribunal OK)
    - The first report, which was a preliminary report that introduced the dispute, should have been disclosed since it contained a number of statements of fact which bore directly on the ultimate issue the Tribunal had to decide. But, everything in the report was public anyways and already revealed so it was not a serious concern
    - The disclosure of the second report, which consists of summary and commentary on the evidence, was NOT required since this report was not unlike to the work done by law clerk which was not disclosed.
    - The distinction the court seemed to be drawing is between reports that add or might add new or undisclosed evidence which should be disclosed and reports that simply summarize the evidence which do not need to be disclosed. However, the trouble is that the court’s own description does not really match up with the distinction it draws since the court acknowledges that the second report contained not just a summary of the evidence, but commentary on the evidence as well. Is there any chance that this commentary influenced the decision maker should it be disclosed?
  + *Trans-Quebec & Maritimes Pipeline Inc. v N.E.B.* (1984, Fed CA) (disclosure of staff papers 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 the parties have not had access containing evidentiary material to which the parties have not had the opportunity to respond, disclosure may be required”)
    - Here, the reason for disclosure was to determine the Board’s reasons for it’s decision and these reports were irrelevant to that because the reports could not be assumed to have been adopted by the Board as it’s reasons for it’s decision.
* Even though the courts in both of these cases held that disclosure was not required, they also suggest that disclosure will be required in some cases, particularly where these sorts of studies reveal new, undisclosed evidence involving the parties or commentary on that evidence that might influence the ADM
* But see these cases which suggest that an even broader approach to disclosure might now be required:
  + *Tremblay v Quebec* [1992, SCC] and *IWA, Local 2-69 v Consolidated-Bathurst Packaging*  [1990, SCC]
    - These two decisions clearly prevent ADMs from listening to, let along taking account of, new material and arguments fed to them by fellow non-sitting members and they require, where this occurs, that the parties be given notice
    - It seems likely that this requirement must also apply to new arguments and information provided by staff to ADMs including information presented either pre-hearing or post-hearing
  + *Suresh v Canada* [2002, SCC]
    - The SCC held that Suresh was entitled, subject to claims of national security, to disclosure of all information upon which the Minister intended to rely in reaching a decision regarding deportation. This included information in a memorandum prepared by a member of the Minister’s staff. This lends support to the idea that reports prepared in relation to a particular case may need to be disclosed if the ADM may rely upon them, as least in a case like this where more generous procedural safeguards are required
  + Do these cases suggest that a broader approach than that adopted in *Toshiba* and *Trans-Quebec* may be required?
    - Yes, this is what they suggest

## Hearing Stage - Right of the parties to Counsel

### Right to (Legal) Representation

* Not a general constitutional right to representation in the context of adminsitrative proceedings.
  + See *Charter*, s. 10(b) – right to counsel on arrest/detention
    - The protection of this right is limited to circumstances of “arrest or detention”
* But, it is sometimes required by other sources
  + Often required by the enabling or procedural statute
  + Often recognized at common law by the right to be heard
    - The argument for a right for representation is that it is essential to allow parties to present their case to an ADM
* The right to representation is the norm in adminsitrative proceedings but this does not necessarily mean that it is required
* But, the right is not absolute in every adminsitrative setting
  + Often denied/limited in investigative setting
    - These are situations where if the right to be heard is triggered, the procedural standards seem to be lower
  + Often denied/limited if relatively minor interests are at stake

#### Howard v Stony Mountain Institution [1985, Fed CA]

* Contains a helpful discussion of the factors to be considered in determining whether legal representation is required at common law in the adminsitrative law context to satisfy the right to be heard:
  1. The nature of the proceeding (complex or easy)
     + The extent of formality of the proceeding
       - The more formal and court like the proceedings, the more likely legal representation will be required
     + The complexity of the issues
       - Are they fairly easy, factual legal issues that could be resolved easily without legal representation? Or are they more complex legal issues with the result that legal representation would be helpful?
     + Whether any questions of law are at issue
       - Issues of law are those that lawyers who have legal training are thought to be well placed to help parties address
  2. The seriousness of the consequences for the party
     + This is also one of the *Baker* factors – the impact of the decision on the individual
     + The more serious the consequences of the decision for the individual, the more likely that a lawyer will be required
     + Denials of lifer, liberty, SOTP, enjoyment of property, ability to access a profession are examples
  3. The party’s experience with that type of proceedings
     + If the party is unsophisticated and unfamiliar with the type of legal proceeding, that will weigh in favour of access to legal representation
     + However, if the party is a sophisticated actor and has experience with this type of proceeding then legal representation may not be as needed
  4. Whether later chances to correct errors are afforded
     + This is also one of the *Baker* considerations – where does this decision fall in the decision-making context of the ADM
     + If it is an interim decision that can be corrected when addressed by the final decision-maker then less procedural protection, including less chance of a right to legal representation, is required

#### Re Men’s Clothing Manufacturers Assn of Ontario (1979, Arbitrator)

**Facts:** Involved disputes in the men’s clothing industry in Toronto. These disputes had been resolved by arbitration for decades without the involvement of lawyers but then the Association, who was a group of employers, indicated that they wished to change this long-standing practice and that they wished to use lawyers.

**Issues:** Whether there is an absolute right to legal representation in labour arbitration? If not, whether discretion should be exercised here to permit legal representation?

**Held:** Harry Arthurs (arbitrator) – No, there is not an absolute right to legal representation in the labour arbitration context. Qualified no to exercising discretion to allow it here. The Association then appealed this decision to the Divisional Court by way of judicial review.

**Reasons:**

* 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, “[t]here 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 in this context:
    - Cost to efficiency and efficacy of industrial relations
      * Disputes in this context have generally been dealt with in a highly informal manner and the result had been to greatly expedite dispute resolution in the industry. The introduction of lawyers may come at the cost of this.
    - Disruption of 60 years of practice
      * The entire viability “of labour management relations in the industry has hinged for 60 years on the mutual agreement between the parties that all of their conflicts should be resolved directly through negotiation and failing that, informal arbitration.” Both of which were responsive to the abnormalities and special needs and traditions of the industry. Introducing lawyers would disrupt this 60 years of practice improperly and unnecessarily
  + However, “[t]here may be certain kinds of issues, especially those which touch the impact of general legal rules upon the parties’ special regime of understanding, which are suitable for argument by counsel”
    - Legal counsel should be permitted to participate in the proceedings only to the limited extent of making legal arguments about the issues raised or about the scope of the arbitrators role. This engages a legal question and legal representation would be helpful to address it
    - Legal counsel would not be permitted to participate I the presentation of facts relating to the grievance. Lay representation here is just fine.
  + A limited role for lawyers was accepted about the legal question raised – in particular, the legal scope of the arbitrator’s role

**Decision of the Ont Div. Court (1979)**

* **Held:** Disagreed with Arthurs on both conclusions.
* The arbitrator erred on issue 1 by limiting the 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 containing such restriction”
  + If you are entitled to representation, you are generally entitled to your choice of representation including a lawyer
  + The court found that representation was always permitted and as such the issue for this court was whether the arbitrator could preclude this
* He also erred on issue 2 by granting legal counsel a limited role
  + The factual issues involved are complex such that lawyers would be helpful
  + Complex legal questions are also involved
  + The “controversy” is of “vital importance” to the company

### Right to (Legal) Representation

* Limiting (but not denying) representation
  + May be limited to advice-giving to a client at a hearing, but no (cross)-examination or making of any submissions etc.
  + Representative, but not client, may be present, with representative undertaking not to disclose information
    - We have seen this where commercially secretive information or secrets may be disclosed

#### Irvine v Canada [1987, SCC]

**Facts:** This cased involved the investigative stage, the first stage of a two-part proceeding before the Restricted Trading Practices Commission (now called the Competition Tribunal). The question at this investigative stage is whether to have a full-blown public inquiry before the Commission into possible violations of the *Combines Investigations Act* (now the *Competitions Act)*. The interim decision maker, the hearing officer, held that various people being questioned under the Act, some for potential infractions of the *Act*, would have their role and the role of their representation limited. In particular, the questioning was to be conducted in camera meaning that those being questioned could not hear the questioning of others. However, the lawyers of those being questioned would be permitted to attend the questioning of others unless potentially prejudicial evidence was being received. Here, this potentially prejudicial evidence was commercially sensitive information. The Act permitted those appearing before a hearing officer to be represented but I did not specify the details of their role. Irvine challenged it.

**Issue:** Were the limitations imposed on the role of counsel inconsistent with the *Act* or the common law duty of fairness? Was cross-examination of potentially adverse witnesses by the lawyers for those appearing before the hearing officer required to satisfy the duty of fairness in the circumstances?

**Held:** No, per Estey J. cross-examination was not required in these circumstances to satisfy the duty of fairness.

**Reasons:**

* Estey accepted that the duty of fairness could apply at this investigative, non-dispositive stage as this is an exception to the triggering of the duty of fairness and the right to be heard. He then went on to make the following point:
  + “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 (motion).”
    - Even though the particular statute allows for a right to representation in this interim context, the courts finds that this does not actually determined the extent of their participation and that in this context it is ok to limit the extent of their participation
* Why was no right to cross-examination required?
  + The investigation was conducted completely in private and the findings and recommendations of the interim investigation could be made public only after a full hearing by the commission itself, not by the hearing officer. This mitigated any potential concerns about damage to reputation
  + The Act prevented testimony during the proceedings from being used against an individual later on. This mitigated concerns about testimony leading to subsequent criminal charges
  + For these two reasons, this is an appropriate case wehre it is ok, as the hearing officer did, to limit the role of counsel and cross-examination as well by extension

#### Re Parrish [1993 F.C.T.D.]

* *Parrish* openly distinguished *Irvine* and rejected the argument that Parrish, a ship captain that had been involved in a collision with another ship, could be required to attend and give evidence without the presence of his counsel to an investigation by the Canadian Transportation Accident Investigation Safety Board.
* The court emphasized that Parrish could be faced with a negative report seriously or adversely affecting his reputation, his professional certification and his livelihood without being given an opportunity to present his case with the assistance of counsel
* Court rejected the argument that the presence of counsel should be denied because it might cause unwarranted delay and perhaps frustrate the immediate gathering of facts. Here, the court said that expediency did not outweigh the right to representation.
* The court did not purport to overrule *Irvine* but the judge distinguished the case and said that this is a context wehre counsel should be required because, unlike in *Irvine,* the reputation of the individual would potentially be impacted because the investigative reports here could be made publicly available in some cases
* Rouleau J (as he then was)
  + “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
      * Here we see the implication of a concern for reputation
    - Where reports of investigations are made public
      * We see the concern for reputation and the impact of the investigation on the individual
    - Where an individual can be deprived of his rights or his livelihood
      * Concern for the impact of the investigation
    - Where some other irreparable harm can ensue.”

### Right to (Legal) Representation

* Is there a right to state-funded legal representation in adminsitrative (not criminal) proceedings?
* Generally, no. There is no right to have it paid for by the state.
  + See *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 adminsitrative process
  + See e.g. *New Brunswick v G(J)* [1999, SCC] (state-funded legal representation required in child protective custody cases)
    - Here, the court held that a parent had an entitlement to state-funded legal representation in the context of child protective custody cases where a child had been seized and taken out of the home due to concerns about the safety of the child and being in need of protection

## Hearing Stage- Right of the parties to call/cross-examine witnesses

### Cross-Examination

* At common law, if an oral hearing is required, there is generally also a right to call and cross-examine witnesses
  + Oral hearings are usually required where credibility is at issue and the ability to call and cross examine witnesses is considered a powerful tool to test credibility
  + However, the right is not absolute
    - ADMs have the right to control their own procedures and may appropriately limit the exercise of these rights in some cases. The guiding principle is whether the parties are being afforded the opportunity to know and meet the case against them
* Right has been limited in, for example:
  + Sexual harassment cases (*Masters* (1994, Div Ct)); and
    - Rights to cross-examine witnesses were denied and the concern was with protecting the ability of the plaintiff to bring forward these sensitive allegations
  + The investigatory context (*Irvine v Can* [1987, SCC])
    - Deals with both cross-examination and with legal representation

#### Innisfil (Township) v Vespra (Township) [1981, SCC]

* This case is one of the leading precedents on the right to call and cross-examine witnesses in the administrative context
* “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 adminsitrative tribunals since the earlier 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 right 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 he clearest statutory curtailment of the citizen’s right to meet the case made against him by cross-examination**”
* **Facts:**  This case involved a hearing before the Ontario Municipal Board pinning 2 municipalities against each other. A letter from the Minister of Treasury of Economics and Inter-Governmental Affairs was introduced at the hearing but the Board refused to allow cross-examination on it. It said it was bound by government policy as communicated in the letter.
* **Held:** The Board erred when it refused to afford an opportunity to cross-examine a representative of the Minister on the letter. A court should require the clearest statutory direction to enable the executive to give binding policy directions to an independent adminsitrative tribunal and to make such directions immune from cross-examination.

## Post-Hearing Stage – Duty to Give Reasons

* Historically, reasons were not required at all to satisfy the common law duty of fairness or before that the rules of natural justice
* The position at common law changed with *Baker*
  + The court accepted that the failure to give reasons could taint a decision as procedurally unfair

#### Baker v Canada [1999, SCC]

**Facts:** Involved an exercise of discretionary power by the Minister of Immigration, or a senior immigration officer acting on the advice of a junior immigration officer. Baker was denied her application for a humanitarian and compassionate exemption to the requirement to make an application for PR from outside Canada. The senior immigration officer, Officer Caden, failed to provide his own reasons for the decision relying instead on the notes of the junior immigration officer, Officer Lorenz. Baker argued that the failure of the senior immigration officer, Officer Caden, to provide his own reasons violated the duty of fairness at common law or alternatively if the notes of Officer Caden were the reasons for the decision as the government suggested, they did not satisfy the duty of fairness.

**Issue:** Did Officer Caden’s failure to provide his own reasons violated the duty of fairness? If Officer Lorenz’s notes constituted the reasons for the decision, were they sufficient?

**Held:** per LHD: Reasons were required. However, Officer Lorenz’s notes were the reasons for the decision of Officer Caden and were also sufficient to satisfy the duty to give reasons.

**Reasons:**

* Benefits of reasons in the administrative context
  + Contribute to more careful reasoning, better decisions
    - The idea here is that the discipline imposed by the task of providing reasons can contribute to more careful decision making, and therefore better decisions
  + Inspire public confidence in adminsitrative decisions
    - The idea here is that public justification of decisions may inspire greater public confidence in the integrity of adminsitrative decision making
  + Can facilitate statutory appeals and judicial review
    - The idea here is that the provision of reasons is important in the facilitation of any rights of appeal granted by statute
* Concerns about delay, cost?
  + These concerns can be met with judicial flexibility as the form of reasons required, and when they are required
    - In this case, the obligation to provide reasons had been met by the notes of the junior immigration officer (the reasons did not have to be crafted by the senior immigration officer who actually made the final decision on behalf of the Minister)
    - In cases where the senior immigration officer added nothing to the reasons identified by the junior immigration officer, the courts would be justified in attributing those reasons of the junior immigration officer to the actual ADM, the senior immigration officer
  + Reasons not always required
    - There is a different between the duty to provide reasons and exposing the reasons provided to judicial review.
    - The reasons here did not pass the test as a matter of substantive review because the reasons provided failed to give sufficient weight or consideration that a weight to Baker’s country of origin, Jamaica, would cause. However, this did not mean there had been a breach of procedural fairness s by the failure to provide appropriate reasons
  + Low threshold to satisfy the duty for procedural purposes

### Issue 1: When are Reasons Required?

* This question speaks to the threshold question of whether reasons are required where they are not provided
* Reasons not required in all cases (*Baker)*
  + It depends on the circumstances and the context
* *Baker*: “some form of reasons should be required…”
  + “where the decision has important significance for the individual,”
  + “when there is a statutory right of appeal,” or
    - Reasons are required here because it is difficult, if not impossible, for individuals to determine whether to appeal a decision and which arguments to make on an appeal if no explanation for a decision is given
    - Similarly, it is difficult for a court considering an appeal to know whether to accept the appeal without an explanation of the decision of the earlier first instance decision maker
  + “in other circumstances”
    - This left open a large residual area of discretion for the courts to require reasons in other situations
    - The tendency of the courts has been to require reasons but this has not been a universal tendency in all cases
* The first factor (the importance of the interests at stake) was decisive in *Baker*:
  + The denial of the H&C exception was of “profound importance” – would lead to Baker’s deportation, separation from children, etc.
  + It would be unfair for a person subject to the sort of deportation decision at issue here to have a decision so critical to them made without being told why the decision that was made was made by the ADM
  + Written reasons were thus required

#### Canada v Mavi [2011, SCC]

**Facts:** The SCC was asked to speak to the procedural rights that were engaged by a governments collection of debts from various individuals that sponsored family members to come to Canada and agreed to reimburse the government if they relied on social assistance. The court held that the government was under a duty of fairness in determining how to collect the debts owed but that the content of the procedural rights required was “family minimal” and did not include an entitlement to reasons, either written reasons or oral reasons.

* No reasons required for decisions related to the collection of family sponsorship debts in the immigration context.
  + Several actors militated in favour of some procedural protections including the fact that the decision was final, it could not be statutory appealed and the effect of the decision om the sponsors (debts could be large and accumulate quickly)
* Why?
  + The nature of the decision was “straightforward debt collection,” individuals undertook the obligation in writing and understood the consequences of a decision of their family member to access social assistance and to reimburse the government
  + Parliament wanted to avoid complicated review process and this was clear in the statutory scheme
  + No statutory right of appeal meaning that reasons were not required to facilitate a later appeal
* This case fell at the low end of the procedural spectrum where it concluded that reasons are not required to satisfy the common law right to be heard

### Issue 2: What is the Content of the Duty to Give Reasons?

* When will the reasons provided by an ADM be sufficient or adequate to satisfy the duty to give reasons?
* Giving no reasons/explanation at all clearly not okay and will not satisfy the duty to give reasons
  + A duty to give reasons means at least some reasons must be given for a decision
* But, two questions:
  + How much will the courts review the contents of reasons provided at the procedural fairness stage?
  + Where an ADM has made a decision without giving reasons, will the courts ever supply the missing reasons? If so, when?
    1. We will discuss this under substantive review
* Question 1: How much will the courts review the contents of reasons provided at procedural review?
  + Addressed in *Newfoundland & Labrador Nurses’ Union v Newfoundland* [2011, SCC]
    - Addressed judicial review of an arbitrator’s decision. Much of the decision is concerned with determining the appropriate standard of review and applying that standard of review, namely reasonableness, to the facts
    - **Ratio:** Only the failure to provide reasons at all, where reasons were required to satisfy the duty of fairness, was a breach of the duty to give reasons. The claim that reasons were flawed or deficient where reasons were provided should be dealt with at substantive review and does not raise a breach of the duty of fairness
  + Two approaches in this case:
    - 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 looking at the content of the decision itself.**
    - 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**
  + Under the SCC’s decision in *Vavilov*, the standard of review that is applied to the substance or outcome of adminsitrative decisions is usually a deferential reasonableness standard of review
  + So, if the courts deal with issues of adequacy or sufficiency of reasons as part of substantive review, complaints about the adequacy of reasons would generally be reviewed on this deferential reasonable standard. This is more deferential than the standard of review courts generally applies to procedural questions which is whether the ADM was correct, whether it got it right
  + **Reasons:** “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 [of the duty of fairness]. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis [within a substantive review analysis]…”** (paras. 20-22)
  + The wholesale failure to provide reasons at all where they are required to give reasons will constitute a breach of the duty of fairness. However, the court did not say how to resolve cases where there are disputes as to whether the reasons were actually provided for a decision. Recall here the decision in *Baker* where there were questions about whether the notes of the junior immigration officer, Officer Lorenz, were the “reasons” of the senior immigration officer, Officer Caden. The SCC accepted that they were because the government conceded that they were. But is this concession enough? Why? Will the courts look to other considerations in making this determination? If so, what?

#### London Limos [2012, MB CA]

**Facts:** London Limos applied to the Provincial Taxicab Board for a license to operate a taxi company. Two existing taxi companies including UniCity opposed it’s application. The objectors were provided with summary information regarding the application and given an opportunity to defend their opposition. The Board granted the application for a license, but the Board did not issue written reasons for its decision. The objectors appealed arguing, among other things, that the Board breached its duty of fairness by failing to provide reasons for the order

**Issues:** (1) Can the hearing record of the Taxi Board be a surrogate (substitute) for the written reasons not provided? (2) Must reasons be requested by the impacted party for the duty to provide reasons to be breached?

**Held:** Steel JA- (1) Yes; (2) No definitive answer, but doubts cases saying yes.

**Reasons:**

* On the second issue – must reasons be requested for the duty to provide reasons to be breached?
  + Court held that various decisions have held that before seeking judicial review for a failure to provide reasons, a party usually must ask the ADM for reasons, otherwise the party would be taken to have waived the procedural fairness breach. The rationale in these cases is that it is more efficient to ask ADM’s at first instance to provide reasons before complaining about their failure to do so on judicial review. The idea is that, at least in some cases, on a request, an ADM may provide the reasons which mitigates the need for later judicial review proceedings
  + In this case, UniCity did not ask the Board for written reasons. Justice Steel refused to decide to dispose of the case on this basis but she did express doubts about whether a failure to request reasons should necessarily result in the denial of a remedy
* On the first issue – can the hearing record of the Taxi Board be a substitute for written reasons not provided?
  + Justice Steel decided the case on the basis of this question
  + Agreed with the Board that the lack of formal written reasons di not constitute a breach of the duty to provide reasons because the record of the hearing could act as a surrogate. Reasons can sometimes be found in the record of the case and the context, such as the ADM’s file and other materials in the file. She pointed to the decision in *Baker* as an example of where this occurred. In that case, it was not the ADM who wrote the reasons, it was the junior officer and in particular, not full reasons, notes of the immigration officer’s interview and thoughts on the interview.
  + Steel said the record disclosed the reasons for the decision and the key factors she pointed to in supporting this decision were:
    - The record of the hearing was publicly available
    - The legal test to apply to make the decision was disclosed in the record which also showed it was understood to be the applicable legal test
* Is there any tension between this case and the *Newfoundland Nurses’* case about which decided that issues of deficiency should be decided under substantive review? Does this determination that the record was a sufficient and adequate surrogate stray into issues of content?
  + Not clear that you can decided whether a surrogate, such as a hearing record, is “sufficient and adequate” without engaging with the content of the reasons provided for the decision and it seems to be that *Newfoundland Nurses’* suggests that that should not happen on procedural fairness review as seen to happen in this case, but rather should be dealt with on substantive review

#### Wall v Independent Policy Review Director [2013, Ont Div. Ct]

**Facts:** Wall was arrested during the G20 protests in Toronto for wearing a disguise with intent. After 28 hours in custody he was released without charge. He made a complaint of police misconduct against the officers involved to an ADM called the Office of the Independent Policy Review Director. This led to disciplinary charges against the officers. During the investigation, Wall learned that the officers may have acted under instructions from senior officers, maybe even the Chief of Police so he filed a further complaint asking that his original complaint be fully investigated or that a new investigation be initiated. The relevant act here, the enabling statute, allows, but does not require, the Director of the Office of the Independent Policy Review Director to refuse to deal with a complaint if it is filed 6 month after the events that gave rise to the complaint so the statute set out various criteria for the Director to consider. The Director dismissed Wall’s complaint for exceeding this 6-month time limit, but the Director did not give any reasons to justify the refusal. He basically just sent Wall a decision letter that paraphrased the relevant statutory language without addressing the merits of Wall’s complaint. Wall sought judicial review on the basis that the Director had breached his statutory and common law duty to provide reasons.

**Issue:** Does the decision letter from the Director breach the duty to give reasons?

**Held:** Div Ct. (Molloy J) – Yes, the duty to give reasons was breached. The letter here in effect provided no reasons at all. The reasons must answer the fundamental question of why the decision was made. It basically answered “why” with “because I can”. This then was appealed to the ONCA.

**Reasons:** “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.”

* Justice Molloy notes that the letter was all that Wall had and it was not possible to supplement the actual reasons with any other materials as in the *London Limos* case
* There is an engagement with the content of the letter to determine whether they constitute reasons for the decisions.

#### Wall v Independent Policy Review Director [2014, Ont CA]

**Issue:** Did the Divisional Court err in finding the decision letter did not satisfy the duty to give reasons?

**Held:** Ont CA (Blair JA)- No, the letter does not properly fall into the no reasons at all category but it comes close. Why?- the letter is “devoid of any reasons **adequate** to allow for judicial review of the Director’s decision”

**Reasons:** Justice Blair said that the standard is not “no reasons at all” but rather “adequate reasons”. The standard on procedural review in determining whether or not the right to be heard and the duty to provide reasons is satisfied is whether adequate reasons have been provided. Here, the letter was “devoid of any reasons **adequate** to allow for judicial review of the Director’s decision to stop Wall’s complaint”. Justice Blair said the letter provided no information about (1) whether the Director considered the criteria he was required to consider in deciding whether to impose the time limit; (2) there was no information as to whether the Director considered evidence which suggested that senior officers, including the Chief of Police, were involved; and (3) that there was no information about whether an investigation was required in the public interest.

**Note:** As with *London Limos*, the court gets into considering the adequacy of the reasons and recall that the content of reasons, after *Newfoundland Nurses’*, is supposed to be assessed on substantive review. Is there any tension? Does this determination that the decision was not supported by adequate reasons not seem to stray again into the content? If so, is maybe the problem here that there is no clean line between process and substance, between the existence of reasons and adequacy? Can you determine whether reasons exist where the existence of them is thrown into doubt without making an implicit judgement that what the ADM identifies as the reasons for the decision is adequate to warrant the label “reasons”.

### Where are we Now?

* *Newfoundland Nurses*’ seems to suggest where there are reasons, their adequacy is to be assessed on substantive review. But how do we determine if there are reasons at all? Where they simply don’t exist formally or in the particular circumstances, matters are fairly clear. However, outside this situation, it is harder to say.
  + On one view, if something that looks like reasons exists, that should be it for the purposes of satisfying the duty to given reasons as an aspect of the duty of fairness. There should be no assessment at all of their adequacy.
  + But, cases like *Wall* seem to suggest a minimum threshold of adequacy to satisfy the duty to give reasons. This minimum threshold seems to require, at a minimum, evidence that the ADM has, at least, turned it’s mind to the primary legal and factual issues, especially if they are mandatorily imposed under the statute
  + There also seems to be an acceptance that what is required to satisfy this threshold will vary with the context, with some contexts requiring more than others.
* If there is indeed a threshold of adequacy to satisfy procedural fairness, and the decision of the CA in *Wall* seems to suggest there is, then the way to reconcile *Wall* with *Newfoundland Nurses’* might be that the level of adequacy under procedural fairness is fairly low and that the level of adequacy to satisfy reasonableness review under substantive review is higher. This is not a completely satisfactory resolution of the tension but it could be a way to reconcile the two cases.

# Procedural Fairness: The Duty to Consult Indigenous Peoples

* The duty to consult is another procedural obligation that ADMs must keep in mind when they make decisions
* It is a particular sort of procedural obligation that ADMs have to keep in mind when they are considering decisions that will, or might, impact the rights of Indigenous Peoples in Canada
* It is a procedural obligation that has taken on considerable importance in recent years
  + i.e. in the decisions of ADMs relating to resource related projects such as Pipeline projects

## Section 35, *Constitution Act*, 1982

* The duty to consult is associated with s. 35 of the *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.”**
* The SCC has said that the purpose of s. 35 is to help reconcile the pre-existence of Indigenous societies in Canada with the claimed sovereignty of the Crown
* Why did the duty to consult develop?
  + Even if the courts are willing to recognize an Indigenous community claim for an aboriginal or treaty right under s. 35(1), the litigation that leads to this recognition is often drawn out over years. The result, until the duty to consult was recognized, is that Indigenous peoples often had to watch as their lands and resources were logged, mined, dammed or sold for other developments
  + The duty to consult was created to ensure that pending judicial resolution of claims, Indigenous peoples can participate in the management of the lands and/or resources, share the benefits and have their interest in the land and/or resources at least partially protected while the claim is being worked out
* The duty to consult has it’s roots in the 1990 decision of the SCC in *Sparrow*
  + In this case, Dickson and LaForest referred to the presence or absence of consultation as a factor to consider in determining whether an infringement of a s.35 Aboriginal right was justified
  + The test developed in this case was the SCC’s first attempt to put flesh on the bones of s. 35(1). The decision set out a test to apply in determining whether infringements under s. 35 are justified.
* Consultation was then also recognized in a trilogy of SCC cases that were released in 1996 and in the aboriginal title context in the *Delkgamuk* decision in 1997. It was really the *Haida Nation* case in 2004 that gave the duty to consult a firm boost and foundation.

## The Duty to Consult

* Two key roles:
  + Interim: protect rights pre-resolution of a claim
    - our key concern in this course
    - arises prior to establishment of a claim to an aboriginal right or a treaty right
    - the duty to consult may arise before a claim is established in court or accepted by the government, imposing on the government the duty to engage in various processes and perhaps accommodate concerns raised by Indigenous communities in order to protect the rights in the interim while the claim is resolved
    - also has implications for ADMs
  + Post-recognition: part of the *Sparrow* test for justification
    - *Tsilhqot’in Nation:* the SCC made satisfying the duty to consult a pre-condition to satisfying a justification of an infringement of aboriginal title under the *Sparrow* test
      * To justify an infringement, a government has to show that it discharged it’s duty to consult before going on to satisfy the two steps of the *Sparrow* test which are: (1) a compelling and substantial objective and (2) consistency with the Crown’s fiduciary obligations
    - Arises after an aboriginal or treaty right is recognized

#### Haida Nation v BC [2004, SCC]

**Facts:** The BC government had issued a license to Wirehauser, a logging company. The license authorized them to cut trees on provincial Crown land. The land subject to the tree cutting license are in Haida Gwaii which are the traditional lands of the Haida people. The Haida had claimed title to the lands of Haida Gwaii for more than 100 years. The claim of the Haida people had been accepted for negotiation by the government but it had not yet been resolved. The cutting of trees on the claimed land would have had the affect of depriving the Haida peoples of some of the economic benefit of the land. In addition, the Haida also claimed that red cedar trees from the island’s old growth forests were an integral part of their culture as they used the cedar to make their ocean-going canoes, their traditional clothing and utensils and the totem poles that guarded their lodges. The Haida brought an application for judicial review of the provincial Forestry Minister’s decision to issue the logging licenses. The focus of the claim was administrative in nature because it focused on a particular decision of the Minister to issue the license.

**Issue:** Was the provincial government required to consult with the Haida about it’s decision to license the harvesting of the forests before the Haida had proven their title to the land?

**Held:** McLachlin CJ- The provincial government was required to consult with the Haida re a tree harvesting license ***before***title established.

**Reasons:** The court expanded the scope of the procedural obligations that the Crown owed to Indigenous peoples in the pre-establishment context

### *Haida:* Source of the Duty to Consult

* The Crown’s duty to consult is grounded in a concept called “the honour of the Crown” which is in term grounded in the objective of reconciliation between the Crown and it’s claim for sovereignty and the pre-existence of Indigenous communities
  + The Crown must act honorably in all of it’s dealing with Indigenous peoples. Nothing less is required if there is to be reconciliation of the pre-existence of Indigenous communities with the claimed sovereignty of the Crown.
  + The honour of the Crown is always engaged in interactions between the Crown and Indigenous peoples such as:
    - Where the Crown assumes control of Indigenous interests as where it holds Indigenous lands for sale to the public
    - In the treaty making and interpretation process
    - Where Aboriginal rights and treaty rights claims have yet to be resolved
      * We are concerned with this example in this module. Why is the honour of the Crown engaged here?
        + To unilaterally exploit a claimed resource during the process of proving an Indigenous claim to the resource might deprive the Indigenous claimants of some or all of the benefit of the resource and this is not honourable. To suggest otherwise might render the rights devoid of meaningful content since if and when the right is established in court, the right might have been denuded of any value in the interim. For example, in this case, the old growth forests that are engaged could already have been cut down in whole or in part
* Recognized as an unwritten constitutional principle: *Beckman v Little Salmon/Carmacks First Nation* [2010, SCC]
  + Court went further here than it did in *Haida Nation* in affirming that the honor of Crown is an unwritten principle of Canada’s constitutional system. In doing so, the court put it alongside other unwritten constitutional principles underlying Canada’s *Constitution* such as the rule of law, democracy, federalism and the protection of minorities

## *Haida:* Trigger for the Duty to Consult

* The duty to consult has to be satisfied by the Crown before a decision is pursued that triggers the duty to consult. A final determination of he underltying Aboriginal right is not required.
* Leading case on when the duty to consult is triggered is *Haida Nation*
* What is the **trigger** for the duty to consult? (3-part test)
  1. There is Crown conduct or a Crown decision;
* This is because the duty to consult applies to the federal and provincial governments but not to private parties
  1. The Crown has real or constructive knowledge of a potential Aboriginal rights/title or treaty rights claim; *and*
     1. *Prima facie* case
        + Proof that the claim will succeed is not required. What is required is a credible *prima facie* case. The claim must have an “air of reality” to it
     2. Real or constructive knowledge of it
        + This means that the Crown must either actually know (real knowledge) or should know (constructive knowledge) about the potential claim
  2. The right/title might be adversely impacted
* Past wrongs and speculative impacts on rights will not suffice. There must be a connection between the impugned Crown conduct and the Aboriginal or treaty right being claimed in the present

#### Mikisew Cree First Nation v Can [2005, SCC]

**Ratio:** Duty to consult not limited to Aboriginal rights/title claims; applies to execution of written treaties as well. The duty is effectively read into the treaty, making it an important implied implication on the terms of the treaty itself.

**Held:** The federal government had a duty to consult where it exercised it’s right to take up lands under treaty 8, impacting the treaty rights of the Mikisew Cree First nation to hunt, trap and fish throughout territories that they were alleged to have surrendered.

**Reasons:** The court rejected the argument that the duty to consult would not arise in executing a treaty because the treaty itself had exhausted the Crown’s obligations in relation to the Indigenous community. Justice Binney said that a treaty was only a stage in the process of reconciliation, not a compete discharge of the Crown’s duty.

#### Rio Tinto v Carrier Sekani [2010, SCC]

**Facts:** In the 1950’s, BC authorized the building of a dam and reservoir by Alkan, a mining company. The dam altered the amount of waterflows in a river. Several First Nations considered this valley as their ancestral homeland as well as the right to fish in the river. However, pursuant to the practice at the time, they were not consulted by the BC government about the dam project. Since 1961, excess power generated by the dam has been sold by Alkan to BC Hydro under “energy purchase Agreements”. In 2007, BC government sought approval of the BC Utilities Commission (which regulated Hydro in the province) for a renegotiated energy purchase agreement. The first Nations asserted the 2007 Agreement triggered the duty to consult. The BC Utilities Commission considered that it had the power to consider the adequacy of consultation with Indigenous communities but found that a duty to consult did not arise because the 2007 Energy purchase Agreement would not adversely affect any Indigenous interests. It would not do so because it would not change existing water levels.

**Issue:** When does the duty to consult arise?

**Held:** McLachlin CJ – Duty to consult NOT triggered here.

**Reasons:** Fleshed out the 3-part trigger test for the duty to consult.

* More on the **trigger** for the duty to consult:

1. Real or constructive knowledge of a potential claim

* Threshold of knowledge “not high” – it is fairly easy to satisfy
* Real knowledge requirement – McLachlin says that real knowledge can be taken to arise from a claim being actually filed by an Indigenous community in court, by a claim advanced during negotiations or that an existing treaty right may actually be impacted.
* Constructive knowledge requirement – McLachlin says that constructive knowledge can arise when particular lands are known or reasonably suspected to have been traditionally occupied by a particular Indigenous community and also wehre an impact on particular rights might reasonably be anticipated.

1. There is Crown conduct or a Crown decision

* Includes decisions that have an immediate, direct impact on lands and resources
* Also “strategic, higher level decisions” that may lead in the future to this sort of an immediate, direct impact
  + This is an extension beyond *Haida.*
  + McLachlin says that because these decisions may set the stage for future conduct that will have a direct impact. The aim is to find the duty to consult to be triggered early on in the process in order to allow for consultation related issues to be addressed before decisions proceed too far along
* Doesn’t include legislative conduct (*Mikisew Cree* [2018, SCC])
  + Not engaged by decisions, including Cabinet decisions, relating to the development and passing of legislation
  + But, suggestions that honour of the Crown is relevant, may lead to other forms of recourse
  + The line between legislative conduct and the “strategic, higher level decisions” is not clear

1. Aboriginal/treaty right/title might be adversely impacted
   * Need a “causal relationship” between the proposed government conduct or decision and a potential for adverse impacts on pending claims
   * Includes prior and continuing breaches if present decision has novel adverse impact on a present claim
   * In order for the duty to consult to be engaged by present decisions that relate to past conduct, there needs to be a novel adverse impact in relation to the present decision to engage the duty to consult
   * What things would not create the adverse impact required:
     + Past wrongs including previous breaches of the duty to consult
     + Merely speculative impacts. The potential for an adverse impact must be appreciable (apparent)
     + Impacts on interests not related to the Aboriginal right being claimed (i.e. negotiating positions)
     + An underlying or continuing breach if there is no potential for a novel adverse impact. Where there is an ongoing underlying breach, if there is no potential for a novel adverse impact now in the present, then the duty to consult is not triggered.

* Not enough to satisfy factor three (adverse impact)?:
  + Past wrong, including previous breaches of the duty
    - First Nations had argued that the duty to consult was triggered because of the failure to consult on the initial dam and water diversion project. McLachlin disagreed with this. She said that the duty to consult is confined to the adverse impacts flowing from the specific government conduct, not to the larger adverse impacts of the project to which it is a part of. Where the resource has long been altered and the present government conduct or decision does not have any further impact on the resource, the duty to consult does not arise.
    - Here, the failure to consult on the initial dam project in the 1950’s did not prevent any further development of the dam without consulting on the entirety of the dam project and its management. You need to focus on the potential impact of the specific government decision. This specific decision was the renegotiation of the energy purchase agreement and there was no evidence of adverse physical effects of the renegotiated 2007 energy purchase agreement. The Commission was right to deny that the duty to consult was triggered in this context
  + Merely speculative impacts
    - Need an “appreciable” impact
  + Impact on unrelated interests
    - E.g. on negotiating position
  + A continuing breach if no potential for a novel adverse impact
* **Note:** remedy for (1) and (4) possible – e.g., damages. She suggests that damages might be available.

## Role of ADM’s in the Duty to Consult

* It is often ADMs, and not classic Crown representatives like Cabinet Ministers, that are on the front lines of helping the Crown meet its obligations under the duty to consult

### Delegation of the Duty to Consult

* Can the duty to consult be **delegated**?
  1. Can the Crown delegate its duty to consult to ADMs just like it can delegate any other issues to ADMs?
     + Is the Crown permitted to rely on ADMs in order to satisfy it’s duty to consult?
  2. If yes, does it have a residual duty to ensure consultation conducted by the ADM on it’s behalf is proper?
  3. If yes, (to (1)), how is delegation properly achieved?
     + What does it need to do in order to properly delegate the duty to consult to ADMs?
  4. If the duty has not been delegated, does the ADM have to ensure Crown consultation is adequate before proceeding with decisions that engage the Crown’s Duty to Consult?
* **Question 1:** Can the duty to consult be delegated and if so, how much can be delegated?
  + The short answer is yes and no
  + “The honour of the Crown cannot be delegated” (*Haida)*
  + But, procedural execution of the duty can be delegated by statute to ADMs BUT this does not let the Crown off the hook because ultimate legal responsibility for consultation rests with the Crown. The honour of the Crown cannot be delegated. What this means is that the execution of the duty to consult can be delegated to 3rd parties, including ADMs, but the actual formal, legal duty itself cannot be delegated. That duty always lies with the crown. It is only the procedural steps necessary to satisfy the duty to consult that can be delegated.
* **Question 2:** Crown has continuing duty to ensure duty satisfied?
  + Yes; because “the honour of the Crown cannot be delegated”
  + Even if the Crown delegates the procedural aspects of it’s duty to consult to an ADM, it retains the ultimate responsibility to ensure the duty to consult is satisfied. This flows from the point made in *Haida* that the honour of the Crown cannot be delegated itself in any legal, formal self. This legal obligation always remains with the crown and so it follows from this that wehre the Crown delegates the procedural aspect of this duty, that the Crown retains the obligation to make sure the duty is properly satisfied
* **Question 3:** How to delegate procedural execution of the duty?
  + Explicitly by statute
    - There may be clear language in a piece of legislation such as enabling statute that says that the procedural execution of the duty is delegated to a particular ADM
  + Implicitly by statute
    - In order to determine if this has occurred, its necessary to take into account three considerations:
      * Jurisdiction to consider questions of law?
        + Did the particular ADM have the jurisdiction to consider questions of law?
        + This jurisdiction will usually be conferred explicitly by the statute
      * Procedural powers necessary to execute the duty?
        + The court will look for procedural things in the statute that would allow the ADM to satisfy the duty
        + This could be the power to conduct hearings and to make orders requiring additional information from parties involved and impacted by the decision
      * Remedial powers necessary to accommodate affected rights?
        + Court will look for remedial powers, (i.e. that permit the ADM to attach terms and conditions to approval in order to mitigate or avoid negative impacts on Aboriginal or treaty rights)
      * If a court finds that an ADM has the authority to consider questions of law, has the procedural powers necessary to execute the duty and has the remedial powers necessary to accommodate the impacted rights then it is likely to conclude that even though the statute does not explicitly delegate procedural execution of the duty that it has done so by implication
  + Is the consent of the Indigenous community affected needed?
    - No, the Crown does not need the consent to delegate procedural execution of the duty. It can delegate unilaterally

#### Clyde River [2017, SCC]

* Important because it deals with the issue of when and how the duty to consult can be delegated, at least procedurally, to ADMs. It also speaks specifically to the 4th question that arises in the delegation context – if the Crown has not delegated its duty, do ADMs have the obligation to ensure that the crown conducts an adequate consultation before proceeding with decisions that engage the Crown’s conduct

**Facts:** Dealt with the National Energy Board (“NEB”), a federal adminsitrative and regulatory agency that dealt with a variety of energy related issues and approvals including pipeline projects. It has been replaced recently by the Canadian Energy Regulator. Petroleum Geo-Services applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. It was undisputed that the testing could negatively affect the treaty rights of the Inuit that lived in Nunavut. They contested the testing alleging that the duty to consult had not been fulfilled. The Inuit, including those that live in Clyde River, rely on marine mammals for food and for their economic, cultural, and spiritual wellbeing. NEB granted Petroleum Geo-Services authorization for testing. In doing so, it concluded that they had made sufficient efforts to consult. The ENB also included the testing was unlikely to cause significant adverse environmental effects. Clyde River applied for judicial review of the NEB’s decision. The Federal CA found that while the Crown’s duty to consult had been triggered, the crown was entitled to rely on the NEB to undertake consultation for it and that the Crown’s duty to consult had been satisfied by the NEB’s consultation process.

**Issue:** Was the duty to consult triggered? If so, had it been breached?

**Held:** The NEB process triggered the duty to consult. The duty was breached and was not satisfied.

**Reasons:**

* 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”
    - Use of the words “its”- The duty to consult is the Crown’s duty and it cannot be formally, legally delegated. Only the procedural execution of it can be delegated.
  + ADMS- not just “the Crown” – can trigger the duty to consult
    - Not the case that only the behaviour of a Minister of the Crown could trigger the duty to consult. Decisions of ADMs implementing powers and duties delegated by statute would also constitute Crown conduct that triggers the duty to consult.
  + If delegated, the Crown must ensure consultation is adequate (Crown holds ultimate responsibility)
  + If the process undertaken on its behalf is inadequate, Crown might have to take additional steps to meet its duty – e.g., by:
    - Filling gaps on a case-by-case basis rather than globally adopting a new policy, it may just attempt to plug the holes on a case-by-case basis
    - Introducing broad-based legislative, policy reforms
      * Rather than doing it case by case, it could attempt to introduce new legislation or policy dealing with this across the board
    - Making submissions to a regulatory body dealing with the duty to consult
    - Requesting reconsideration
    - Seeking postponement to carry out further consultation itself
  + Crown must give notice to affected Indigenous communities if it intends to rely on ADM to fulfill its duty. This would allow them to know how consultation will unfold.
* Role of ADMs to ensure the *Crown* satisfies the duty
  + If ADM is granted the power to consider questions of law = duty to consider whether the Crown’s duty to consult has been satisfied
    - Does not matter if the Crown is a “party” or not. Even if the Crown is not before the ADM as a party, it remains the case that the ADM has to make sure the Crown is satisfying its undelegated duty to consult
    - It is not ok for ADMs to just sloth this off to the Crown, an ADM, where it has the authority to considers questions of law, has to make sure the Crown satisfies its duty
  + If the Crown’s duty is not satisfied, the ADM cannot proceed.
  + ADMs should generally address concerns regarding whether consultation by the Crown is sufficient with written reasons. This is because this would foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed, and promote better decisions

## Content of the Duty to Consult

#### Haida Nation v BC [2004, SCC]

* What is required to satisfy the duty if it is held to be triggered?
  + Requirements vary with context
  + Duty falls on a spectrum just like the duty of fairness
    - Pre-establishment: focus is on consultation and accommodation
  + The cases contemplate three types of Crown response which fall at different points on the spectrum
    - **Consultation:** At the bottom of the spectrum, is consultation. Consultation involves a good faith discussion about the nature of the concerns raised by the Indigenous community. It does not require consent by the Indigenous community or even their accommodation. It would only involve notice of the crown conduct to the impacted Indigenous community. This notice would need to be sufficiently detailed so as to allow the impacted party to prepare its views. It would also require the provision of information by the Crown about the decision to be made being contemplated. It would require a reasonable amount of time so that the party being consulted could prepare it’s views. It would require the opportunity to present these views to the party obligated to consult. Finally, it would require full and fair consideration by the party obliged to consult of any views presented.
    - **Deep Consultation:** This would involve formal participation of the impacted Indigenous community in the decision-making process as well as written reasons to show that their concerns were addressed in making the decision. It may not however, require accommodation
    - **Accommodation:** Requires more than consultation. Where accommodation is required, it is usually also the case that deep consultation is required. Accommodation arises where the duty to consult is strong enough to require modification of the Crown’s decision. It might require adaptation of a decision, namely steps taken by the Crown to avoid harm or minimize the affects of harm pending resolution of the claim. Alternatively, it may also require other things like compensation or revenue sharing if mitigation measures are not available or are inappropriate. In determining how much accommodation is required, the Crown has to balance Indigenous concerns with the potential impact of the decision on the asserted right with other societal interests.
    - **Consent:** This is the strongest and most controversial form of consultation. This requires the crown to get the consent of the Indigenous community before proceeding. Where we are dealing with the duty to consult at the pre-establishment stage, there will be no obligation to get consent. In this context, the maximum obligation on the Crown would be to accommodate, there would be no requirement of consent.
  + Requirements proportionate to two things:
    - The strength of the claim; and
      * There are 2 things relevant in considering the strength of the claim:
        + (1) the nature of the claim – relevant because the cases are clear that Aboriginal title claims demand more than claims involving Aboriginal rights. You must determine what is the nature of the claim involved. If it is a claim to Aboriginal title, that will have an impact about where the case falls on the spectrum
        + (2) the strength of the claim – how strong is the claim to the Aboriginal right/title., treaty right. If it is strong, more will be required, and the case will fall further along the duty to consult spectrum. But, if a claim is dubious, it may attract a mere duty of notice.
    - The seriousness of the adverse impact on the right/ title that the contemplated Crown conduct/decision would have
      * If the breach is less serious, this reduces the demands of the duty to consult
      * If the breach is serious, more will be needed to satisfy the duty
    - At the lowest end of the spectrum are where the case involves a claim to a right or title that is weak and the potential impact of the Crown conduct or decision on the claim is minor. At the other end of the spectrum, are cases where the claim to the right or title is strong and the right and potential infringement is of high significance to the Indigenous community. Regardless of where the claim falls on the spectrum, the Crown must always act in good faith with the intention of addressing the concerns raised by the community. It is not ok for the crown to just go through the motions, it must sit and engage with the community in a good faith way with the idea of addressing the concerns the community is raising.

#### Tsilhqot’in Nation v BC [2014, SCC]

* What happens if the duty is not satisfied?
  + Pre-establishment – various options including:
    - Injunctive relief
    - Damages for breach of the duty
    - Order to satisfy the duty

#### Haida Nation v BC [2004, SCC]

* Was the duty triggered here?
  + McLachlin said that it was triggered because the Haida’s claims to title and a right to harvest red cedar were supported by a good *prima facie* case. In addition, the province knew the potential rights and title claims applied to the block of land subject to the license. Also, the particular Aboriginal rights and claims could be adversely affected by the decision to authorize the licenses. The 3-part test was satisfied on the facts of the case.
* What was the scope of the duty owed in this case?
  + McLachlin did not make a final determination about the extent of the duty to consult because the province failed to consult at all. The province thought it had no duty to consult in the pre-establishment context.
  + She did conduct an analysis of the factors she set out in the case. First, the strength of the case. She held there was a *prima facie* case for the title claim to the Haida’s traditional territory so their Aboriginal title claim was supported by a *prima facie* case. She also said there was a strong *prima facie* case for the Aboriginal right to harvest red cedar. This requirement was held to be satisfied.
  + With respect to the seriousness of the impact, McLachlin held that the granting of the licenses could have a serious impact on the title and rights claim because it could lead toa logging of a limited resource on the land.
* If so, was it satisfied?
  + No, the Crown did not consult with the Haida at all before issuing the licenses. Therefore, the licenses were invalid. Because there was no consultation at all, McLachlin did not have to decide whether the duty to consult would have included a duty to accommodate the Haida as well.
  + She did indicate in obiter that given the strength of the Haida’s case and given the seriousness of the impact of the province’s licensing decisions on their title and rights claim, the Crown may have to significantly accommodate the Haida
* This was a case that fell closer to the top end of the spectrum as it applies in the pre-establishment context. It probably would have required deep consultation as well as significant accommodation

#### Clyde River [2017, SCC]

**Facts:** One issue in this case was whether the NEB had satisfied the duty to consult the Inuit of Clyde River in agreeing to grant an authorization to do testing for oil and gas. The proposed testing contemplated towing air guns by ship through a project area for several months a year over a 5-year period. The air guns created under water sound waves. Clyde River, where most of the residents are Inuit, opposed the testing. The NEB asked the proponents of the testing, Petroleum Geo-Services to provide more information about it. The NEB held hearing in Clyde River and other affected communities for the purposes of collecting comments about the testing. Representatives from PGS attended these meetings but were unable to answer most of the questions raised. This led the NEB to suspend its assessment of PGS’s request. In 2013, PGS filed a document of almost 4, 000 pages that purported to answer the questions raised at the meetings. The document was posted on the NEB’s website and delivered to the government office of the affected communities. However, most of the document was not translated into the Inuit language. In addition, the Internet is slow and expensive in Clyde River. As the document was filed, the NEB resumed its assessment of PGS’s application. Clyde River and other communities file letters of comment with the NEB arguing that the consultation provided was inadequate. They asked for a strategic environmental assessment. The NEB refused with the support of the Minister and granted PGS’ authorization over the objections of the affected communities.

* Was the duty triggered?
* If so, was it satisfied?
  + No, the duty to consult was not satisfied. They pointed to several problems with the consultation that occurred.
    - (1) The report issued by the NEB when it granted the authorization to PGS was misdirected. First, it focused exclusively on the environmental effects of the testing. However, a duty to consult analysis must consider the impact of the proposed decision on the right or title claimed. The report suggested that this was not considered by the NEB in issuing and making its report.
    - (2) The Crown was relying on the NEB assessment process but that it had failed to make this clear to the Inuit. Remember, where a Crown delegates the procedural execution of the duty to consult to an ADM, it must provide notice that it intends to do this to impacted communities. This requirement of notice had not been satisfied
    - (3) The process itself did not satisfy the duty to consult. They started this point by determining the level of consultation requirement. Significant deep consultation with a level of accommodation was held to be required here because of the strength of the Inuit’s claim to begin with. The Inuit’s had an established treaty right to hunt and harvest marine mammals and these had been recognized in the Nunavut Land Claims agreement in 1993. The Inuit’s claim was strong. In addition, the potential impact on the right was serious. These rights to hunt and harvest marine mammals were extremely important to the economic, cultural, and spiritual wellbeing of the Inuit of Clyde River. The level of risk that the testing posed to these risks was high because the evidence showed that the testing could increase the mortality of marine mammals, cause permanent hearing damages and change their migration routes thereby impacted the use of the Inuit of these marine mammals. Therefore, the level of consultation was deemed to be high and to be accompanied by a requirement for accommodation.
    - Having reached a determination about the level of accommodation, the court then went on to articulate why the consultation provided by the NEB was inadequate. They point to a few reasons for this. First, limited opportunities were made available for participation and consultation by the NEB. For example, there were no oral hearings, and no funding was provided to the Inuit to participate in the process. They also emphasized the fact that the proponent’s response to the questions raised by the communities were provided in a forum that was practically inaccessible to the community. While the document was posted on the website, the Internet was slow in Nunavut and expensive making the method of delivery chosen inadequate. In addition, they pointed to the fact that most of the document had not been translated into the Inuit language. As a result, it was inaccessible for members of the community. Finally, some changers were made to the proposed testing after consultation but that the accommodations made were not sufficient considering the potential seriousness of the impact on the particular rights involved. For all these reasons, the court concludes that the level of consultation provided was inadequate.

# Bias and Independence- The Right to an Independent, Impartial Decision-Maker

## The Duty of Fairness

* The duty of fairness has 2 central components:
  1. The **right to be heard** (captures by the latin *audi altera, partem*, meaning ‘hear the other side’); and
  2. The **right to an independent and impartial decision-maker** (captured by the latin *memo judex in sua causa debet esse,* meaning the decision-maker must not be “a judge in his/her own cause”
     + This is important for several reasons:
       - (1) important because it is unfair for individuals affected by adminsitrative decision making to have the decisions in relation to them pre-determined based on irrelevant considerations rather than decided on the specific merits of the particular case. Therefore, the right to an independent decision maker is important because it is an essential aspect of individual fairness
       - (2) Also important because the public as a whole needs to have confidence in adminsitrative decision making and the sense that ADMs are predisposed to particular outcomes without reference to the laws and the facts of individual cases would undermine public confidence with negative implications for the legitimacy of independent decision-making and the administrative state as a whole. The second argument for the right to an independent, impartial decision-maker is that it is essential to preserve public confidence in administrative decision making and the administrative state as whole
     + Both of these considerations influence the principles and decisions, or at least ought to influence them, in this particular area of the law

## Bias/Impartiality and Independence

* Preliminary points:
  + At common law: same trigger as the right to be heard
    - This is the *Cardinal-Knight* trigger
    - Before SCC decision in *Nicholson* in 1979, it was only possible to make bias allegations in the case of ADMs who were acting in a judicial or quasi-judicial capacity. This changes, as it did for the right to be heard, in *Nicholson* and it is now the common law trigger exemptions that determine whether the right to an independent, impartial decision-maker is engaged
    - In other words, in determining whether the right to an independent, impartial decision-maker is engaged, you have to go back to the *Cardinal-Knight* trigger but also the various cases interpreting and applying the various exceptions to the *Cardinal-Knight* trigger relating to the right to be heard
  + Focus is usually on apprehension/perception, rather than the state of mind of the ADM as a question of fact
    - The concern is whether the circumstances are such as to give rise to a reasonable perception or reasonable apprehension that an impermissible degree of bias or independence does or will exist
    - This focus on perception is pragmatic. It is often very difficult to prove what is in the mind of an ADM and the focus on apprehension means that this does not have to be proven. So, in one of the cases here, *Roncarelli*, where the actual state of mind of the ADM was revealed, it is important to note that Premier Duplessis actually testified in the trial and in doing so, revealed some of his state of mind in targeting Roncarelli’s liquor license
    - A focus on perception and a refusal to require investigation of the actual state of mind of a decision-maker also reflects the concern that public confidence in administrative decision making may be undermined when the facts create a public perception that an ADM is too predisposed towards a particular outcome and is not judging individual cases on their own merits
  + Perfection is not required
    - Courts don’t require there to be an absolute absence of bias or absolute independence since everyone ahs biases in the sense of preferences and predispositions. The concern of the courts is with **impermissible biases*.***
    - Moreover, since ADMs do not have the same degree of independence from the executive branch as judges do and are formally members of the executive branch the courts accept that at least some degree of lack of independence may just go with the territory of adminsitrative decision making. Therefore, the concern of the courts is with striking a balance between fairness to the individuals affected by administrative decision making and on the other hand, the efficiency and efficacy of adminsitrative decision making
  + Context-specific
    - As with the right to be heard, what is required to satisfied the right to an independent, impartial decision-maker is context specific and varies from case to case
    - For example, ADMs making decisions on broad grounds of public policy that impact a large group are often given more leniency than ADMs focuses on an individual and a narrow set of facts relating to that individual
* The right to an independent, impartial decision-maker
  + Two aspects:
    - Bias/impartiality
    - Independence
  + What are they?
    - Bias- focus on internal influences on ADMs
      * These influences can be internal in the sense of speaking to the state of mind of the particular ADM but they can also be internal in the sense of being institutional, speaking to the impact that participating in a larger administrative decision making context can have on the decision making of a particular ADM. When thinking of the institutional context, think of a member of the Ontario Securities Commission. There is not one member of this Commission, there are various members and so one of the questions that can arise is what impact the other members have on the ADM dealing with a particular matter
      * Bias is concerned with both the state of mind of the particular ADM but also the institutional context in which the particular ADM is making its decisions
      * The requirement that an ADM be free of a reasonable apprehension of bias aims to ensure that ADMs are sufficiently impartial. Impartiality is the ideal state that the absence of bias aims to safeguard. This state of mind is one that approaches decisions with a sufficiently open mind and thus is free of individual or institutional bias
      * Impartiality is “[a] state of mind or attitude of the tribunal in relation to the issues and the parties”: *R v Valente* [1985, SCC]
    - Independence – focus on external influences on ADMs
      * Looks at the outside forces that impermissibly interfere, or try to interfere, with adminsitrative decision making
      * It speaks to the relationship between ADMs and others
        + Often, but not only, the relationship of the ADM to the executive
      * Things can get hazy because sometimes both bias and independence are frames as prerequisites to impartiality. For our purposes, we will link bias with impartiality when talking about the internal perspective of ADMs and the term independence when talking about the relationship of ADMs to external sources

### Sources of the right to an Independent and Impartial Decision-Maker

* Our focus: the common law
  + This makes sense because the right to an independent and impartial decision-maker is an aspect of the duty of fairness which is a right protected at common law by the courts
* But also, important – and potentially relevant – are:
  + Statutes may also try to guard against bias and a lack of independence in various ways
    - They might establish rules of appointment to a particular ADM that seek to mitigate government influence ensuring an element of independence
  + The *Charter*, s. 7
  + The *Canadian Bill of Rights*, ss. 1(a) and 2(e)

## Bias/Impartiality: General Test

* General Test applied at common law in determining whether bias arises: Reasonable Apprehension of Bias
  + “… 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], Grandpre J (dissenting of SCC)
    - There are two levels of reasonableness built into this test. First, the particular individual that claims that impermissible bias has arisen must be reasonable and second, the apprehension of bias that the individual, as a reasonable person has, must also be reasonable in the context
  + This test was adopted by SCC in many later cases: e.g., *Baker*
* General points to note about this test:
  + This test focuses on, and looks for, a reasonable perception, apprehension of bias, not actual bias. Whether bias actually exists in fact in not the question. Although, of course, if bias exists in fact that would give rise to impermissible bias. It is not a requirement to look for actual bias in fact. The focus is on a reasonable apprehension, perception of bias. To have a decision quashed for bias, it is sufficient to show that a reasonable person with an informed understanding of the context would perceive, apprehend that a decision-maker is wrongly biased
  + There must be more than a suspicion of bias for a reasonable apprehension of bias to arise. The courts use various terms to capture this idea; sometimes referring to a “real likelihood of bias”, a “reasonable suspicion of bias” but the basic point is that mere suspicions of bias are insufficient to make out a claim. The bias must rise to a level of a real likelihood or reasonable suspicion of a reasonable apprehension of bias
  + The standard for bias varies depending on the adminsitrative context. What will give rise to a reasonable apprehension of bias in one context may not do so in another context. While the reasonable apprehension of bias test is the general test, there are some situations where a lower level of procedural protection against bias is thought to be appropriate and as a result, where the courts have come to apply a different test or standard in determining whether wrongful bias arises
  + There is uncertainty and some disagreement about the knowledge that is to be attributed to the reasonable person in applying the reasonable apprehension of bias test. The test requires the court to put itself in the shoes of the reasonable and right minded person and then to attribute to that person a certain amount of knowledge about the relevant process and administrative decision maker under scrutiny. This is what the language of “obtaining the required information” in the test seems to require. In the least, this requirement to obtain a certain amount of information requires the courts to go beyond what the individual actually knows and requires the court to take into account information a reasonable person in the position of the individual would have been able to ascertain by reasonable diligent inquiry. This is thought to weed out the claims of the unreasonable or the unduly sensitive. A question that emerges is whether this question is to be conducted from the perspective of the individuals affected by the decision or from the perspective of a reasonable person more generally abstracted from the context. Take for example a Coroner’s Inquest into the shooting of a minority youth by a white police officer. If bias is alleged, should the court in any way attempt to see the facts as presented to it through the eyes of the victims family and broader community or should it attempt to adopt some sort of broader, more neutral perspective? If it should adopt a more neutral perspective, what is this neutral perspective?
    - Wright says that if the concern is to maintain faith in adminsitrative decision making, there is a case to be made for taking into account the perspectives of those directly impacted by the decision but this might need to be balanced against concerns of the broader public as well.

## Bias- Specific Examples

### Antagonism During the Hearing

* Antagonism during a hearing may give rise to a reasonable apprehension of bias
* For example, ADMs should not engage in overly hostile questioning or cast dispersions on particular individuals involved with an administrative matter or their representatives
* Hearing should not be understood in the narrow sense of an in person, classic oral hearing. Antagonism towards an individual or the claim they are advancing can be evidenced where the hearing that is involved is entirely written in nature. In *Baker*, this is an example of where antagonism arose where it was during the written hearing.
* **Note:** *Baker* could also, and sometimes is also, understood as a case of attitudinal bias. Attitudinal bias suggests a bias on the part of the ADM towards a particular outcome that results due to an attitude towards a particular party or a group of which the individuals forms a part or a lack of sympathy with the goals of the legislative scheme and the way it is being implement. What this shows is that the categories, the examples, are not clear cut, there is overlap with them and the principles in one situation are really not principles that are limited to that particular context. In many situations, they are principles that we will see engaged across the range of categories and examples.

#### Baker v Canada [1999, SCC]

**Facts:** This case involved an Immigration Officer charged with determining on behalf of the Minister, whether Baker, who had overstayed her visitor’s visa and was now subject to deportation, should be allowed, on humanitarian and compassionate grounds to make an application for permanent residency in Canada without leaving the country as is required under the general rule. The decision was ultimately made by a senior Immigration Officer, Officer Caden. In making this decision, Officer Caden relied on the notes prepared by a junior Immigration Officer, Officer Lawrence, who considered Baker’s case and situation. In recommending that the Minister deny Baker’s application the Junior Immigration Officer complained in his reasons about the administration of an immigration scheme that took so long to rude out and deal with overstayers as well as attributing negative characteristics to Baker painting her as a past and, if she was permitted to stay, future drain on the social assistance system.

**Notes of the Junior Immigration Officer (Officer Lawrence):** “This case is a catastrophe [sic]. 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 CHIDLREN 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 charges of “assault with a weapon”.

**Issue:** Was there a RAB here?

**Held:** Yes, the Junior Immigration Officer’s notes gave rise to a RAB.

**Reasons:** The decision was tainted by a reasonable apprehension of bias. The claim that the notes could not give rise to a reasonable apprehension of bias because it was the senior immigration officer that made the decision could not succeed. The subordinate officer, Officer Lawrence, played an important part in the process and if a person with such a central role does not act impartially, the decision itself cannot eb said to have been paid impartially itself. The involvement of Officer Lawrence who played a critical role in the decision-making process ultimately tainted the decision of the senior Immigration Officer, Officer Caden. In addition, the notes of Officer Lawrence constituted the reasons for the decision. So, it came to be that if they gave rise to a reasonable apprehension of bias then the decision itself was tainted by the apprehension of bias that arose.

* “… the standards for [RAB] may vary…. Depending on the context and type of function performed by the…. Decision-maker involved”
  + This affirms the view that the court had adopted in earlier cases which is that the standard of acceptable bias may vary depending on the particular context and the type of decision being involved here
* 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
    - Here we see two factors from *Baker* itself that are set out in determining the level of procedural protection. We see those factors being imported into this context in determining the level of impartiality required of an ADM
  + Immigration decisions demand the “recognition of diversity, an understanding of others, and openness to difference”
    - This is a focus on the particular nature of the adminsitrative scheme involved and the decisions being made, decisions that by virtue of dealing with immigration need to involve an element of sensitivity and understanding which extends to recognizing the importance of diversity
  + 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”
    - The particular concern the Court has is that the notes reveal play on stereotypes
    - These comments were actually contrary to a letter submitted by Baker’s doctor which stated that with treatment, Baker could remain well and return to being a productive member of society
    - There is a concern with the conclusion being drawn in relation to Baker itself especially drawing conclusions from the fact that she had several children that she would be a strain on the social assistance system
  + “It would appear to a reasonable observer that his own frustration with the ‘system’ interfered with his duty to consider impartiality [the appellant’s application]”
    - This is a broader point about frustration with the nature of the scheme of the whole and in particular with its administration and not about Baker at all. This is actually part of the problem. His frustration with the administration of the scheme seems to influence the conclusion that he draws about Baker’s case in particular

**Note:** Various authors that have looked at this case found it interesting that the court did not seem to draw any conclusions about how the reasons here might also have been impacted by Baker’s race. Is there an argument to be made that the notes here may implicitly play on racial stereotypes as well?

### Association Between the Party and ADM

* Where there are associations between a particular party involved in an adminsitrative matter and the actual ADM
* A professional association or personal relationship between an ADM and one of those involved in the matter can give rise to a reasonable apprehension of bias
  + The emphasis here is on CAN – the fact that there is an association between a party and an ADM will not necessarily give rise toa claim of bias but it many depending on the particular contexts
* It is not only relationships with parties that can be a problem. Significant relationships between ADMs and others involved in the matter (I.e. lawyers, witnesses) must also be considered as potential issues
* In determining whether there is a reasonable apprehension of bias due to an association between a party and an ADM, courts tend to emphasize 2 factors:
  + Nature (significance) of the relationship
    - The concern here is with whether the relationship is significant enough to potentially impact the decision of the ADM
  + Timing and currency of the relationship
    - The time that has passed between the association between the party and the ADM
    - The concern here is “is this a relationship that is current enough to reasonably pose a problem and to give rise to a reasonable apprehension of bias”
* Examples:
  + *Marques v Dylex Ltd.* (1977, Ont Div Ct)
    - Labour board member that previously worked with law firm acting for earlier iteration of union appearing before his panel not disqualified for that reason due to a reasonable apprehension of bias
    - This case provides an example of where the time factor played a very important role.
    - Court emphasize several things in reaching this conclusion:
      * (1) the nature of the involvement and said the board member had nothing to do with the particular proceedings involved during his time at the firm nor did the firm during his tenure. This spoke to the nature of the involvement with the specific matter that was being dealt with
      * (2) the time that had passed. They emphasized that over a year had passed since the labour board member had been involved with the union and almost a year since he left the particular firm
      * (3) the labour relations context. They emphasized that it was in keeping with the nature of the labour relations board that board members would have prior professional associations and associates coming before them because members of labor relations board are drawn from those with experience and expertise in the area of labour relations law
  + *Terceira, Melo v LIUNA*  (2013, Ont Div Ct)
    - Labour board member disqualified; issues had a long history (been going on a long time), the positions of the parties had become deeply entrenched
    - But, Court of Appeal reverses Div Ct

#### Terceira v Labourers International Union of North America (2014 ONCA) (Ont. CA)

* Overturns Divisional Court decision finding bias
* Why?
  + “no materials or record… were filed in support” of the bias claim
    - There was no evidence offered to substantiate the claim of bias
  + Issue central to bias claim was not before the Vice-Chair
    - Board member had nothing to do with the particular proceedings in issue (same as with *Marques* case)
  + Even if it was, the “nexus” between the “factual matrix before the Vice-Chair and the prior retainer” was “inadequate”

#### United Enterprises v Sask. [1997, Sask QB]

**Facts:** United owned a tavern and its’ liquor license had been suspended. It applied of review of the suspension decision to the provinces’ Liquor and Gaming Commission. At the first day of the hearing, the members of the panel for the Commission and the Commission’s in house lawyer who was acting in opposition to United arrived together and they also entered the hearing room together without the individual representative of United and it’s lawyer being present. When United and its lawyer were invited into the room, the panel members and the in house lawyer were already seated and conversing with each other. This happened on 4 more occasions during the hearing. The Commission Chair referred to the Commission lawyer during the hearing by his first name but used the surname of the lawyer for United. Finally, at the end of the hearing, the Commission Chair had a conversation with the Commission lawyer that confirmed that he had received an invitation to the barbeque at the Charis’ house and that he was planning to attend the barbeque.

**Issue:**  Did all of this behaviour give rise to a reasonable apprehension of bias?

**Held:** A RAB arose on the facts. Special relationship, preferred status suggested.

**Ratio:** Illustrates how personal connections rather than simply professional connections can also give rise to a reasonable apprehension of bias. A reasonable apprehension of bias can arise if the Tribunal treats one party with a degree of familiarity that is not extended to other parties.

**Reasons:** The Commission members acted in a manner that suggested the Commission lawyer had a special relationship or referred status. It was the cumulative impact of the interactions here that was significant. The invitation or one of the *ex parte* interactions may not have been enough on their own but all of these issues taken together gave rise to a reasonable apprehension of bias.

### Prior Active Involvement

* This does not mean prior active involvement between the parties themselves per say but rather with the actual matter at issue
* Prior active involvement in the actual matter being considered will generally give rise to a reasonable apprehension of bias
* Key factors to consider:
  + The nature of the previous involvement
    - In what capacity was the decision maker actually involved in the matter
  + The extent of the previous involvement
    - How significantly was the decision maker involved in the matter earlier on
* Usually takes one of two forms:
  + The ADM plays other roles in the process before the hearing
    - For example, problems arise where an ADM sits on an appeal panel of their own earlier decision
    - Problems also arise where an ADM has been involved in an investigation and decision to proceed with the hearing and then sits on the hearing panel itself
    - Problems also arise where an ADM rehears a matter that is sent back for reconsideration after a successful application for judicial review (particular due to bias)
  + Associations with the matter in an earlier external/professional capacity (not with the particular ADM)
    - This is an involvement with the actual matter being considered

#### Province of NB v Comeau [2013, NB CA]

**Facts:** Stemmed from an investigation into whether 2 employees of an adult residential facility in NB had abused residents of the facility. Important to note that what is involved here is the investigative stage of an administrative process. Minister of Social Development made a decision against the 2 employees. The decision emerged from an investigation that was initiated and conducted in part by a regional Director who then also approve the investigation teams recommendations and finalized its conclusions.

**Issue:** Whether prior involvement in the decision-making process gave rise to a RAB?

**Held:** Yes

**Reasons:** The court emphasized that the regional Director was supposed to operate as the final decisionmaker about the findings and conclusions of the investigation. However, the Regional Director was actually involved in the actual conduct of the investigation itself before the final conclusions about the investigation as made. This tainted the final decision around the investigation with bias. The policy adopted by the Minister and the common law duty of fairness, which required a high level of fairness in this context, both required a formal separation between the conduct of the investigation on the one hand and the final decision about the findings and conclusions of it on the other hand.

#### Committee for Justice and Liberty v N.E.B. [1978, SCC]

**Facts:** Involved a panel of the National Energy Board. The panel of the Board had been struck to determine whether to grant an application for a new pipeline. The Chair of the panel was a Mr. Crowe who had previously been involved in a study group that put in the application for consideration of the particular pipeline. He had supported the project and also helped develop some of the terms on which the application came to be made to the National Energy Board.

**Issue:** Did prior involvement on the matter create a RAB?

**Held:** Yes.

**Reasons:** It didn’t matter that the application was refined and revised, and the final decision to apply made, after Crowe left the group. The court was unconvinced by arguments that there was no reasonable apprehension of bias because the application itself for the particular pipeline had been refined and revised after Crowe’s involvement and that there was no final decision as to whether to apply for approval before Crowe left the study group. Court emphasized “the vice of reasonable apprehension of bias lies not in finding correspondence between the decisions in which crow participated and the NEB’s decision but rather in the fact that he participated in working out at least some of the terms on which the application was later made and supported the decision to make it.” Here, simple participation in the matter was enough to give rise to a reasonable apprehension of bias. It wasn’t necessary to show that ultimately the final application that was made was determined at least in whole by the participation of Crowe.

### Attitudinal Pre-disposition towards an Outcome (“Attitudinal Bias”)

* This is where, though an ADM’s conduct or comments, it is revealed that they appear to have a particular attitudinal pre-disposition. In other words, where their conduct or their comments suggest that they are not approaching the particular case with an open mind but may actually be prejudging the result
* Examples of where this can occur:
  + From comments or conduct of an ADM before a hearing begins; or
    - Question here is to what extent attitudes expressed about general or even more specific issues that are related to a decision before a hearing give rise to a reasonable apprehension of bias.
    - There is an argument to be made that having part time ADMs who are also active in the particular field can be useful so long as they are not engaged as legal counsel, parties, intervenors as well as ADM’s in any particular case
    - To what extent should municipal counsellors who have campaigned on certain issues and then have those issues come before them in an adjudicative capacity then be excluded for a reasonable apprehension of bias
    - What the cases in this are show is the significant extent to which a reasonable apprehension of bias is dependent on the context
  + From comments or conduct of an ADM during a hearing process itself
    - *Pelletier v Gomery*
* Highly context-specific
  + Different standards applied in different contexts

#### Old St. Boniface Residents Assn. v Winnipeg [1990, SCC]

**Facts:** A municipal rezoning application for a development project of 2 condos came before a committee of the Winnipeg Municipal Council. One of the members sitting on the Committee, a municipal Councilor, had previously spoken in favour of the particular development project at a separate financing committee meaning which made a key decision allowing the project to proceed. A residents association that was opposed to the development challenged the Member’s participation on the zoning committee on grounds of reasonable apprehension of bias.

**Issue:** Whether the councilor was properly disqualified due to RAB?

**Held:** No, per Sopinka J (for six-judge majority)

**Reasons:** While previously the content of the then rules of natural justice depended on a classification of the adminsitrative decision maker’s decision as judicial or quasi-judicial a flexible contextual approach was now being taken in determining whether an ADM should be disqualified for bias.

* Context specific approach
  + Sopinka reasoned that the Manitoba legislature could not have intended that the rule requiring an ADM to be free from a reasonable apprehension of bias should apply to municipal councilors with the same force as in the case of other ADM show character and functions more closely resemble those of a court.
  + Some prejudgment is inherent to the city councilor’s role
  + The legislature must be taken to be aware that municipal councilors fight elections in which the matter they are called upon to decide may have been debated and they thus might have taken a stand on the particular issue.
  + On the one hand, it is clear that due to the municipal context here it cannot be that the standard of reasonable apprehension of bias is the same as it would be in a regular adjudicative context. On the other hand, since the legislation contemplated a hearing for rezoning applications, the Manitoba legislature could also not have intended that there be a hearing before a body that has already made up it’s mind. Effectively this would render the whole hearing a formality
* Test: Whether the councilor has such a closed mind on the matter as to be incapable of being persuaded otherwise?
  + The RAB test does not apply in this context (but does apply to municipal cases involving pecuniary interests)
    - Sopinka distinguished between cases where a municipal councilor is alleged to have a personal or financial interest in the matter, where the strict standard reasonable apprehension of bias standard would apply and then cases involving a attitudinal predisposition where a more forgiving standard would apply
    - Sopinka then articulated what this standard would be, calling it the “closed mind standard”
      * Under this standard, the issue is whether the municipal; councilor has such a closed mind on a matter as to be incapable of being persuaded otherwise effectively making a hearing futile
      * The issue here is whether the opinion is in other words final in relation to the particular decision and so cannot be dislodged or changed
      * Sopinka articulated a different standard to be applied in determining if bias arises in the municipal context due to the particular circumstances of this context (namely that municipal councilors are elected to their positions and may well have run elections coming out in favour of or opposing issues they alter will have to make decisions on as members of particular committees.
* Here, a closed mind is not established
  + The disqualifying conduct was said to consist of the appearance of the municipal councilor before the finance committee in favour of the development. However, this in itself would not necessarily lead to a conclusion that a municipal councilor’s mind could not be changed if he or she was a member of a later zoning Committee
  + The role of advocate for the development did not equate to an improper role as advocate for the developer motivated by improper relationship with or interest in the developer

#### Save Richmond Farmland Society v. Richmond [1990, SCC]

**Facts:** A member of a municipal council had been reported as stating that although he would listen attentively at public hearing into the matter, he was unlikely to change his mind on the rezoning application. He was in favour of the particular rezoning application.

**Issue:** Whether the municipal councilor was disqualified due to bias?

**Held:** Companion case to *Old St. Boniface*. Sopinka J wrote again for the majority. Applied the closed mind test; no disqualifying bias found specifically reiterating that the issue is whether the municipal councilor in fact had a closed mind not whether a reasonable person would think that he did.

* La Forest J (concurring, for himself and 2 others)
  + Criticizes the closed mind test
    - Said that a closed mind should not be grounds for finding impermissible bias in relation to an elected official acting in a legislative capacity
  + 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”
    - For La Forest we see that the standard should not be a closed mind but corruption.
  + Why?
    - The difficulty of gauging “openness” of mind
    - The majority’s approach (requiring an open mind) will lead to posturing with politicians learning to pay mere lip service to a possible change of mind

#### Newfoundland Telephone Co. v Nfld. [1992, SCC]

**Facts:** Wells was a former municipal counsellor in Newfoundland and a long time consumer advocate. He was appointed to the provinces Board of Commissions of Public Utilities and promised to continue his support of consumers causes, more specifically he railed against the salaries and enhance pensions given to senior executive officers of Newfoundland Telephone. He called them fat cats and other colorful things. These were matters actually under investigation by the Boards of Commissions of Public Utilities and the investigation led to a hearing as to whether the board should order the rollbacks on either or both of these compensation items: the salary and/or the pension. Afte the hearing was scheduled, Wells continued to make public announcements about his concerns with the salary and pensions of the executive officers. This persisted even after the commencement of the hearing into the matter and even after a challenge made by the company on grounds of reasonable apprehension of bias.

**Issue:** Whether a RAB arose? Did Well’s participation in the hearing as a member of the Board gave rise to a RAB?

**Held:** Corey J- Prehearing: no; During the hearing: yes

**Reasons:** At the pre-hearing stage there was no problem of RAB but once the particular hearing date was set, a different standard of bias applied and applying that standard, a RAB arose.

* Boards “can, and often should, reflect all aspects of society”
  + “There is no reason why advocated 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”
  + Strong endorsement that it is ok to have ADMs that draw diverse memberships from broad cross sections of the community and that that itself should not eb taken to create a perception of a RAB
* Pre-hearing: the *Old St. Boniface* “closed mind” standard applied
  + Why?: “During the investigative stage, a wide license must be given to board members (ADMs) to make public comment”
    - This suggests another context where the lenient closed mind test will apply is to investigative functions
  + Applying this lenient closed mind standard, Wells’ comments before the hearing didn’t show a “closed mind” and so he was not disqualified due to bias because of these comments
* Once the hearing date was set, the RAB standard applied (but, it 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” on the subject which is the standard that applies to investigative and legislative decisions
* Wells’ statements, taken together, lead to the conclusion that a reasonable person would have a RAB. He had clearly made up his mind what his decision was going to be before hearing all the evidence
* The appropriate result was to invalidate the decision

|  |  |
| --- | --- |
| ***ADM?*** | ***Standard?*** |
| **Primarily adjudicative (court like) ADMs**   * Deciding cases of individuals or small groups on a particular set of facts * This is where procedural protections are at their highest | Traditional reasonable apprehension of bias standard (*Committee for Justice)* |
| **Elected ADMs**   * i.e. those dealing with planning and development | Closed mind standard (*Old St. Boniface)*   * to satisfy this standard, there would need to be a prejudgment of the matter to such an extent that any contrary representations would effectively be pointless |
| **Investigatory ADMs**   * Not final decisions but dealing with initial investigations | Closed mind standard (*Old St. Boniface)* |
| **Policy-setting ADMs**   * This would be a middle ground | More flexible reasonable apprehension of bias standard because subjecting them to a stricter standard would undermine the role entrusted to them by the legislature |

* This case has been interpreted as creating a spectrum of decision making contexts with a deferential closed mind standard appropriate for investigative and legislative functions, a flexible RAB standard for policy infused decisions and a strict RAB for conventional adjustive functions

#### Pelletier v Gomery (2008, FC TD)

**Facts:** Arose from the Sponsorship Inquiry and the finding and conclusions of the Commissioner of the Inquiry, John Gomery. Sponsorship Inquiry investigated allegations that federal funds were used improperly in Quebec in the wake of the 1995 sovereignty referendum. The sponsorship inquiry was highly politically contentious, and the inquiry played a major part in the Liber governments electoral defeat in 2006. John Pelletier who was swept up in the inquiry as Chief of Staff to form Prime Minister challenged the inquiries findings and conclusions on judicial review. The former Prime Minister, Jean Chretien, also initiated a similar challenge. Pelletier said the Commissioner’s public comments during and after the sponsorship inquiry established a RAB. Case was decided on a federal court judge based on the common law standard as it applied to a public commission of inquiry.

**Issue:** Did a RAB arise?

**Held:** Yes, per Titelbaum J.

**Reasons:** The required standard for a public inquiry falls between the flexible and strict RAB standard. Here, a RAB was created, applying this standard based on statements made by Commissioner Gomery.

* 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 its 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)
    - Here we see the concern that Commissioner Gomery has made statement that suggest that he is predetermining the outcome that he will reach in the inquiry on the basis of testimony provided to that point but incomplete testimony because there were various important witnesses still to come
* 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)
    - This statement suggests that Gomery had predetermined the outcome even though the inquiry was still ongoing and further testimony was to be heard
* Gomery on upcoming evidence: the “juicy stuff” is yet to come (para 87)
  + Teitelbaum J: “This comment trivialized the proceedings, which has enormous stakes for the witnesses involved in the proceedings, especially those who had yet to testify. It had telegraphed to the public a prediction that evidence of wrongdoing was forthcoming… Whatever interpretation is given to this comment, the comments bears a pejorative connotation to which no witness ought to have been subjected” (para 88)
* On Gomery’s quest for media attention: In giving these interviews Gomery gave a reason for giving these interviews which was that “there was increasing pressure for judges to ‘come out of their ivory towers to establish some sort of relationship with the media’”
  + Teitelbaum J: “I agree with the Applicant that the Commissioner became preoccupied with ensuring that the spotlight for 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)
  + Teitelbaum J: “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)
* All of this taken together was adequate to show that Commissioner Gomery had prejudged the issues (that he had an attitudinal pre disposition) and that he was therefore not sufficiently impartial giving rise to a RAB

### Pecuniary or Material Interest in the Outcome

* One of the clearest cases giving rise to a RAB
  + Bias rule is designed to prevent ADMs from being judges in their own cause and standing to gain financially from a decision is one of the classic examples of an ADM being a judge in their own cause
  + E.g., a RAB will arise if an ADM is a shareholder in a company that is a party to a proceeding: *Dimes v Grand Junction Canada Do* [1852, HL]
  + A reasonable apprehension of bias will arise if a member of a municipal Board that makes zoning decisions participates in a decision that will impact property that they co-own in the particular area
* Does the pecuniary/material interest have to be direct?
  + Only a direct and certain interest is sufficient: *Energy Probe* [1985, FCA]
    - The issue was in relation to the Automatic Energy Control Board who renewed the operating license of a nuclear generating station run by Ontario Hydro. A part-time member of the Board, Mr. Olsen, was also the present of a company that supplies cables to nuclear power plants. Olsen had also been a past Director and shareholder of the particular company. The company had supplied cable to Ontario Hydro in the past after having completed successful in a competitive tendering process raising the possibility it may do so again if the operating license for this particular nuclear generating station was approved. Energy Probe, a competitor, contested the decision to renew Ontario Hydro’s license arguing that the decision should be quashed for RAB due to Member Olsen’s participation
    - **Issue:** Whether the decision should be quashed due to RAB.
    - **Held:** No
    - **Reasons:** Adopted the reasons of the lower court judge who held that a pecuniary interest must be sufficiently direct and certain to give rise to a RAB. Here, the final interest of the part time member was not sufficiently direct. It wasn’t direct because Olsen was not presently a shareholder. In addition, the interest of Olsen was not sufficiently certain. As of the date of the hearing relating to the operating license, the company did not have a contract with Ontario Hydro and the contract the company held in the past had been contingent on access in a tendering process and thus, there was no certainty that Olsen’s company would actually sell to Ontario Hydro id the license was approved
  + If law held that indirect pecuniary interest could give rise to an RAB then many more ADMs would be caught by the rule
* Is any interest at all sufficient, no matter how small?
  + The conventional view is that the size of the proprietary interest is relevant but the cases have started to place limits on this view.
    - Some cases have used the requirement of directness to preclude a claim for RAB where the likely gain is minimal at best
  + 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)
    - **Held:** The ability of the Law Society to order costs against a member found to have engaged in misconduct did not give rise to a RAB. The argument was that the Member’s of the disciplinary committee stood to gain financially as members of Manitoba’s Law Society from the order of costs since the costs recouped could be used to lower bar fees. Court said that any pecuniary interest that members of the committee may have is far too attenuated and remote to give rise to a RAB since costs recouped from the property of the Law Society and in no way do they accrued to the individual members of the Committee who determined that the charge of misconduct was in fact well founded. Even if one were to assume that all of the recouped costs were applied in such a manner as to reduce bar fees it would be unreasonable to conclude that this would lead to a likelihood of bias in members of the committee due to the minuscule amount that would be applied in this way

## Institutional Bias

* A RAB can arise from:
  + Individual comments or conduct of a particular ADM acting either alone or as part of a panel for example; or
  + *Institutional* structures or practices of the particular adminsitrative decision making context as a whole
* Focus of later is on the structure or operation of an ADM
  + Focus will be on the statutory scheme and the processes adopted by the ADM institutionally in making particular decisions
* Claims commonly arise:
  + Where individual members of an ADM collaborate to set policy, creating concerns about pre-judgement in situations covered by it
  + Where ADMs are multi-functional, combining an investigative, ‘prosecutorial’, and/or adjudicative role
    - Here, concerns about bias arise where there is overlap between these different functions with the possibility that individuals who play a role in investigating/prosecuting are then called upon or can influence the ADMs who make the final decisions
* If the structure or practice at issue is the actual direct by product of the legislative scheme, rather than the manner in which decisions are made in practice in implementing the scheme, you will have to attack the validity of the legislative scheme itself. The common law obviously cannot be used to attack the validity of a legislative scheme, only constitutional or quasi-constitutional schemes can do that
* However, if the issue is with the manner of how a legislative scheme is implemented, in practice on an institutional level, then a common law claim of institutional bias may be available

#### 2747-3174 Quebec Inc v Quebec [1996, SCC]

**Facts:** The body responsible for regulating alcohol permits revoked the company’s alcohol permits for various violations of the provinces Liquor Control statute. The company sought a declaration that the various provisions of the Quebec Alcohol Licensing Statute were invalid under s. 23 of the *Quebec Charter*.

**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 (bias)?

**Held:** Yes (Gonthier J)

**Reasons:** In interpreting s. 23 the SCC stated clearly that it was informed by and elaborating on the common law.

* “There is no longer any doubt that impartiality, like independence, has an institutional aspect”
  + Courts makes it clear that it is possible to brings claims of institutional bias.
* Whether or not any particular judge harbored any preconceived ideas or biases if the system is structured in such a way as to create a RAB on an institutional level, then the requirement of impartiality is not met
* General test: “The determination of institutional bias presupposes that 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”
  + This is really just the classic RAB test from the *Committee for Justice* case that has been modified for claims involving institutional bias
  + The requirement is not to find bias in all cases, it is a requirement to find cases in a substantial number of cases.
* The inquiry 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 adminsitrative agency and the operational context as a whole will of course affect the assessment”
* A plurality of functions in a particular ADM is possible
  + “… a plurality of functions in a single adminsitrative agency is not necessary problematic [but must] not result in excessively close relations among employees involved in different stages of the process”
    - It is ok to have a multi functioned ADM that plays a number of different roles (investigative, prosecutorial and adjudicative) but what is important is that there is no blending of the individual playing those roles
* 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/functions 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)
    - Even Directors have the ability to make a decision that a hearing was necessary and then could sit on that particular hearing
* Given the potential for overlapping roles the process could create in an informed person, create an RAB in a substantial number of cases
* However, legislation not invalidated, since the problem was not with the statute, but the manner of its implementation
  + The proper remedy was to therefore quash the Regis’ decision in this particular case and to encourage the Regis to respond by changing its particular procedures in implementing the statutory scheme

**Note:** In any claim for institutional bias, it will be important to go beyond what the statute says and find out what actually happens in the particular decision making context in practice

## Statutory Authorization

* It is a defence to an allegation of bias and to a lack of independence if the conduct complained of is authorized by statute either explicitly or by necessary implication
  + For example, statute may authorized participation of those with a firm attitude or even having a relationship with one of the parties or a stake in the outcome
  + For example, Labour relations Board are typically composed of a representative from both employment and labour with a neutral chair and any attempt to opposed this situation on grounds of RAB due to an attitudinal predisposition would face a claim of statutory authorization

#### Brosseau v A.S.C. [1989, SCC]

**Facts:** A notice of hearing was issued to a company the Alberta Securities Commission (ASC). The notice alleged that false or misleading statements were contained in the company’s prospectus. B, who was counsel for the company, alleged that the chair of the ASC was disqualified from sitting in an adjudicative capacity at the hearing into these allegations because he was also impermissible acting as an investigator into the allegations as well. In other words, there was an impermissible overlapping in roles. During the investigation, the Chair of the Commission had instructed the Commission’s staff to review files and infuriation in the possession of the police about the company. In addition, the Chair had received a copy of the resulting reporting of the Commission’s staff into the investigation. The chair had then decided to sit on the panel that was going to adjudicate the claim.

**Issue:** Whether the chair of the ASC was disqualified by RAB?

**Held:** No, the conduct involved was statutorily authorized.

**Reasons:** “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”
* The Act provides statutory authority to the Commission to conduct a full scale investigation with strict requirements and this implied the authority to conduct a more informal internal review as well otherwise it would have to undertake a formal investigation or what are often simple adminsitrative purposes
* Chairman had the right to seek out the police reports and share them for purposes of the investigation
* “So long as the Chairman did not act outside of his statutory authority, a ‘reasonable apprehension of bias’ affecting the Commission as a whole cannot be said to exist”.

**Note:** Compare this case with the case above (Regis). In the Regis case, the court held that there was a RAB resulting from the Regis’ decision making process but the court said that the problem as not statutory but could be dealt with internally by changing the way the Regis operated. Why didn’t the court make the same decision in this case? If the ASC could have avoided the overlapping of roles while acting within the scope of the statute, why was statutory authorization a defence? Wasn’t it just possible the Chair and the Commission could bring itself into compliance with the principles relating to bias just by changing their practices?

* What seems to be the difference is that in the *Brosseau*, the court is quite concerned about the practical impact of the particular decision to require the Commission to change how it conducts investigations in this context

### General Result

* What happens when a claim of RAB is held to arise?
  + Decision invalidated, sent back for reconsideration by another decision maker
    - This is the normal result even if one member of a multi member decision maker (i.e. Labour Relations Board) is tainted by perceived bias. The perceived bias on the part of 1 decision maker will taint the decision of an entire panel that sits on that particular matter

## Independence

* Second component to the right to an independent and impartial decision maker – the requirement of independence
* The right to an independent decision-maker does not only speak to a RAB and the need for impartiality, it also speaks to the need for ADMs to have a certain amount of independence from external sources
  + Focus on independence from external influences that impermissibly interfere or try to interfere with adminsitrative decision making
  + Speaks to the relationship between adminsitrative decision making and others (ADMs and the executive branch) but it is also concerned about the relationships between ADMs and private actors
* General test: whether a reasonable, well-informed person, having thought the matter through, would conclude that the administrative decision-maker is sufficiently free of factors that could interfere with its ability to make independent decisions
* Courts have been preoccupied with 3 factors in determining whether independence is somehow insufficient under this test – **The “*Valente”* factors:**
  + Security of tenure
    - “The essentials of security of tenure include:… that the [ADM] be removeable 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]
    - Concern here is with the ability of government to remove an ADM for making decisions that it does not like. This requirement is typically understood to require, at a minimum, than an ADM can only be removed for cause
    - This passage shows that there are 2 essential requirements to security of tenure: (1) ADMs only be removable for cause and (2) for cause decisions be subject to independent review and determination which would allow the impacted ADM a full opportunity to be heard
  + Financial security
    - “The essences 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 Board* [1995, SCC]
    - Here the concern is that the government will alter the pay of ADMs for arbitrary reasons such as its discontent with the decisions being made by a particular ADM
  + Adminsitrative independence
    - Concern is with institutional control, particularly in relation to matters that have a bearing on adjudicative functions of ADMs, their ability to deal with particular cases and particular individuals with their owns sets of facts
    - Institutional control deals with the way the affairs of an administrative decision-maker are administered – from budgetary allocation to individual case assignment
    - Concerned with making sure that ADMs are not put in situations where they might choose to make decisions that protect their own working conditions rather than making decisions on their specific merits
* General points:
  + These three factors are not fixed standards
    - Rather, they constitute criteria that are considered by the courts in determining whether concerns about independence arise
  + The standards of independence vary with the context
    - The requirements to satisfy the three factors will vary depending on the statutory context
    - Standards applicable to ADMs will not be as demanding as the standard of independence applicable to regular courts
    - ADMs cannot be held to the same standards as regular courts because they have some connection with the government but this does not mean they should lack independence in individual decisions they are asked to make
  + Courts look to actual practice in determining whether concerns about independence arise, not just the statutory scheme
    - Even wehre the legislation leaves open the possibility that independence may be compromised, there is room for arguing that actual practice will convince a court that there really is no problem in reality

#### 2747-3174 Quebec Inc. v Que. [1996, SCC]

**Facts:** The Quebec numbered company had its liquor license revoked and it challenged this by the Regis which was the regulator of the Quebec Liquor Licensing scheme. In addition to arguments that there was an institutional RAB it also argued that the Regis was insufficiently independent. It made a couple of key independence arguments: (1) it argued that the Regis lacked insufficient security of tenure; (2) the Regis lacked sufficient adminsitrative independence. In making the argument of insufficient security of tenure, the company referred to a few points of the particular adminsitrative scheme.

* Challenge to independence of 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 members of the Regis

**Issue:** Are there concerns about insufficient independence on the part of the Regis from the executive branch?

**Held:** No, there was sufficient independence.

**Reasons:**

* Security of tenure argument- one argument was that the Directors of the Regis who were allocated adjudicative functions in specific cases, possessed insufficient security of tenure because their appointment terms were limited
  + Fixed term appointments are acceptable for adjudicative tribunals provided that the term of tenue is secure against interference (that it is not at pleasure)
    - Court held that there were no concerns about security of tenure
  + However, removal of tribunal members must not be merely “at pleasure” of the executive
  + Here,
    - Appointments were fixed term (2, 3 or 5 years)
    - Members could be dismissed only for cause (not at pleasure) and could challenge their dismissal in court. Recourse was available for arbitrary interference with the Regis decisions and functions
  + For these reasons, there were no concerns about insufficient security of tenure
* Adminsitrative independence – it was argued that there were so many points of contact between the Regis and the Minister responsible for the Board’s enabling legislation that the Regis’ adminsitrative independence was compromised
  + “It is not unusual for an adminsitrative agency to be subject to the general supervision of a member of the executive”
  + There was no evidence that indicated that contact here involved the minister in day-to-day regulation and scrutiny of the R’s adminsitrative functions; this role fell to the R’s chairman

**Takeaways:**

* The manner in which the law was applied. The courts relied on the actual practice of the Regis in assessing whether it was sufficiently independent., It did not focus along on the statutory scheme, it pushed beyond that and looked at the practice of the Regis
* In more recent decisions the court has suggested a spectrum of decision-making types with some requiring more independence than others. This is similar to the spectrum the court adopted in cases dealing with bias. Highly adjudicative tribunals and ADMs endowed with court like powers and procedures require the most independence and those at the other end of the spectrum dealing primarily with legislative functions like policy making require less independence

### Statutory Authorization:

* If the relevant statute expressly, or by necessary implication, authorized decision making processes that do not meet standards of independence, there will be no remedy by virtue of a claim of statutory authorization unless the statute can be challenged on constitutional or quasi-constitutional grounds under s. 7 of the *Charter* or *Canadian Bill of Rights*

#### Ocean Port Hotel Ltd. v B.C. [2001, SCC]

**Facts:** The Ocean Port Hotel in BC had its liquor license suspended due to licensing infractions. An appeal of this decision was heard by the provinces Liquor Appeal Board. The statutory scheme explicitly provided that members of the Board could be dismissed at pleasure, that they served only part time and that they were assigned to cases at the Chair of the Board’s discretion. On appeal, the Hotel argued three thing: (1) as an administrative tribunal exercising adjudicative functions the Board required the same level of independence as the regular courts; (2) this level of independence was constitutionally protected and (3) the Board’s independence was insufficient focusing on security of tenure. The hotel relied on decisions holding that judicial independence was an unwritten constitutional principle arguing that these decisions should be extended to ADM’s exercising adjudicative functions.

**Held:** McLachlin CJ – claim of inadequate independence fails. Why? – statutory authorization

**Reasons:** There is no general, free-standing constitutional guarantee of independence for ADMs exercising adjudicative functions. She distinguished ADMs from the courts. Ocean Port had argued that the preamble to the Constitution Act gives constitutional protection to an unwritten constitutional principle that mandate a degree of independence. However, the CJ dismissed this argument and in doing so said that this unwritten principle of independence is confined to the provincial and superior courts and it does not extend to ADMs.

* “This principle [the principle of independence] 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 of government.”
  + There is no general free-standing constitutional guarantee of independence for ADMs. However, she included a qualification that in some cases, ADMs may attract constitutional guarantees of independence. This would be the case wehre *Charter* guarantees to independence are actually engaged.
* “While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not”
* “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 (displaced) 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.
  + The independence required of particular ADMs is determined by interpreting the statute in question to discern the legislatures intent.
  + It is not open to a court to apply a common law rule, like the right to an independent impartial decision maker, 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’”
  + The Act said explicitly that the Chair and members of the Board served at the pleasure of the Lieutenant Governor in council

**Key Takeaways:**

* There is no free standing general constitutional guarantee of independence for ADMs even if they are exercising adjudicative functions typical of the courts. However, constitutional guarantees of independence may be recognized in some cases if provisions of the constitution are engaged
* A statute can expressly or by necessary implication override the common law independence requirements just as it can with bias.

# Substantive Review: Pre-*Vavilov*

* **Remember:** there are 2 major grounds upon which an adminsitrative decision can be challenged: (1) procedural review (the right to be heard and t he right to an independent and impartial decision maker) and (2) substantive review
* The leading decision by the SCC on substantive review is it’s recent decision in *Vavilov* (2019)
* *Dunsmir* was the leading decision of the SCC just prior to it’s decision in *Vavilov*

## Substantive Review

* Concerned with the outcome (substance or merits and the reasons given for them), not with the process followed in making a decision
* Basic question underlying the substantive review analysis is whether a decision of an ADM reflects an error of the sort that the courts are prepared to interfere with it on an application for judicial review
  + This often turns on how much deference the court is willing to give to the ADMs decision. This question of how much deference a court is prepared to give is wrapped up in the standard of review
* The law relating to substantive review has been quite unstable, subject to fairly dramatic fluctuations in approach. The reason for this is that substantive review is ground zero for the tension between the theoretical ideas
* Key theoretical ideas:
  + Parliamentary sovereignty/ legislative supremacy
    - Refers to the basic idea that the legislative branch, the branch of government that is the more democratically legitimate because it is popularly elected, has the power to make or unmake any law provided it respects constitutional limited (i,.e. the federal/ provincial division of powers)
    - Dicey thought that Parliamentary sovereignty entailed two things: (1) the idea of omnipotence which is the basic idea that the legislative branch has the power to make or unmake whatever laws it chooses and (2) legislative monopoly which is that all public power must be channeled through the legislative branch to subject it to democratic approval before hand and democratic scrutiny after the fact
      * The first idea was not necessarily inconsistent with delegation of decision-making power to ADM but the second idea was in tension with the existence of adminsitrative decision making
    - It is not generally accepted that the notion of a legislative monopoly is widely unrealistic.
    - When we speak of parliamentary sovereignty in the adminsitrative context, the idea is often presented as a short form for the idea that the courts should respect the wishes of democratically elected legislatures by respecting their decision to delegate certain decisions but only those decisions to ADMs
    - Means the legislative branch can delegate decision making to ADMs
  + The rule of law
    - Generally entails, as a minimum, that all government actions must be authorized by laws validly enacted by the relevant legislature or the royal prerogative. No one should be made to suffer as Dicey put it, except for a distinct breach of the law
    - Accordingly, when you see the rule of law invoked in the admin law context it is often invoked as a short hand to capture the idea that ADMs can only act or not act to the extent they are permitted to do so by a valid statutory delegation of authority
  + The separation of powers
    - Speaks to the relationship between the different branches of government and the need to respect the proper roles of each branch
    - According to the separation of powers, the role of the courts is to interpret and enforce laws validly enacted by the legislative branch including those that delegate decision making to ADMs
      * The courts in Canada’s system are also thought to have an important role to play as guardians of the rule of law and its demand that all government action must be authorized by law. If authority has been delegated to an ADM by Parliament or a provincial legislature, it falls to the courts to ensure that the will of Parliament or legislature is respected. For the courts not to intervene could accord a legislative power to the decision maker to make decisions not actually delegated to it in violation of the rule of law.
    - The role of the legislative branch is to enact those laws
    - The role of the executive branch is to implement those laws
    - Problem often arise in this delegation of powers because the language that is used to delegate power to ADMs is often open to varying interpretations. Why is the language open to various interpretations?
      * Because it is often under determinant and lacks clarity of the meaning of the language

### Interpretation

* This problem with the under determinant is the lack of clarity of meaning of language which
* Plain meaning approach: under this approach you would have to attempt to determine what is the plain meaning of the word
* Purposive approach: you would attempt to determine what is the purpose of the rule here and then attempt to interpret it consistently with the purpose
* Attempt to determine the intention of the drafters of the law: would need to determine what was their purpose in enacting the rule
* Adopt a more contextual approach: attempt to interpret the rule in keeping with the common understanding of the relevant language used in the particular area. You would have to determine what is that common understanding and then apply it

### Substantive Review

* “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 adminsitrative 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 adminsitrative functions in respect of the matters delegated to adminsitrative bodies by Parliament and legislatures.” (*Dunsmuir*, para 27).
  + This passage reflects the tension between the idea of the courts playing an important role as guardians of the rule of law making sure that ADMs do not overstep the delegation given to them but on the other hand the necessity of avoiding undue interference with the decisions of ADMs because those decisions have been delegated by the democratically elected legislative branch of government
  + Judges have to attempt to resolve this tension between the underlying principles in this area and in doing that, it is natural that they will struggle with how to resolve the tension. Difference judges may also take different views about how the tension is to be resolved. Some may prefer the rule of law, guardian function of the courts more than deferring to the decisions of ADMs to defer power to adminsitrative actors.
* Recurring concepts
  + Standard of review
    - Refers to the intensity that the courts apply in reviewing the substance or outcome of an adminsitrative decision making process
    - The question of which standard of review to apply is often framed in terms of how much deference or respect the reviewing court should show the ADM. Less deference means a stricter standard of review by the courts
    - Captures the intensity with which a reviewing court is going to review a decision of an ADM
      * Is it going to review it and see if it is simply reasonable or will it review it to see if it is correct?
  + Privative clause
    - A statutory provision usually in an enabling statute which say that an ADM’s decision is final and not open to judicial review by courts
    - Were inserted by the federal Parliament and provincial legislatures to try and prevent the courts from reviewing adminsitrative decisions at one point in response to the hostility that courts showed to adminsitrative decision making and the adminsitrative state
    - Thought by some to be important because they are taken to be a signal by the legislative branch that the courts should defer to the decision made by ADMs
    - The court treatment of privative clauses has varied over time reflecting their overall approach to adminsitrative decision making
      * At time they have been ignored
      * At other times they have been determinative
      * Other times they have been treated as just one factor in the fix of a larger group of factors to be taken into account
    - At present, privative clauses are effectively ignored all together but only because a deferential approach to judicial review is typically applied broadly across the board
    - Primitive clauses vary in their language and strictness
    - Example:
      * *Worker’s Compensation Act*, 1979, S.S. 1979:
        + 22(1) The board shall have exclusive jurisdiction to examine, hear and determine all 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…
        + (2) The decision and finding of the board under this Act upon all questions of fact and law are final and conclusive and no proceedings by or before the board shall be restrained by injunction, prohibition or other proceeding or removeable by certiorari or otherwise in any court.

Tis would be a strict privative clause because:

The language of this clause confers on the ADM exclusive jurisdiction to deal with the matter

It also says that on all questions of fact and law that he decisions of the Board are final and conclusive and should not be restrained

* + - * Underlying purpose of all privative clauses is that they seek to reduce the judicial review of the courts
  + Jurisdiction
    - “Show me the power!”
    - Central to debates about substantive review
    - Speaks to the idea that ADMs have to have the legal power to act. ADMs have to be authorized by law. Usually that will be by statute but it could also be authorized by royal prerogative
    - ADMs have no inherent power. Unless an administrative decision is grounded in law, then the decision is invalid because it is beyond the jurisdiction of the ADM

## Pre-*Dunsmuir* (2008)

* From 2008 to late 2019, the SCC decision in *Dunsmuir* was the leading decision on substantial review. It has now been overtaken by SCC decision in *Vavilov*
* This component will be about the leading decisions UP UNTIL *Dunsmuir*
* Two-step analysis:
  + Determine the proper standard of review. The standard of review determines the intensity with which the reviewing court will review the decision of the ADM
    - Two options now: (*Vavilov* maintained these two)
      * Correctness
        + Non deferential standard of review
        + A reviewing court asks whether the decision of the ADM was correct meaning the same decision that the revieing court would have reached
      * Reasonableness
        + More deferential standard of review
        + When reasonableness is the standard of review, it is less likely to result in a decision being quashed or invalidated
      * *Vavilov* varied the approach used in determining which of these 2 standards apply in various ways but it maintained the two key standards of review from *Dusnmir*. In addition, reasonableness is now the standard of review applied to the vast majority of adminsitrative decisions.
  + Apply the standard of review to determine whether the decision warrants interference by the court
    - If a reviewing court applies the non-deferential correctness standard, it is more likely that it will interfere with the decision of an ADM than if it applies the more deferential reasonableness standard
    - However, even when it applies the more deferential reasonableness standard it is not the case that adminsitrative decisions will always stand. Various decisions were found to fail reasonableness review as well.

### Jurisdiction’s Heyday: Pre-1979

* 1979 was an important year in the procedural review context and the substantive review context as well
* Prior to 1979, the substantive review analysis really turned largely on the notion of jurisdiction, although the courts also interfered with decisions involving questions of law and fact as well
* Courts weren’t especially interested in deferring to ADMs during this period.
* Analysis turned largely on notion of “jurisdiction”
  + If the issue was jurisdictional, the courts deferred to the ADM
    - If the issue fell within jurisdiction the courts would defer to it, treating it as immune from judicial interference
  + If the issue was not jurisdictional, the courts did not defer to it
    - If a jurisdiction question was involved, they would freely review it. And in reviewing it, they explicitly applied a non-deferential correctness standard of review
* The result was really all or nothing
  + If the basis upon which a decision as challenged was thought to fall within jurisdiction, it was virtually immune from judicial review
  + But, if the basis on which a decision was challenged was thought to involve a jurisdictional question, then the courts reviewed it, interfering if, in their view, the ADM simply did not get it right according to the court’s own view of the issue
  + The extent to which the courts used the notion of jurisdiction to interfere with adminsitrative decision making during this period really varied. But, in the 1960’s and 70’s it was regularly used to interfere with administrative decisions even in the face of privative clauses (provisions in the enabling statute which say that an ADM’s decision is final and not open to review by courts)
  + Legislatures used to use privative clauses to try to preempt, stop, judicial interference
* “Jurisdiction” used to evade privative clauses
  + Their reasoning was that a legislative scheme that confers power on an ADM determines the scope of an ADM’s jurisdiction. Actions by an ADM that exceed its jurisdiction are not decisions but rather void. Accordingly, privative clauses, regardless of their wording, do not insulate decisions that exceed an ADM’s jurisdiction because they are not decisions at all. They only insulate decisions that fall within jurisdiction.
* Two techniques used to frame issues as “jurisdictional”
  + Frame as a preliminary or collateral question
    - Here, the courts framed certain issues as preconditions to jurisdiction that if they were not met, meant the ADM lacked jurisdiction
    - Statutes often set out certain conditions that must exist before a decision can be made making it clear that if A, B or C happens then an ADM can do E, F or G.
    - It is often difficult to determine whether something is a pre-condition to an exercise of statutory authority. Even if this is clear, what is required to satisfy may not be clear. This all goes back to the issue of the indeterminacy of language.
    - There was a strong sense during this period that the courts exploited indeterminacies in language to justify interfering with decisions that they simply did not like for their own substantive reasons
    - See, e.g., *Bell v Ont.*  [1971, SCC]
      * **Issue:** Whether the Ontario HR Commission had jurisdictions to consider claims of discrimination in relation to rental housing which applied to “self-contained rental units”
      * The SCC framed the question of whether a rental was a “self-contained dwelling unit” as a preliminary or collateral question that had to be answered correctly before the Ontario HR Commission making its own decision that it was not satisfied on the facts
      * Courts decision implied that the courts had nothing to gain from permitting the Ontario HR Commission to consider the meeting of this term first. It really got around the issue by framing the issue of whether the rental was a “self-contained swelling unit” as a preliminary or collateral question that had to be answered correctly first. The determination of whether the decision was correct was a decision that the court decided that it was allowed to make for itself on judicial review, implicitly applying the correctness standard
  + Accuse the ADM of asking the wrong question
    - Here the courts would ask whether the ADM asked itself the right question in making the decision. If not, the ADM would lose jurisdiction and the court would interfere with the decision even if there was a privative cluse in it that purported to preclude judicial review
    - See, e.g., *Metropolitan Life Insurance Co. v International Union of Operating Engineers, Local 796* [1970, SCC]
      * Labour legislation provided that a union could be certified as the bargaining unit for a group of employees if at least 55% of the employees were members. The Ontario Labour Relations Board adopted a policy about union certification and that policy treated eligibility to be in the union under the union’s constitution as only 1 factor to be considered. The Ontario Labour Relations Board explained the policy at some length. SCC said that the Ontario Labour Relations Board acted without jurisdiction because it asked itself the wrong question. It should have asked whether the employees in question were members of the union at the relevant date not whether the employees satisfied developed by the Ontario Labour Relations Board for this purpose. Implicit in the decision of the court was that the union Constitution was determinative of membership.
* Approach adopted was widely criticized as formalist and unprincipled. It was also widely criticized as insufficiently attentive to the fact that the courts were interfering with decisions that had been delegated to ADMs by democratically elected legislatures. Another concern was that ADMs often had much more expertise in relation to the issues involved than the courts.
* There was much force to this criticism by branding an issue as jurisdiction because it dealt with a preliminary question or asked the wrong question, the courts could then replace an ADM’s decision with one that they referred regardless of the expertise of the ADM in the particular context and often at the expense of the clear will of the particular body that delegated the power to the ADM, not to the courts. Courts moved away from this approach following significant criticism in 1979.

### Jurisdiction’s Fall, Deference’s Rise:

* *CUPE* was a seminal case marking a clear turning point in the law where they turned away from the focus on jurisdiction

#### CUPE v New Brunswick Liquor Corporation (1979, SCC)

**Facts:** The New Brunswick Public Service Relations Board had to determine the meaning of what is generally agreed to be a badly worded provision in its enabling statute. The provision dealt with the provision of work by management during the course of a lawful strike by CUPE, a public sector union. The language of the provision was “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). The employer argued that management were not employees within the meaning of this provision and so that there was no problem using management to fill the positions of the striking employees during the strike. It also argued that even if management were employees, there was nothing in the statute that prevented it from filling the positions temporarily. The provision only operated to prevent it from filling the positions permanently to reserve the positions once the strike was over. The Board determined that this provision did preclude the employer from temporarily using management personnel to do their work ordinarily done by the striking employees during the strike. The Board reasoned that the purpose of the provision was not to preserve positions once the strike was over but rather to prevent picket line violence with replacements by prohibited strike breaking. The legislation protected the Board’s decision with a privative clause which stated that every “award, direction, decision, declaration or ruling of the Board is final and shall not be questioned or reviewed in any court”. The employer applied for judicial review of the Board’s decision and succeeded in part on appeal. The appellate court held that the interpretation of the provision was a preliminary or collateral matter wrongly decided by the Board which thereby assumed jurisdiction that it did not properly have under the statute. The Board appealed the decision.

**Issue:** Whether the interpretation of the provision of the legislation was protected by the privative clause in the statute by virtue of the fact that this involved an issue which fell within the court’s jurisdiction or whether this involved a jurisdictional question and thus was not protected by the clause.

**Held:** Dickson J – The issue here came within the protective shield of the privative clause and was not in any respect subject to judicial review on a correctness standard.

**Reasons:**

* Began by noting that the key provision was replete with ambiguity
* Emphasized the Board’s expertise and experience in relation to labour relations issues along with the clear legislative intent demonstrated by the existence of the privative clause on the part of the legislature to delegate these issues to the Board
* He then went on to stress that judicial constraint should be exercised in relation to the Board’s interpretation of this provision since it would seem to lie logically at the heart of the specialized jurisdiction confided to the Board
* 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 a “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”?
    - Applying this standard of review, he refused to override the interpretation that the Board gave to the provision. He disagrees with the decision of the appeal court.

**Significance of this Decision:**

* Important because it shows deference to and respect for the decision making mechanism chosen by the New Brunswick legislature, namely that the Board deal with labour relations issues in this context
  + Dickson emphasized the legislative choice to confer certain tasks on ADMs and the virtue of judicial deference where this happens
* For the first time, his decision acknowledged and gave weight to the specialized expertise of the Board in a decision of the SCC. This marked a real break from decisions that had so far failed to acknowledge that ADMs are specialized bodies that possess a legislative mandate to apply their expertise and experience to matters they are often better situated to address than the courts
  + His decision introduced expertise and experience into this substantive review mix as a matter to be taken into account in determining and applying the standard of review
* Acknowledged the difficulties raised by the court’s approach up until this point which placed a real emphasis on jurisdiction as its central organizing concept.
  + He did not abandon the role of jurisdiction all together but he did say that courts should not be alert to brand as jurisdictional and therefore subject to broader curial review meaning more intense review that which may be doubtfully so.
  + The instruction here was that in close cases, the courts should give the benefit of the doubt to ADMs and exercise deference
* It introduced the concept of patent unreasonableness. In relation to matters that fall within jurisdiction, the courts should not interfere with the result with a decision reached by an ADM unless the interpretation of the statute is “so patently unreasonable that its construction cannot be rationally supported by the legislation”
* Stated that matters falling outside the jurisdiction are subject to non-deferential correctness review and matters falling within jurisdiction are subject to a new form of deferential review for patent unreasonableness
* It candidly acknowledges that no single correct interpretation could be offered to the provision here due to its bad drafting. Several reasonable alternative interpretations were available. This implicitly departs from one of the key assumptions underlying the old approach to substantive review, namely that statutory provisions do or must have 1 correct interpretation and that it falls tot eh courts to say what that correct interpretation actually is. This marks a turning point in Canadian administrative law relating to substantive review. While it did not abandon the old concept of jurisdiction, it demonstrated a much more deferential posture, a acknowledging the legislative choices and the expertise and experience of ADMs and that in close cases where it is unclear whether issue is jurisdiction the courts should give benefit of the doubt to ADMs by deferring to them

### The Pragmatic and Functional Approach

#### Pushpanathan v Canada [1998, SCC]

* This case consolidated the post- *CUPE* cases and remained relevant until the SCC decision in *Vavilov* because the factors it set out were incorporated into the *Dunsmir* framework
* Affirmed the existence of three standards of review (SORs)
  + Correctness – least deferential SOR
  + Parent unreasonableness (from *CUPE*)- most deferential SOR
  + Reasonableness simpliciter – an intermediate SOR that had been developed in the years after *CUPE*
    - The cases struggled to articulate the difference between these reasonableness standards clearly. They said that the difference between the *CUPE* patent unreasonableness standard and the new reasonableness simpliciter standard was the “immediacy or obviousness of the defect in the ADM’s decision”. The problem in a patently unreasonableness decision would be obvious on the face of the decision. The problem in a merely unreasonable decision would require more careful scrutiny to find.
* Sets out four factors to consider in determining the SOR that should be applied
  1. The existence of a privative clause
     + The existence of a privative clause was taken to be a central indication of the legislature intention about judicial intervention in relation to the issue
     + Two considerations:
       - Is there a privative clause in the enabling statute covering the decision?
         * If yes, more deference (but not all privative clauses created equal)
         * If not privative clause, neutral factor in determining the SOR
         * If no privative clause and a statutory right of appeal, less deferential SOR

The existence of the appeal was taken to imply that judicial intervention was contemplated

* + - * What is the nature (strength) of the privative clause (strong or weak)?
        + All privative clauses were not treated equal during this period. Some were taken as more strongly indicative of deferential review than others.
        + “The stronger a privative clause, the more deference is usually due”
  1. The relative expertise of the ADM and the courts
     + Said to be the most important factor in determining the appropriate SOR to apply (e.g., in *Southam)*
     + Looked at relative expertise of the reviewing court and the ADM in relation to the particular issue
       - If the ADM was regarded as having expertise in relation to the issue, then a higher degree of deference would be afforded
     + Factors weighing in favour of deference here
       - Composition: specialized, with expertise
         * Is this an ADM that deals with a specialized issue in which the members of the Board have particular expertise
       - Subject: technical, complex (e.g. economic, financial, technical issues) or is it an issue like HR that the courts feel more comfortable dealing with
       - Specialized non-court-like procedure
         * Was the procedure contemplated something that was unlike what the courts are accustomed to dealing with
  2. The purpose of the Act as a whole, and the provision at issue
     + If the act/provision established the rights, interests or privileges of particular individuals based on particular facts, then less deference given
     + But, if they were “polycentric,” then more deference given
       - Polycentric decisions are those that have a significant policy component and engages a balancing of multiple interlocking interests and factors
     + Justification for more defence on polycentric issues?
       - The relative expertise of the ADM. Judges have less expertise in dealing with such issues
  3. The nature of the problem
     + Questions of law: little deference warranted (often correctness SOR)
     + Questions of fact: considerable deference warranted
     + Questions of mixed law and fact: depends on mix of law and fact (balancing exercise)
       - The more factual the problem was, the more deference would be warranted
     + Discretionary decisions (added in *Baker)*: deference
     + The rational for different levels of deference is that reviewing courts have different levels of expertise in reviewing questions of law than they do in reviewing questions of fact. The idea here is that reviewing courts are excerpts at reviewing questions of law and interpreting and applying statutes but that they are not as expert at considering questions of fact that would have been addressed at first instance by ADMs on the basis of the full record of the issue
     + How to distinguish questions of law, fact and mixed law and fact?:
       - Its tricky
       - “Questions of law are questions about what the correct legal test is (questions about what the law is); questions of fact are questions about what actually look place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.” (*Southam*)
       - Tip: consider how much impact the decision is likely to have in future cases
         * The greater the potential impact, the more likely it is a question of law, therefore warranting less deference under this approach

#### CUPE v Toronto [2003, SCC]

* LeBel J, concurring
  + Criticized the P & F approach, and in particular, the 3 SORs
    - Lack of clarity regarding what patent unreasonableness entails and how to apply it, and so it often becomes blurred in practice with correctness review
      * The problem arose in cases that were supposed to be applying the more deferential patent unreasonableness SOR, but in these cases courts often seemed to be interfering with decisions on the basis that they were incorrect, rather than limiting their intervention to those decisions that lacked a rational foundation or fell outside the range of reasonable alternatives. This is a problem where patent unreasonableness is the SOR because mere disagreement with a decision is supposed to be insufficient under that SOR to warrant interference by the reviewing court
    - The two standards of reasonableness are problematic and difficult to apply in practice both for courts and for parties
      * One approach focused on the relative magnitude of the defect while another approach focused on the immediacy or obviousness of the defect. However, it had proven difficult to determine how intensely to scrutinize a decision under either of these approaches.
  + “In the end, attempting to distinguish between the unreasonableness 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 evidence on a cursory glance or only after a close examination – the result is the same. There is little to be gained from debating as to whether the text is illegible similiter or patently illegible; in either case it cannot be read.”
    - Even if a distinction could be drawn between unreasonable and patently unreasonable decisions, that the distinction was problematic in principle
  + Argues reconsideration is seriously needed – it comes in *Dunsmuir*
    - LeBel seemed to suggest that the 3 SORs should be collapsed into 2 standards

## *Dunsmuir* (2008)

### The Dunsmuir Era

* **Facts:** Dunsmuir was a public servant with the New Brunswick Department of Justice. He was dismissed without cause being alleged and without a hearing. On his dismissal, he was given 4.5 months of salary in lieu of notice. He challenged his dismissal by way of judicial review.
* **Held:** The SCC used the decision as an opportunity to revisit the law relating to substantive review and add some clarity. The SCC divided 5-3-1. The decision for the 5 judge majority was written by Justice Bastarache and LeBel.

#### Dunsmuir v New Brunswick [2008, SCC]

* Judicial review has 2 key functions. Judicial review is:
  + Essential to preserve the rule of law (paras 27-28)
    - 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
    - All decision-making powers have legal limits. Judicial review is the means by which courts supervise those who exercise statutory powers to ensure they do not overstep their legal authority. The function of judicial review is to ensure the legality, reasonableness, and fairness of the adminsitrative process and its outcomes
  + Essential to preserve legislative supremacy (para 30)
    - Judicial review performs an important constitutional function in maintain legislative supremacy
* But, there is a tension between the rule of law and parliamentary supremacy (para 27)
  + 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 legislature to create various adminsitrative bodies and endow them with broad powers
  + Courts must be sensitive to the need to uphold the rule of law and the necessity of avoiding undue interference with the discharge of adminsitrative functions with respect to the matters delegated to them
* How to resolve it? (para 30)
  + Rule of law maintained when courts have the last word on jurisdiction of ADMs
    - The last word on whether ADMs have the legal authority to make the decision they made
  + Parliamentary supremacy maintained because intent decides the standard of review (SOR) applied by the courts
    - SOR for adminsitrative decisions is chosen on the basis of legislative intent
* The law relating to SOR needs (our) help
  + Problems
    - Difficulties distinguishing between the two reasonableness standards
    - The theoretical problem of a parent unreasonableness standard
      * A patent unreasonableness standard seems to require parties to accept an unreasonable decision because the unreasonableness of the decision is not clear enough or serious enough to warrant the intervention of the courts
  + A “simpler test is needed”
    - One that offered guidance, is not formalistic or artificial and permits review here justice requires it but not otherwise
  + Need a “holistic” approach
* Makes two big changes to SOR analysis
  + Collapses the three SORs into two (correctness and reasonableness), defines reasonableness
  + Revises the SOR framework that determined which of these 2 SORs would be applied in reviewing a decision
* First big changes: three to two standards of review
  + Pre-*Dunsmuir*
    - 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
      * Correctness
* What is reasonableness?
  + “Reasonableness is a **deferential standard** animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions… do not lend themselves to one specific, particular result. Instead, they may give rise toa number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.”
    - In some situations, a particular question before an ADM may not lend itself to one single correct answer and that there may be a number of possible reasonable conclusions in that context
  + It is concerned with two things:
    - “**mostly** … the existence of **justification, transparency and intelligibility** within the **decision-making process**”
      * The focus here is on the reasons provided for a particular decision
      * These reasons must be capable of justifying the decision reached, they must be transparent as to the evidence relied upon and they must be intelligible, readily understandable not by implication
    - But also “whether the decision falls within a **range of possible, acceptable outcomes** which are defensible in respect of the facts and law”
      * The outcome must fall within a range of reasonable outcomes
  + 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”
    - This notion that the courts should consider the reasons that COULD BE offered in support of a decision raised major questions and difficulties in later cases. Court later said that he two aspects of a reasonableness analysis, the reasons and the outcome, were not to be treated distinctly. The overarching question was whether the adminsitrative decision itself was unreasonable but this was to be assessed by looking at both the reasons provided for the decision and the outcome of the decision itself
    - It was clear from the cases that an outcome that was unreasonable, in the sense that it did not fall within a range of acceptable outcomes, would view an adminsitrative decision as unreasonable. In this case, the reasons are also likely to be unreasonable but even if they were not the decision would like still fall
    - However, a dispute emerge about whether an outcome that seemed reasonable in the sense that it falls within a range of reasonable outcomes should be quashed if the reasons provided for it fall short in the sense that they fall short do not justify the outcome reached in a transparent, intelligible way
  + What is correctness?
    - They say it is a non-deferential standard of review
    - “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.”
    - Ultimately, on correctness review, the court is just determining whether the ADM got it right. It determines this by asking itself what it would have decided and weighing that against the decision the ADM reached. If the ADM reached the same decision it will be upheld, if not, the courts will substitute it’s own view and provide the correct answer.
* Second big change: new approach/framework to deciding the SOR (first stage of substantive review analysis)

1. Has the appropriate SOR been settled already?
   * Does a statute indicate the appropriate SOR for the particular issue being considered?
     + Statutes don’t regularly or consistently determine the SOR to be applied but they do so in some cases
     + E.g. BC *Adminsitrative Tribunal Act* which specifies a SOR for various provincial ADMs in BC
     + Wehre a statute defines the SOR, then under this approach you are to apply the SOR articulated in the statute
   * If not, has case law “determined in a satisfactory manner [the SOR for] the particular category of question”?
2. If the answer to (1) is no, “proceed to an **analysis of the factors** making it possible to identify the proper SOR”
   * “The analysis must be contextual… it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. 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 in a specific case.”
     + These factors are from *Pushpanathan*

* However, there were criticism that the decision did not resolve the question of the proper approach to take. This is one of the reasons *Dunsmuir* was so criticized.
  + The first ambiguity related to the role of various presumptions that the decision sets out. Earlier in it’s decision the majority seemed to set out various situations in which a particular SOR would apply. This seemed to create a strong presumption that if a case fell within one of these situations then the SOR indicated would apply. However, then in paragraph 64 the majority seemed to say that it was the old pragmatic and functional factors that should be applied in determining the SOR at least when it is not resolved y statute r a previous judicial decision at stage 1.
    - So how do we resolve this ambiguity?
      * The last sentence indicating a partial resolution of it. The majority seemed to be saying that where a case falls within one of the situations articulated, all of which seem to constitute shortcuts around the 4 factors emphasize one or a few of them, then it is not necessary to consider all of the factors. This in effect became the approach that the courts, including the SCC, usually adopted in most cases. Most cases were decided by applying the presumptions. If the 4 contextual factors were applied at all it was usually just to confirm the SOR arrived at by applying those presumptions.
  + Apply the **presumptions** based on the nature of the question first
    - See below for a description of the presumptions
  + If a question of law is involved:
    - Was the ADM interpreting its home (enabling) statute(s)?
      * If so, SOR is presumptively reasonableness
    - If not the ADM’s home statute, apply the other *Dunsmuir* presumptions
  + If the SOR is presumptively reasonableness (involving a question of law), is the presumption rebutted (it could be rebutted):
    - By falling into one of the 4 correctness categories (see below)
    - By an application of the four contextual factors
* Third ambiguity in the decision is that the scope of the SOR presumptions and categories from the case, both on the reasonableness and correctness side, were also unclear because the decisions also sent mixed signals about this, particularly about the scope of the 4 correctness categories.
* The presumptions at step 2:
  + “Generally,” or “usually” reasonableness for:
    - Questions of fact
    - Questions of mixed law and fact and the legal issues could not be easily separated from the factual issues
  + Questions of law? – It depends!
    - Reasonableness:
      * “Usually” for interpretations by the ADM of “its own statute or statutes closely connection to its function” with which it was presumed to have particular familiarity
        + **Note:** this was the key presumption post-*Dunsmuir*, with the “usually’ bit dropped
      * Deference would always be required where the statute contained a privative clause and what is involved is the interpretation of a discrete and special adminsitrative regime in which the ADM has special expertise
      * Maybe if the ADM has expertise applying an outside rule (e.g. a common law or civil law rule)
        + If there is expertise and a privative clause, deference “will” be appropriate (para 55)
      * What happened in the post-*Dunsmuir* cases is that where an ADM was interpreting its home statute, then reasonableness presumptively automatically became the SOR
    - Correctness
      * For questions of “central importance to the legal system” **AND** outside expertise
        + Correctness should be used here because of the impact of these questions on the legal system as a whole they require uniform and consistent answers
      * “Constitutional questions”
        + Should be subjected to correctness because of the unique role of the provincial superior courts as interpreters of the Constitution
        + Many constitutional questions are still subject to correctness review, BUT there have been some constitutional questions that are now subject to a reasonableness standard as well
      * “True questions of jurisdiction”
        + Defined in a narrow sense wehre the Tribunal must explicitly determine whether tis statutory grant of power gives it the authority to decide a particular matter
      * Questions regarding the “jurisdictional lines between … competing specialized tribunals”
        + Where you have 2 ADMs and there are questions about which one of them gets to deal with the matter, then that determination of which one has jurisdiction would be dealt with on a correctness standard

## *Dunsmuir* to *Vavilov*

### Criticisms of *Dunsmuir*

* Role of the contextual factors unclear
* Scope of the presumptions, categories unclear
  + Particularly two correctness categories
    - Questions of central importance to the legal system
    - True questions of jurisdiction
* **Criticism 1:** Of approach adopted for determining the SOR
  + Role of the contextual factors (old pragmatic and functional factors) and the relationships of these factors to the presumptions articulated in *Dunsmuir* were unclear
    - In most cases, courts would simply apply one of the SOR presumptions from *Dunsmuir* and in doing so they tended to ignore the contextual factors all together. But, in some cases the court did not ignore the contextual factors and some members of the SCC seemed to want to reinvigorate the factors and give them a larger role in the substantive review analysis
  + Scope of the presumptions and categories (4 correctness categories) were unclear, making them difficult to apply and predict
    - Particularly two correctness categories
      * Questions of central importance to the legal system
        + Usually rejected by the SCC
        + The scope of the category was unclear, and the cases could be difficult to predict
        + Complicating matters, some members of the SCC seemed to want to give this category a broader application than most of their colleagues and so many litigants would invoke their decisions in an attempt to argue for a broader application of this category
      * True questions of jurisdiction
        + This category was often argued in cases but in not one case during this period between *Dunsmuir* and *Vavilov* find it to be engaged. In one case, *Alberta Teacher’s Case* (2011), most of the SCC questioned the existence of this category all together
* **Criticism 2:** Of how to engage in reasonableness review (how the courts applied reasonableness when it was held to be the appropriate SOR)
  + Disguised correctness review
    - Even when reasonableness was held to be the SOR, in applying the reasonableness SOR the court seemed to actually engage in correctness review in disguise
  + There was no spectrum of reasonableness, that there was a single standard of reasonableness review
  + Courts could review the reasons “which could be offered”

### Reasonableness Review – Disguised Correctness Review

* SCC seemed to be applying the reasonableness SOR improperly, namely by engaging in a disguised form of correctness review under the guise of reasonableness review
* Reasonableness was supposed to be a deferential SOR. It works from the basic assumption that there is often no correct answer to questions that come before ADMs. Properly done, a reviewing court that is applying reasonableness as the SOR will begin by looking at the ADM’s decision and reasons and determining whether they are unreasonableness, not by making its own conclusions about the issue and then applying those conclusions to the decision and reasons.
* It is a problem for a reviewing court to start with it’s own view of the matter because this creates yardstick. The danger with a yard stick is that the court will then measure the ADM’s decision and reasons against the yardstick that the court creates in effect engaging in a form of disguised correctness review because a decision that does not match up with the court’s chosen yard stick will seem unreasonable

#### Dunsmuir v New Brunswick [2008, SCC]

**Facts:** Dunsmuir was a public servant with the NB Department of Justice. He was a non-unionized employee and so he was not covered by any collective agreement. He was dismissed without caused alleged and without a hearing. On dismissal, he was given 4.5 months of salary in lieu of notice. New Brunswick relied, in dismissing him, on section 20 of the provinces *Civil Service Act* which stated ”Subject to the provisions of this Act and any other Act… [termination] shall be governed by the ordinary rules of contract”. According to the NB government, this provision meant that it could dismiss Dunsmuir simply by providing him with reasonable notice or salary in lieu of notice which is the ordinary rule of contract for employment contracts and that it did not have to establish cause or give him a hearing. However, section 100.1 of the Act extended grievance rights to non-unionized employees. Dunsmuir grieved his dismissal under the Act and an adjudicator was appointed in accordance with the terms of the Act. Section 97(2.1) of the NB *Public Service Relations Act* stated “Where an adjudicator determines that an employee has been discharged or disciplined for cause…, the adjudicator may substitute such other penalty for the discharge or the discipline as to the adjudicator seems just and reasonable”. Dunsmuir asserted that the government had dismissed him for cause and relying on s.97(2.1) he argued that he was entitled to seek reinstatement to his position. Reinstatement is not an option available under ordinary common law principles. Government challenged the adjudicator’s authority to go behind Dunsmuir’s dismissal to ascertain whether he was dismissed for cause. Adjudicator rejected the government’s challenge but made to finding as to whether Dunsmuir was dismissed for cause. He ordered Dunsmuir reinstated because on his view he was dismissed without a hearing in violation of the duty of procedural fairness. In rejected the government’s claim that he not go behind the reasons for Dunsmuir’s dismissal, the adjudicator had reasoned that:

* NB had 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 cause
* The *CSA* is explicitly subject to any other Act, including the *PSLRA*
* Therefore I can look for cause, and order reinstatement if this was the real reasons for the dismissal, and cause was actually lacking

**Held:** Bastarache and LeBel JJ – Adjudicator’s decision is unreasonable because it treats a non-union employee as unionized by creating a requirement that the employer show cause before dismissal.

**Note:** It is not clear that that is what the adjudicator actually did. The adjudicator’s ruling leaves open the right of the employer to dismiss a non-unionized employee by giving adequate notice but it does add a qualification. The employer’s exercise of that authority is subject to scrutiny by way of a grievance if it amounts to dismissal for cause. Why? – Because non-unionized employees dismissed for cause are entitled to have an adjudicator consider not only whether their dismissal was actually for cause but also if it was, and there was no cause, whether to order their reinstatement. Under this interpretation, the ordinary rules of contract still have course in that the employer still has the right to dismiss an employee without cause on the giving of notice. However, the employer cannot use this power without exposing itself to a grievance when the dismissal is actually for cause and if it is, for reinstatement of the employee to then be ordered. It is not clear that the adjudicator turned Dunsmuir into a unionized employee, at least not completely but some sort of hybrid between a non-unionized employee and unionized employee. If the issue of reasonableness review is, as the court claimed in this case, whether the decision falls within a range of reasonable alternatives, it is not clear why this decision is unreasonable Majority’s decision does not allow the arbitrator to go behind a dismissal to see if it is actually for cause. It’s decision seems perfectly reasonable but it is not clear why the adjudicator’s position of allowing an adjudicator to go behind a decision is unreasonable for failing to meet the minimum requirement of justification, transparency and intelligibility or as falling outside a range of reasonable alternatives. It just seems the arbitrator places more emphasis on the employer interests of non-unionized employees than the majority of the court which privileges the employer. What this shows is that this case is an example of what came to be called “disguised correctness review” where the court claims to be applying reasonableness as the SOR but in disguise seems to be judging the decision from a perspective of correctness review.

### Reasonableness Review: Outcomes – One standard or a spectrum of reasonableness?

* The cases sent mixed signals about whether there was a spectrum of reasonableness or whether the same reasonableness standard applied unchanged in all contexts.
* In *Dunsmuir*, Justice Binney (concurring) questions how a single standard of reasonableness could apply in the multitude of different adminsitrative decision making contexts. This led him to the conclusion that there would need to be a sliding scale of deference or reasonableness to adequately encompass the whole range of ADMs and thus that by collapsing the two reasonableness Sor’s together, the majority had merely displaced the analysis that used to occur in determining the SOR to apply.
* In later cases, the SCC regularly insisted that there was no spectrum of reasonableness and that reasonableness is a single standard. However the court qualified this statement by saying that even though it is a single standard, it is single standard that takes its color from the context which means there was to be no separate inquiry that involving placing the case on a spectrum of reasonableness before engaging with the particular context. By suggesting that reasonableness was a single standard that takes its color from the context, the courts seemed to accept that ADMs would get more deference in some contexts than in others but not because the standard varied, but rather because the context itself varied. Even so, the court did not clarify what it meant by this and in some cases, it seemed to suggest a unique standard to be applied in determining whether a decision is unreasonable in the context.

#### Catalyst Paper Corp v North Cowichan [2012 SCC]

**Facts:** Case involved a challenge to a municipal by law that imposed significantly higher property tax rates on industry within the municipality than with regular residents. Catalyst Paper argued that the considerations informing the difference in rates were not limited to objective criteria such as the consumption of municipal services and that for this reason the by law was unreasonable.

**Issue:** Is the taxing by law reasonable?

**Held:** McLachlin CJ. The SOR is reasonableness and the by-law is reasonable.

**Reasons:** While the court agreed that reasonableness was the applicable standard, they disagreed about how to apply it. In particular, the disagreement was about which factors should be taken into account in determining whether the outcome in this case fell within a reasonable range of alternatives. McLachlin rejected that there was a spectrum of reasonableness.

* Reasonableness “takes its color from the context”
* Two contextual factors considered here when by law’s were at issue:
  + The statute that conferred the municipality’s by-law powers
  + Past decisions of the courts on the issue
* Here, both support giving significant deference and thus that the range of reasonable alternatives available to the municipality was broad. First, the legislation support the conclusion that significant deference should be given to the municipality in enacting the by law. It gave broad and virtually unfettered discretion to the municipality to establish property rights. Second, previous cases had also recognized that municipalities should be given broad deference when they adopt by laws. The most significant reason for this being that provincial legislatures had usually given municipalities engaged in the making of bylaws broad discretion and the fact that municipal councilors are elected and accountable.
* When might a by-law be unreasonable?
  + Identifies several “general indicators of unreasonableness” in the context of municipal by laws (para 21) (*Cruz v Johnson)*
  + Test: a municipal by law will be unreasonable “only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside” (para 24)
* McLachlin rejected Catalyst Paper’s argument that the municipality acted unreasonably by not limiting itself to objective factors.

**Ratio:** Reasonableness does not seem to be a single standard that merely takes its color from the particular context. On the contrary, if we look at the decision what we see is McLachlin setting out a unique approach to apply in the municipal context in determining whether a municipal by law was unreasonable.

### Reasonableness Review: Reasons – What does it mean to pay “respectful attention to the reasons… ***which could be offered in support of a decision?”***

* Reasonableness review, according to *Dunsmuir*, speaks to two things: (1) the reasons and (2) the outcome
* *Dunsmuir* says that reasonableness is concerned mostly with the justification, transparency and intelligibility within the decision making process which means the reasons. But, *Dunsmuir* also says that on reasonableness review, the courts should pay respectful attention to the reasons offered **or which could be offered** in support of a decision
* Determining just how far a court should go in assessing reasons which would be offered was unclear and disputed
* Another issue that was unclear is whether a decision could be unreasonable if the outcome was reasonable in the sense that it fell within range of reasonable alternatives, but the reasons fell short because they did not meet the standards of justification, intelligibility and transparency

#### Alta. V Alta. Teachers’ Assn. [2011, SCC]

**Facts:** Involved a complaint made to Alberta’s Privacy Commissioner. The Commissioner’s empowering statute required him to complete the inquiry within 90 days of the complaint being received unless the parties were notified of an extension and estimate completion date. The inquiry was not completed within the 90-day period. However, several days after the 90-day period had expired, the Commissioner notified the parties that the inquiry had been extended. The Commissioner did not provide reasons justifying the decision and no party disputed his power to extend. What the Commissioner had done was assume the power to use an extension after the 90-day period had expired and this decision went unchallenged by the parties until judicial review. Once judicial review proceedings were initiated, the ATA challenged the authority of the Commissioner to extend the inquiry after the 90 day period had expired.

**Held:** Rothstein J (majority). The SOR was reasonableness and the Commissioner’s “implicit decision”, that an extension after the 90-day period did not automatically terminate the investigation of a complaint, was reasonable even though reasons had not been given.

**Reasons:**

* Reviewing courts can consider the “reasons that could have been provided” in some cases (*Dunsmuir)*
  + Decision can be upheld if a “reasonable basis” for it is apparent
    - In considering the reasons that could have been offered, it will be sufficient if a reasonable basis for the decision is apparent
    - Can look at reasons offered by that ADM on the question in other cases for this
      * Rothstein turned to a prior order of another Commissioner who interpreted a similar section of the Act and he used those reasons as a surrogate for the actual reasons that were not provided here
* Does this respect *Dunsmuir’s* concern for justification, transparency, and intelligibility?
  + Various caveats provided as to when it would be reasonable to consider reasons that could have been provided:
    - Appropriate where:
      * No or limited reasons are required to satisfy the duty of procedural fairness; or
      * Where failure to provide reasons concerns an issue that was not raised before the ADM, misleading the decision maker about the necessity of reasons
    - The power to consider implicit reasons should not be taken to dilute the duty to give proper reasons
    - If reasons were in fact provided for a decision, courts should not “cast aside an unreasonable chain of analysis”
      * Courts do not have cart Blanche to reformulate a tribunal’s reasons
    - In some cases, it is appropriate to remit to the ADM for reasons, rather than review the reasons that could have been provided
      * “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

**Ratio:** Courts have only a narrow scope to review the reasons that could be offered in support of a decision.

#### NL Nurses’ Union v NL [2011, SCC]

* This case took a broader view of when it will be appropriate for courts to review the decisions that could have been provided. This case told us that the adequacy of reasons is not to be assessed on procedural review, but rather on substantive review.

**Facts:** Nurses’ Union was contesting a labour arbitrator’s decision that the collective agreement did not permit the crediting of time spent as a casual employee when calculating an employee’s vacation entitlement. The union argued that the arbitrator’s reasons did not adequately support the decision reached. They didn’t support the decision articulating the argument went a clear path from certain agreed upon statement of fact and law to the conclusion reached.

**Issue:**

**Held:** Abella J- The SOR was reasonableness and the arbitrator’s decision was reasonable.

**Reasons:** Abella agreed that a more comprehensive explanation could have been provided and would have been preferable for how the law and evidence supported the conclusion. However, she took note of the main inferences the arbitrator had drawn from the provisions of the collective agreement and held that taken together, the reasons provided a reasonable basis for the arbitrator’s conclusion.

* *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)
  + This passage resulted in considerable uncertainty. It is open to at least 2 interpretations. Read broadly, it seems to say that on reasonableness review it is impermissible to quash a decision if the outcome is reasonable but eh reasons offered ins support of the outcome are flawed because the adequacy of reasons is not a stand alone basis for quashing a decision. On this view, the outcome would also have to be unreasonable. A narrower reading of this passage is that it does not suggest that a decision cannot be unreasonable if the reasons are flawed but the outcome is not. What is suggested on this reading is in determining whether the reasons are enough to quash a decision as unreasonable, the reasons and outcome must be read together because reasons that seem flawed on their own may become more reasonable when read together with the outcome reached. In later cases, the court seemed to suggest that flawed reasons would be a sufficient reason to invalidate a decision. But this remained a source of uncertainty and disagreement.
  + *Vavilov* will tell us that flawed reasons are enough to quash a decision even if the outcome reached otherwise seems reasonable in the sense of falling within a range of reasonable alternatives
* How broadly should this passage be read?
  + Can a “reasonable” decision be quashed if reasons are flawed?
* Takes a broader view that *Alberta’s Teacher’s Association* of when courts can review the reasons that could have been provided
  + “Supplement” reasons first, before “subvert[ing]” them
    - Even if the reasons given do not seem to wholly support the decision reach, the court must first seem to supplement them before it seeks to subvert them. This allows the court to supplement reasons where an ADM has failed to address an issue potentially important to an outcome or has failed to lay down a clear path of reasoning from the relevant law or evidence to the outcome reached.
    - The decision that courts can supplement was not qualified as it was in Justice Rothstein’s reasons.
  + In doing so, the courts can “look to the record” and beyond the reasons themselves
  + But, courts should not “substitute their own reasons”

## *Vavilov* and Beyond

* *Vavilov* is now the leading decision of the SCC relating to substantive review, replacing *Dunsmuir*
* When you encounter a substantive review issue, there is always two steps you must consider. At the first step, you have to determine what the applicable SOR is (the level of intensity the court will apply in reviewing the substance of the decision). After this, you go to stage 2 where you apply the applicable SOR which will be either reasonableness or correctness.

### The *Vavilov* Era

* The SCC granted leave to appeal for three cases: *Vavilov* and 2 other cases in 2018. The court typically does not provide reasons when it makes a decision to grant leave to appeal. However, in this case, the court made it clear that it viewed these 3 cases as an opportunity to reconsider the law relating to substantive review
* Court heard from a large number of interveners in the appeals and it also appointed an amicus to provide submissions to it on the substantive review issue
* *Vavilov* provides additional guidance on how to apply the reasonableness SOR when it is found to be the appropriate standard

#### Canada v Vavilov [2019, SCC]

**Facts:** Mr. Vavilov was born Alexander Foley in Toronto in 1994. At the time of his birth, his parents were posing as Canadian citizens under assumed names. Vavilov also had an older brother Timothy. In 2010, Vavilov’s parents were arrested in the US for spying for the Russian Foreign Intelligence Service. They were living in the US at the time where they worked, ran a business, pursued higher education and raised a family. Vavilov did not know that his parents were Russian spies until their arrest. He thought he was a Canadian citizen by birth. Vavilov was 16 when his parents were arrested. His parents plead guilty and they were sent back to Russia as part of a US-Russia spy exchange. Just prior to his parent’s deportation to Russia, Vavilov left the US with his brother on a trip that had been planned before the arrests. They first went to Pairs, then Russia on a tourist visa to join their parents. This entire appeal revolves around Vavilov’s efforts to obtain a renewal of his Canadian passport and to return to Canada. There were two sets of reasons issue in this case. First, there were the reasons of the majority which were issued jointly by 7 members of the court. Then there was a concurring decision in the case because Justice Abella and Karakatsanis end up concurring in the result reached by the majority but when you look at the decision it really reads more like a dissent because it strongly criticizes aspects of the analysis set forth by the majority. Th

* The majority began its analysis by defining the problems relating to the law of substantive review and what its goals were in this case in relating to the first SOR analysis - determining the applicable SOR
  + Problems with choosing the SOR framework used to choose the SOR
    - Uncertainty about the scope of the correctness categories as well as uncertainty about when it was appropriate to utilize the 4 contextual factors
      * This uncertainty came at a cost. Courts and litigants struggled to determine the appropriate SOR and that the result was access to justice was undermined for litigants because too much time was being spent debating what was the appropriate SOR at the expense of the actual merits of the claim
    - Unprincipled
    - Extensive criticism from scholars, courts, litigants etc.
    - Court recognized that since *Dunsmuir*, it had been recognized that reasonableness would be the SOR for most categories of decisions including when an ADM interprets its enabling or home statute
    - Majority noted the cases recognized that this presumption of reasonableness could eb rebutted in 2 situations: (1) by noting that the issue raised falls within one of the two categories of questions attracting correctness review and (2) by showing that he context indicates that he legislature intended the SOR to be correctness by applying the 4 contextual factors which were the old pragmatic and functional factors from *Pushpanathan*.
  + Goal
    - “… to make the law on [choosing] the standard of review more certain, coherent and workable” (para 22)
* The majority then turns to articulate the problems and goals relating to the second stage of the SOR analysis where the applicable standards are applied. They focus here on the reasonableness SOR where it is held to be the applicable standard
  + Defining the problem and goals
    - Perception of advancing “a two-tiered justice system” (para 11) in which those subject to adminsitrative decisions are entitled only to an outcome somewhere between good enough and not quite wrong
  + Goal
    - To “ensure that the framework it adopts accommodates all types of adminsitrative decision making” (para 11)
      * Majority here is not just concerned to articulate a clear understanding of what reasonableness review involves, it is also concerned to attempt to articulate and understanding of reasonableness that can accommodate the full range of adminsitrative decision making
    - To “more clearly articulate what the standard entails and how it should be applied in practice” (para 12)
* Underlying principles
  + “The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir*…” 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 adminsitrative decision making” (para 2).
    - On the rule of law and legislative intent, see para. 23 (handout)
      * Idea that judicial review serves 2 key functions: (1) to maintain the rule of law to ensure that ADMs only make decisions they are legally authorized to make and (2) that in doing this, the courts also give effect to and respect legislative intent (indirect reference to parliamentary sovereignty)
    - On the culture of justification, see para 74 (handout)
      * Concerned to make sure that ADMs justify the decisions that they make
  + Court imports the underlying principles from *Dunsmuir* into the *Vavilov* decision.

### Choosing the Standard of Review

* The majority set out a revised framework for determining the appropriate SOR. This revised framework tracks the *Dunsmuir* decision in some respects but also departs from them in others.
* The majority maintained the 2 SOR’s from *Dunsmuir*: correctness and reasonableness
  + This is significant because in a concurring decision in 2016, Justice Abella suggested collapsing the 2 SOR’s into one single reasonableness SOR. This suggestion as not adopted by the joint majority.
* **Starting point:** presumption that reasonableness is the appropriate SOR in all situations
* Can derogate from this presumption in two situations

1. To give effect to legislative intent – this is where the legislature has somehow indicated that it intends a different SOR to apply. This would be the case in 2 situations:
   * When a statute explicitly prescribes the standard of review in a statute
     + In this case, apply the SOR prescribed in the statute which may be correctness or some other standard such as patent unreasonableness.
   * When there is a statutory appeal to the courts – this should be taken as an indication that the legislature intends a different SOR to apply as well
     + Apply the SOR applied by courts on appeals from lower courts
2. When the rule of law requires the correctness SOR to be applied
   * Three situations where this will be the case:
     + Constitutional questions
     + General questions of law of central importance to the legal system as a whole
     + Questions related to the jurisdictional boundaries between two or more ADMs
   * These categories are similar to the categories from *Dunsmuir* with a few exceptions including the fact that one of the *Dunsmuir* categories of correctness is missing: jurisdictional questions
   * Majority now says clearly that it is no longer necessary for courts to engage in a contextual inquiry and thus it is now safe to say that the 4 contextual factors can be ignored in setting the applicable SOR

### Choosing the Standard of Review

* The presumption of reasonableness – should always start that the applicable SOR on an application for judicial review is reasonableness this is broader that the presumption in *Dunsmuir* and the cases after it because it does not apply only where an ADM is interpreting it’s home statute or enabling statute. It is, rather the starting point in all situations.
  + Why this presumption?
  + “… it is the very fact that the legislature has chosen to delegate authority which justifies a default position of reasonableness review”
    - It is not the comparative expertise that justifies the starting point presumption of reasonableness review, it is rather the very fact that the legislature has chosen to delegate authority to the ADM. Therefore, it is the decision of the court to respect that legislative choice
  + Note sidelining of expertise
    - Because the decision in *CUPE*, expertise of ADMs was ignored. It was then referred to as an important factor to be considered in *CUPE*. Then in *Pushapnathan* it was explicitly articulated as one of the 4 contextual factors. It was so important in this case that Bastarache said it was the most important of the 4 contextual factors and those factors were brought into the *Dunsmuir* decision. Expertise also played a role in other ways in the *Dunsmuir* decision including in articulating the scope of some of the presumptions applied in the case.
    - Demotion from *CUPE, Pushpanathan* and *Dunsmuir.*
    - They say an ADM’s expertise may help explain why legislatures do delegate to ADMs but the only thing that matters is that the legislature has chosen to delegate
  + One of the most significant points of criticism that we see in the concurring decision in this case is this sidelining of expertise by the majority. They would make expertise a more important part of the analysis.

### Choosing the Standard of Review

* Rebutting the presumption: legislative intent – this is where the legislature indicates that it intends a different SOR to apply to the particular issue
  + **The legislation explicitly prescribes the SOR for the issue**
    - Apply the SOR prescribed
    - Examples: BC’s *Adminsitrative Tribunals Act*
      * This Act explicitly prescribed the SOR for provincial tribunals in BC
      * This Act indicated that correctness is the SOR for questions that involved statutory interpretation by the BC Human Rights Tribunal
      * If you encounter a substantive law issue dealing with the BC HR Tribunal and you determined that a question of law was involved there, then you would apply correctness as the SOR to that issue even though under *Vavilov* the applicable SOR would otherwise be reasonableness
      * This exception will only be significant where the statute prescribes a SOR other than reasonableness.
      * This exception was already recognized in a number of cases and does not mark a departure from the case law
  + **When there is a statutory appeal from the ADM to the court**
    - Where a legislature has provided, by a statute, that parties may appeal a decision to a court either as of right or with leave of the court, the legislature had indicated that it excepts the court to scrutinize the decision on an appellate basis by apply the SOR applied by courts on appeals from lower courts
      * This means that where the statute includes an appeal mechanism from the decision to a court, the SOR is to be determined in the same way that the SOR is determined on a regular appeal from the lower trials courts to the appellate courts.
      * This marks a significant departure from the laws relating to substantive review as it existed prior to *Vavilov*
    - The approach applied by appellate courts in reviewing the decisions of lower courts was first set out by SCC in *Housen* in 2002. By virtue of *Vavilov*, this analysis has now been imported into the substantive review context in adminsitrative law where a statute allows for an appeal from the decision of an ADM to a court
    - **First step** where this statutory right of appeal is engaged is: Determined the nature of the issue that is being raised – is it a question of law?; or fact?; or of mixed law and fact?
      * See test from *Southam* (1997) (cited in slide from earlier lecture on *Pushpanathan*)
        + The SCC states that this is how you distinguish between questions of law, fact and mixed law and fact. As they put it, questions of law are questions about what the correct legal test is, questions of fact are questions about what actually took place between he parties and questions of mixed law and fact are questions about whether the facts satisfy the applicable legal tests
        + SCC provided examples of the distinction between these 3 possibilities drawn from tort law. In the law, what negligence means is a question of law, the question fo whether the defendant did this or that is a question of fact and then once it has been decided that he applicable standard is one of negligence, the question of whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact
    - **Second Step-** Determine the applicable SOR based on the nature of the issue (defined in *Housen*)
      * Questions of law = correctness – same standard of correctness that is otherwise engaged in some situations in adminsitrative context
      * Questions of fact = “palpable and overriding error”
      * Questions of mixed law and fact
        + Legal issue readily extricable from the factual issue = correctness for the legal issue, “palpable and overriding error” for the factual issue
        + Legal issue not readily extricable (cannot easily draw it out form the particular question involved) = “palpable and overriding error”
        + In *Housen¸* the court tried to provide further clarification about what this analysis would look this for questions of mixed law and fact. Matters of mixed law and fact lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed clearly to the application of an incorrect legal standard, a failure to consider a required element of a legal test or some similar error of legal principle, such an error can be characterized as an error of law and subject to the regular standard of correctness for error of law. But, appellate courts need to be cautious in finding that a TJ erred in law in their determination of negligence as it is often difficult to extricate the legal questions from the factual questions. It is for this reason that these matters are referred to as “questions of mixed law and fact”. Where the legal principle is not readily extricable, the matter is one of mixed law and fact and therefore subject to the standard of “palpable and overriding error”
    - **Third Step -** Apply the applicable SOR
      * For questions of law, the court will do what it does where correctness is the SOR on regular judicial review proceedings. It will determine whether the ADM got it right with reference to what it would have done as a court. If it concludes that the ADM did get it right, then the decision of the ADM will stand. But, if the court concludes the ADM got it wrong, the decision will be invalidated
      * For questions of fact and questions of mixed law and fact wehre the legal principle is not readily extricable, the court will apply the standard of “palpable and overriding error”
        + A palpable and overriding error is an error that is plainly seen, that is obvious. It also must be an error that is not just plainly seen(obvious), but also one that is shown to have affected the articular result and in this sense is overriding. A palpable and overriding error must be plainly seen (palpable) and has to be shown to have affected the result (overriding)
    - Court offered several reasons why they introduced this change:
      * (1) There had been significant criticism of the courts treatment of statutory appeal rights under *Dunsmuir* and the cases interpreting an applying it
      * (2) If legislative intent is to be the touchstone of analysis in determining the SOR, then it leads to an inconsistency to ground the presumption of reasonableness in the legislative choice to delegate a decision to an ADM but then to ignore or give little weight to legislative choices around statutory appeals
      * (3) There was no satisfactory justification for the recent trend giving no effect to statutory rights of appeal in setting the SOR
    - The majority also offered a few suggestions for how to apply this new exception for statutory appeal rights in determining the SOR:
      * (1) If an appeal provision includes that a party must seek leave of a court before it can appeal, this does not affect the standard to be applied if leave is given and the appeal is heard. If there is a requirement to seek leave, if it is granted, you just apply the new approach under the *Vavilov* (I.e. you apply the appellate SOR and analysis from *Housen*)
      * (2) Not all provisions that contemplate a reviewing court reviewing the decision of an ADM actually provides a right of appeal. Some provisions simply recognize that all adminsitrative decisions are subject to judicial review, not an appeal, and set our procedural and other considerations that apply on an application for judicial review in the particular context. Where one of these provisions is engaged, then the appellate standards will not apply. The regular standard applicable to judicial review will apply. This means that you have to be careful in reading a statute and in looking at something that might seem to be a provision that grants a statutory right to appeal, you need to look carefully at it and ask “does it actually contemplate a statutory appeal” or is it rather a provision that recognizes that decisions of ADMs are always subject to judicial review and attempts to set out procedural and other considerations related to judicial review proceedings, not to appeal proceedings
      * (3) Statutory appeal rights are often limited in scope, limited to particular types of questions such as questions of law or to particular types of decisions (i.e. a statutory scheme may contemplate a variety of decisions being made and only confer appeal mechanisms from some of the decisions that the particular statute contemplates). Majority noted that these limitations in statutes must be respected and so appellate standards will only apply in keeping with the limitations of the statutory appeal rights. They also noted that if a statutory appeal is not available due to these limitations, then judicial review will be remain available and the regular presumption of reasonableness will apply. If, looking at the appeal provision, you determine that an appeal is not available for the particular decision involved, then that does not mean it is game over it just means you need to look to judicial review in that context and apply regular judicial review principles including the presumption of reasonableness.
    - In making this change, the court stripped away deference from hundreds of ADMs. An example of this is the CRTC. It is not a decision that by virtue of appeal rights being recognized, is subject to the new analysis in *Vavilov* for statutory rights to appeal.
  + **Rebutting the presumption: the rule of law and correctness**
    - First category: Constitutional questions – this is one of the existing categories of correctness from *Dunsmuir*
      * This exception where an SOR will be used for constitutional questions will be used in several situations:
        + The federal-provincial division of powers
        + Relationship between legislative and other branches of government within the same order of government (federal or provincial) not the division of powers
        + The scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act*, 1982
        + Other constitutional matters that require a final answer
        + Charter challenges to the validity of laws also attract a correctness standard

However, since 2012, there has been a significant qualification to the idea that Charter challenges to laws themselves will engage a correctness standard. This exception applies where it is not the legislation itself being challenged on Charter grounds, but rather a particular administrative decision implementing a statute that is challenged

Since 2012 and the SCC de6cision in *Dore*, it has been clear that a reasonableness standard will apply to decisions that are challenged on Charter grounds. Important to note that this exception to correctness as the standard applied where Charter challenges are involved for adminsitrative decisions, is something that has been of significant commentary in the courts and the academic literature

Majority acknowledged that there had been questions raised about *Dore* and the exception for Charter challenges to adminsitrative decisions, but it set that aside

* + - * The rule of law required correctness to be the SOR for constitutional questions because the constitutional authority to act on the part of government must have a determinate, defined and consistent limit.
    - Second category: “general questions of law of central importance to the legal system as a whole”
      * One of the correctness categories from *Dunsmuir*. However, in that case, the majority said this category could only be engaged for general questions of law which are both of central importance of the legal system as a whole and outside of the adjudicator’s specialized area of expertise. Majority in *Vavilov* dropped the expertise qualification. This revised category is engaged for any general questions of law of central importance to the legal system as a whole
      * The rationale for this category is that certain questions of law that are of central importance to the legal system quire uniform and consistent answers by virtue of their impact on the broader system of justice
      * For something to qualify under this exception, need two things:
        + Question must be of “fundamental importance”
        + Question must be of “broad applicability”
      * Look for significant consequences from the resolution of this issue for the legal system as a whole or other institutions of government, not just one context
        + You are looking for an impact beyond the particular adminsitrative context that you are dealing with
        + If the issue is only relevant to the particular adminsitrative context, then this exception will not be engaged
      * Examples that would satisfy this particular exception:
        + When an adminsitrative proceeding is barred by the doctrines of res judicata or abuse of process (*CUPE* [2003, SCC])
        + The scope of the state’s duty of religious neutrality. This was a duty that would not be engaged only in one particular adminsitrative context but across the broad range of public decision making (*Saguenay (City)* [2015, SCC])
        + Limits on solicitor-client privilege not limited to one context but were engaged more broadly by administrative decision making (*University of Calgary* [2016, SCC])
        + The scope of parliamentary privilege (*Chagnon* [2018, SCC])
      * Anti-examples (what does not qualify):
        + Whether a certain ADM can order a particular type of compensation in the particular adminsitrative context (*Mowat* [2011, SCC])

Something focused on one particular context, not engaging more than one context will not be caught by this exception

* + - * + When estoppel may be applied as a remedy on arbitration (*Norman* [2011, SCC])
        + Interpretation of a provision prescribing time limits for investigations in a particular context (*Alberta’s Teachers* [2011, SCC])
        + The scope of a management rights clause in a collective agreement (*Irving Pulp and Paper* [2013, SCC])
        + Whether a limitation period has been triggered under securities legislation (*McLean* [2013, SCC])

This was problematic because it was dealing with a particular adminsitrative context, the securities context

* + - * + What these cases tell us is that it is not only that the issue must be one of fundamental importance to satisfy this exception but it must be of broad applicability (it must expand beyond the particular adminsitrative context that you are dealing with and be of significance for the justice system, as a whole or at least for other institutions of government)
      * Majority cautions that this category should not be understood broadly as a broad catch all category for correctness review because expertise no longer plays a role as it had under *Dunsmuir*
    - Third category: jurisdictional boundaries between two or more ADMs
      * Why? What is the rationale? - The “rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between 2 adminsitrative bodies, pulling a party in two different competing directions”
      * This is also one of the correctness categories that was recognized in *Dunsmuir*
      * Majority provided a few examples of this exception:
        + (1) A case that considered a jurisdictional dispute between a Labour Arbitrator and the Quebec HR Tribunal. Where there are questions about the jurisdiction of 2 competing ADMs, then that will engage correctness as the SOR
    - Note what is missing!
      * Expertise
      * The four contextual factors originally from *Pushpanathan* that were brought into *Dunsmuir*
        + Majority tells us these factors no longer need to be considered in choosing the applicable SOR
      * Jurisdictional question
        + This was the 4th category recognized under *Dunsmuir* by saying it would arise where “the Tribunal must explicitly determine whether it statutory grant of power gives it the authority to decide a particular matter”
        + Majority noted that since *Dunsmuir*, the SCC questions the necessity of this category and struggled to articulate its scope so it finally consigned it to the dust bin. It said it was not necessary to maintain this category because concerns about whether ADMs overstepped the boundaries of their legal authority could be addressed by reasonableness review
        + This category may rear its head in how the new reasonableness standard is applied resulting in a non deferential approach to reasonableness review
        + Majority said that the reasonableness standard will enable courts to fulfil their constitutional duty to ensure that adminsitrative bodies have acted within the scope of their lawful authority (para 57). This statement may be sued in future cases to justify a correctness form of review under the disguise of reasonableness
    - Notice also door left slightly ajar to new correctness categories in a particular case
      * But, this would be an “exceptional” occurrence and should not be interpreted as inviting the routine establishment of new categories
      * Majority rejected an additional category of correctness review that had been suggested in argument in *Vavilov:* for legal questions on which there is persistent discord within a particular adminsitrative context such that the statute comes to mean simultaneously both yes and no. Majority agreed the rule of law is threatened when discord is so persistent with an adminsitrative context, that the laws meaning comes to depend on the identity of the adminsitrative decision maker but the majority said that reasonableness review is able, in tandem with internal adminsitrative processes, to guard against the rule of law that can result from this kind of discord.

#### Canada v Vavilov [2019, SCC]

* There is a two-step process wehre a substantive review process arises where we are concerned with the outcome or process of an adminsitrative decision
  + (1) Determine the applicable SOR
  + (2) Apply that SOR
* Applying the standard of reasonableness where it is held to be the applicable SOR
  + Starting points
    - Burden on the party challenging the adminsitrative decision to show that it is unreasonable, not on the ADM to show it is reasonable
    - Reasonableness review analysis should focus on the ADM’s decision actually made, not what the court itself would do
      * A reviewing court is not to decide what decision is correct or even what decision it would have made if it was the ADM
      * It should also not attempt to ascertain the range of possible conclusions that would have been open to the ADM by creating a benchmark and then assess the reasonableness of the particular decision on the basis of this range
      * Rather, reviewing courts must focus on the actual decision made by the ADM and the reasons provided for it and consider whether they are unreasonable
    - Where required by the duty of fairness, reasons are the primary way to assess reasonableness (if required)
      * + Where you are engaged in reasonableness review and reasons are provided you must engage carefully with the reasons provided by the ADM
    - In focusing on the decision actually made, consider two things: (1) the reasons; and (2) the outcome
      * The ADM’s decision must be justified, not merely justifiable
        + Put another way, it is a requirement under reasonableness review that an ADM’s decision is justified, not just justifiable. It actually has to be justified by the ADM
      * A decision will be unreasonable if the outcome reached is found to be unreasonable
      * However, in trying to resolve a disagreement that had arisen after *Dunsmuir*, it said that a decision may also be unreasonable if the reasoning process is unreasonable even if the outcome is not unreasonable
        + Majority said this is consistent with the proper concern for both the reasoning process and the outcome of administrative decisions
    - Remains a single standard that takes its color from the context
      * What this means is that the SOR itself and the degree of scrutiny that it entails will not vary with the context. Instead, what is reasonable will depend on the constructs imposed by the legal and factual context
      * It is not the standard, but rather the context that fluctuates. This means there is no need to conduct a preliminary assessment that looks to the particular context to determine the degree of scrutiny that should be applied by the reviewing court. The degree of scrutiny will be the same and it will be the legal and factual context itself that will determine what is reasonable in the particular situation
    - Perfection is not required of the ADM
      * Reasons also be read in the context of their history and in light of the proceedings which they were rendered
      * The history of the proceedings may actually explain an aspect of the ADM’s reasoning process that is not apparent from the reasons or may reveal that an apparent shortcoming in the reasons is not in fact a shortcoming (i.e. because an opposing party made a concession, it obviated the need for an ADM to consider a particular issue in the particular context)
      * Reiterated that wehre reasons are defective, a reviewing court is not to fashion it’s own reasons in order to buttress the adminsitrative decision even if the decision could be justified with other reasons. This shuts down a reading that had been adopted by the SCC in *Newfoundland Nurses* and the *Alberta Teacher’s Case*. This was the idea that we could focus on the reasonableness of the outcome and that the courts were to give broad sway to overlook defective reasons. Majority noted that even wehre an ADM’s rationale for an essential element of the decision is not addressed in the reasons and it cannot be inferred from the record of the proceedings then the decision will generally be an unreasonable one
        + This resolves one of the issues that had arisen post – *Dunsmuir*- the idea that courts had considerable sway to correct defective reasons on judicial review. Majority emphasizes that where reasons are defective on their face, it is not the role of a reviewing court to fashion it’s own reasons in order to buttress/support the defective adminsitrative decision even if the decision could be justified with other reasons

### What is the standard of reasonableness?

* “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.” (para 100)
  + The standard might seem to be a sufficiently serious shortcoming OR a lack of justification, intelligibility, and transparency
  + Wright thinks it is the second one and that sufficiently serious shortcomings is used to capture the point that minor flaws would not be sufficiently serious to require the lack of justification, intelligibility, and transparency
  + Majority emphasizes that what is required in the adminsitrative context is “responsive justification” – reasoning processes and outcomes that are justified in response to the context of the decision

### Two Types of fundamental flaws that may show an adminsitrative decision to be unreasonable

* Majority emphasized that it is not necessary to categorize flaws as falling into one of these types of flaws, that they are being used as examples of the types of issues that may show a decision to be unreasonable
* (1) Failures of rationality or logic
  + Failures of rationality (para 103)
    - (1) Reasons provided, real holistically, fail to reveal a rational chain of analysis leading from the law and the fact to the decision reached
    - (2) Conclusion reached cannot follow from the analysis
    - (3) The reasons, read in light of the record, do not make it possible to understand the ADM’s decision on a critical point
    - Where any of these are present, a failure of rationality may result in a decision being unreasonable
  + Failure of logic (para 104)
    - Where the reasons exhibit clear logical fallacies such as circular reasoning, false dilemmas, unfounded generalization or absurd premises
  + The absence of rationality and/or logic are things you should look for in a decision in determining whether the decision is unreasonable but they are not really categories that you should attempt to pigeon whole adminsitrative decisions into, they are just markers to keep in mind in looking for unreasonableness in a decision.
* (2) Lack of justification in light of the legal and factual constraints
  + These do not function as a checklist for reasonableness review, some will be relevant in all cases (statutory scheme) but others may not be relevant in the particular context or if they are relevant they may not be important in that context
  + Relevant factual and legal constraints
    - Governing statutory scheme
      * Because ADM’s receive their powers from statute, this is likely to be the most salient aspect of the legal context
      * Keep in mind the purpose of the scheme since any exercise of legislative authority must accord with the purposes for which it was given
      * Attention should be paid to any specific textual constraints imposed by the governing statutory scheme like statutory definitions, principles or formulas that prescribed or limit the exercise of discretion
      * Majority notes that the nature of the language used will be a major factor. Precise language will support a narrower range of reasonable interpretation whereas broader and more open-ended language will allow for a broader range. It will be impossible for an ADM to justify a decision that stray beyond the limits set by the statutory language it is interpreting. If an ADM strays beyond the clear limits of its authority, it will be impossible for it to justify the decision
    - “Other statutory or common law” rules or principles
      * Statues other than the enabling statute and the common law are often relevant to ADM’s and where this is true, this is another constraint that needs to eb considered by the ADM and by a reviewing court on judicial review
      * i.e. Where a governing statute specifies a standard (i.e. reasonable grounds to suspect standard) that is well known in law, a reasonable decision will generally be one that is consistent with the established understanding of that term
    - The principles of statutory interpretation
      * ADM’s are not required to engage in a formalistic statutory interpretation exercise in every case.
      * However, ADM’s must interpret contested provisions in a manner that respect a provision’s “text, context and purpose” applying its particular insight into the statutory scheme at issue
      * The usual principles of statutory interpretation apply equally when an ADM interprets a provision
      * If the words used are precise and unequivocal then the text will usually play a significant role. However, if they are broader and more open-ended, the context and purpose will be more important than the test
      * A decision will not automatically be unreasonable if an ADM fails to consider every single element of the text, context, or purpose of the contested provisions. The issue is whether the omitted aspect of the analysis causes the reviewing court to “lose confidence in the outcome reached by the ADM”
        + This will be the case where an ADM may have arrived at a different result if it had considered the omitted element. Where an ADM fails to consider some relevant aspect of the text, context or purpose you need to look for whether the ADM may have arrived at a different result if they had considered it. If so, it is likely decision will be held to be unreasonable
    - The evidence before the ADM
      * A reviewing court will not interfere with factual findings of ADM’s absent exceptional circumstances
      * It is well accepted that reviewing courts must refrain from reweighing and reassessing the evdeince considered by an ADM
      * However, majority said that reasonableness of a decision may be jeopardized where the ADM has fundamentally misapprehended or failed to account for the evidence before it
    - The submissions of the parties
      * Reviewing courts cannot expect ADM’s to respond to every argument or line of possible analysis in a particular context
      * However, the ADM’s fail to meaningly grapple with key issues or main arguments raised by the parties may call into question whether an ADM was alert and sensitive to the matters before it
      * Failure to consider every issue is not fatal if the issue is not key or central somehow but where a key or central issue is neglected, that may call into question whether the decision is reasonable
    - Past practices and past decisions
      * ADM’s are not bound to their previous decisions in the same way as the courts and that a lack of unanimity in a particular context is the price to pay for adminsitrative decision making freedom and independence
      * ADMs and reviewing courts” must be concerned with the general consistency of adminsitrative decision making, otherwise, decisions might become conditional on the identity of the particular adminsitrative decision maker/
      * ADM’s have a range of tools available to address inconsistencies between decisions of ADM’s in particular contexts. However, wehre an ADM departs from long standing practices or established decisions, then the ADM bears the burden of explaining that departure in its reasons. Otherwise, the decision **will be** unreasonable
    - Potential impact of the decision on the affected individual
      * If impact “severe, … the reasons … must reflect the stakes” (para 133)
      * Under *Baker*, individuals are entitled to greater procedural protection when the decision involves the potential for significant personal impact or harm. This principle is also relevant to reasonableness review.
      * Where the impact of a decision on an individuals’ rights or interests is severe, (i.e. where an individuals life, liberty or livelihood involved) then the reasons provided to the individua must reflect the stakes and take into account the potential serious impact

### Related issues that stem from Reasonableness review

* Application where no reasons are provided?
  + Look to the record to understand the decision reached
    - Looking to things like debates, deliberations, statement of policies, previous decisions etc.
  + If not possible to identify the reasoning process that underlies the decision from the broader context, it is “perhaps inevitable that … the analysis will focus on the outcome, rather than on the ADM’s reasoning process” (para 138)
* Remedial discretion on judicial review? -this is the remedy where a court finds a decision to be unreasonable
  + Focuses here on whether it should exercise its discretion to remit the matter to the ADM for reconsideration with the benefit of the court’s reasons
  + Most often appropriate to remit matter to ADM to reconsider the decision if a decision is found unreasonable
    - Why? – This goes back to the basic point that the legislature has entrusted the matter to the ADM and not the court to decide and the court should respect that legislative choice
  + However, may not be appropriate to remit the matter to the particular ADM in some cases (i.e. where it becomes evidence to the court if the course of it’s review that a particular outcome is inevitable and that remitting the matter would therefore serve no useful purpose)
    - If a particular outcome is inevitable, so remitting would serve no purposes
    - See also para 142 – this paragraph outlines various considerations that may influence the exercise of a court’s discretion as to whether to remit the matter to an ADM (concerns for delay, fairness to the parties, urgency of providing a resolution to the dispute the nature of the particular adminsitrative scheme etc.)
* Prior precedents on substantive review after *Vavilov*?
  + May need to request submissions from the parties on Vavilov’s impact
  + *Vavilov* is intended to be a break from the past and the majority indicates, for example, that a court seeking to determine what SOR is appropriate in a case before it should look to the reasons of the court in *Vavilov* first in order to determine how the general framework it articulates applies to the facts of the case
  + Some precedents may now carry less force like those dealing with jurisdictional questions which has been rejected as a category of correctness review as well as administrative context where there is a statutory appeal which are now subject to the appellate SORs under *Vavilov*
  + Other precedents like those dealing with whether a questions deals with an issue as a whole will continue to apply essentially without modification
  + Majority acknowledges that difficult issues may arise in future cases about whether a particular substantive review decision or approach remains good law in light of this decision and they said that wehre a reviewing court is not certain how the majority reasons in this case relate to the issue before it, it may be prudent to request submissions from the parties on both the appropriate SOR and the application of that standard in the particular context

### Application to the Facts

**Facts:** Alexander Vavilov did not know that his parents were Russian spies until they were arrested in the US and returned to Russia. Alex believed he was a Canadian citizen by birth, he lived and identified as a Canadian and he held a Canadian passport. Alexander’s parents were deported to Russia from US in a spy swap. Before they were deported, Alex and his brother left the US, where the family had been living, on a trip that had long been planned. They went to Pairs and then to Russia on a tourist visa. A few months later, Alexander attempted to renew his Canadian passport through the Canadian Embassy in Moscow. His application failed. He filed a second unsuccessful application for a Canadian passport a few months later after doing sever things suggested by the Passport authorities at the Canadian Embassy including his name from “Foley, the name his mom adopted to Vavilov, his mom’s actual surname. E was informed after his second unsuccessful application that even though he had a Canadian birth certificate he would need to obtain a certificate of Canadian citizenship before he was issued a passport. So, he applied and was issued a certificate. He then filed a third application for a Canadian passport. After this application, he received a letter from the relevant ADM (Canadian Registrar of Citizenship). The letter stated that Vavilov had not been entitled toa certificate of citizenship and that under the *Citizenship Act*, he was not a citizen of Canada. The Registrar of Citizenship cancelled his certificate of citizenship. In doing so, the Registrar relied on section 3(2)(a) of the *Citizenship Act*. The Registrar reasoned that Vavilov’s parent’s were employees or representatives of Russia at the time of his birth and thus, Vavilov has not acquired Canadian citizenship by birth by virtue of the exception in section 3(2)(a). Registrar id not offer any analysis or interpretation of 3(2)(a) in the letter but in arriving at her conclusion, she appeared to have relied upon a 12 page report prepared by a junior analysis on the issue The 12 page report did include an interpretation of s. 3(2)(a). Vavilov applied for judicial review in the federal court of the Registrar’s decision. Federal court rejected the application for judicial review but the Federal Court of Appeal accepted his application, quashing the Registrar’s decision. Vavilov appealed to the SCC.

* *Citizenship Act*, RSC 1985, c. C-29
  + 3(1) Subject to this Act, **a person is a citizen if**
    - **(a) the person was born in Canada** after February 14, 1977
  + 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 office 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);
    - (c) an office or employee in Canada of a specialized agency of the United Nations or an office 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 y the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)

**Held:** In applying their new framework, the SCC held that the standard was reasonableness. This is presumptively the SOR for all adminsitrative decisions now and the presumption here was not rebutted by the 2 exceptions recognized in this case: the rule of law exception or legislative intent exception. Majority then goes on to find that the Registrar’s decision was unreasonable.

**Reasons:** The Majority suggested that the Registrar’s decision came up short for several reasons:

* She failed to account for four relevant considerations
  + The text of the *Citizenship Act* properly
    - The text of the Act provided clear support for conclusion that all of the persons contemplated by s. 2(a) including the other representative or employees in Canada of a foreign government must have been granted diplomatic privileges and immunities in some form for the exception in it to apply
    - Another subsection, s. 3(2)(c), exempted officers or employees of various organizations if they 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)
      * Majority concludes that if 3(2)1(a) includes person who do not benefit from diplomatic privileges and immunities, it is difficult to see how affect could be given to explicit equivalency requirement in s. 3(2)(a). This is a technical point of analysis that is clearly grounded in the intricacies of the scheme
      * Key takeaway: on the analysis by the joint majority of the particular statutory provisions in their context, read together with other provisions related to the relevant provision, the majority finds that the Registrar failed to properly consider the text of the Act
  + International law and the leading international treaties that inform the interpretation of the Act
    - These principles and treaties extend diplomatic privileges and immunities to employees and representatives of foreign governments
  + Precedents
    - Majority said that various precedents were put before the Registrar which suggest that 3(2)() was intended to apply only to those individuals whose parent’s would have been granted diplomatic privileges and immunities
    - If she had considered these precedents, it would have been evidence to her that she needed to grapple with and justify her interpretation of3(2)(a) which took a different view
    - This is the idea that where a decision departs from a line of precedent, it is incumbent on the ADM to justify he departure and a failure to do so will render a decision unreasonable
  + Potential consequences of the decision which was to include individuals who have not been granted diplomatic privileges and immunities
    - Provisions like 3(2)(a) must be given a narrow interpretation because they potentially take away rights (in this case citizenship rights)
    - Registrar’s interpretation could not be limited to the children of spies, it’s logic would apply to a number of other scenarios, catching the children of various individuals
    - They said there was no evidence that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals.
  + Vavilov raised many of these in his submissions to the Registrar but she had failed to consider them. Each of these constraints viewed individually and collectively strong supported their conclusion that it was not reasonable for the Registrar to interpret 3(2)(a) as applying to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities at the time of the child’s birth. It was undisputed that Vavilov’s parents had not been granted diplomatic privileges and immunities in Canada ad thus, the decision of the Registrar was quashed!

**Important Takeaway:** Note that the joint majority refers to 4 of the “relevant constraints” in the context and that the failure of the Registrar to consider these relevant constricts individually or collectively renders her decision unreasonable.

# Threshold Issues and Remedies

## Threshold Issues

### Discretionary Bars to Relief

* It is sometimes said that judicial review for wrongful adminsitrative decisions is available automatically, particular where an ADM exceeds its jurisdiction, or the scope of the legal authority conferred on it.
* However, this suggestion is no longer accurate, if it ever was accurate. It is now clear that there is no automatic entitlement to a remedy on judicial review.
* The courts have the discretion to refuse to grant a remedy to an applicant who is or might otherwise be entitled to a remedy on either procedural or substantive review grounds.
* The discretion the courts exercise to refuse to grant a remedy is the vice the courts use to control access to judicial review. Courts can refuse to grant a remedy after engaging in a judicial review analysis but they can also determine at the outset of a judicial review hearing or on a preliminary motion that discretionary reasons dictate that the application for judicial review should not proceed
* There are a few common grounds upon which the discretion to refuse to grant a remedy in the judicial review context is exercised: these are the discretionary bars to relief:
  + The existence of adequate alternative remedies
    - Applicants for judicial review must usually exhaust other avenues for redress before seeking judicial review
    - The typical other avenue for redress is an appeal to an internal appellate tribunal or a statutory appeal to a court that is provided for by statute
    - The standard here in looking at whether the existence of adequate alternative remedies is likely to operate as a discretionary bar is adequacy. If the alternative remedy is not adequate (i..e because the appellate tribunal or court does not have the jurisdiction to consider the issue raised by the party or the remedy sought by the party) then judicial review will not be denied, at least not on this basis
    - Preemptive judicial review will usually be denied where an adequate alternative remedy is available regardless of whether the issue raised is a breach of procedural fairness or a threshold question about whether the ADM has the necessary jurisdiction at all
  + Prematurity
    - Involves an assertion that while an applicant for judicial review may have a good claim, it is inappropriate for a court to intervene on an application for judicial review at this point in time
    - The existence of an alternative remedy is a subset of prematurity
    - The other main situation where claims of prematurity arise is where an application for judicial review is initiated before a final decision is made by an ADM.
      * E.g. A party may seek judicial review of an investigative decision before the final decision maker makes a decision in response to the investigation or this may involve an interim evidentiary or procedural decision of an ADM (i.e. a refusal to order a particular type of discovery or disclosure) before the ADM makes a final decision resolving the issue
      * To obtain judicial review of an ADM’s preliminary or interim rulings prior to a final decision, an applicant must show exceptional circumstances that would make it inappropriate to wait for a final decision
        + Cases show that the threshold for something to be exceptional enough to justify early intervention is VERY HIGH and there are few modern cases where this threshold has been found to be met
  + Mootness
    - Opposite of prematurity
    - Claims of mootness arise where the dispute has seized to have practical significance for the applicant either at the time judicial review is commenced or at the time a court is called upon to make a decision
    - Mootness may arise where a dispute is over, where an ADM’s decision no longer affects the applicant (i.e. because they are no longer on parole), where the applicant no longer wants the remedy that the ADM might have granted or where the circumstances make it impossible for the remedy requested to be granted
    - The test that is applied in determining whether a claim is moot was set out in the SCC decision in *Borowski* (1989)
  + Delay (by the applicant)
    - This relates to the conduct of the applicant
    - It relates to the commencement of adminsitrative proceedings
    - Can arise as an issue in this context in two ways:
      * (1) It can go to the jurisdiction of an ADM to consider an issue at all (i.e. where there is a failure to respect mandatory limitation periods prescribed in a statute)
        + Where these limitation periods exist, they must be satisfied. An ADM has no jurisdiction to consider an issue if a time period prescribed to consider the issue is not satisfied
        + An important limitation periods for adminsitrative law purposes is the limitation in the *Federal Courts Act*, s. 18.1(2). This provision requires that applications for judicial review be commenced within 30 days from the communication of the decision to the particular party. Although, judges have the authority to issue extensions in some cases
        + The Ontario Ford Government has considered a similar limitation period for Ontario ADM’s
      * (2) Where even if there is no limitation period prescribed or even if there is, courts may deny an application for judicial review due to delay
        + The remedies available on judicial review should not eb available to those who sleep on their rights
        + Court typically weigh various factors in determining whether to refuse to hear a judicial review application due to delay on the part of the applicant such as the extent of the delay, whether there is a good explanation for it and most importantly, whether the delay has reduced the position of any other parties to the proceeding, the public interest generally and the functioning of the adminsitrative process
  + Misconduct (by the applicant)
    - A party making an application for judicial review must come to the court with clean hands.
    - This basis for refusing relief is rare. IT would include seeking a remedy to facilitate illegal conduct or the committing of perjury.
  + Waiver (by the applicant)
    - Commonly arises in 2 situations
      * (1) A failure to object in a timely fashion due to the participation of an ADM that a party believes is disqualified due to a reasonable apprehension of bias or inadequate independence
      * (2) A failure to object in a timely way to a breach of procedural rights (i.e. a failure to insist upon disclosure of particular information where it is thought to be required)
    - Parties should object in a timely prompt way to any perceived impropriety on the part of an ADM. Generally, the failure to do this will cause a loss of entitlement to object later. Particularly after a matter has been heard and decided
    - Choosing not to exercise a procedural right granted could be considered a waiver of any ability to complain later on judicial review
    - However, for there to eb a proper claim of waiver, the party concerned must be aware of the facts giving rise to the particular claim. Without knowledge, an essential foundation of a claim of waiver is lacking (namely knowingly failing to assert one’s rights in a timely fashion)
  + Balance of convenience
    - Still a work in progress but it seems right now to be a catch all category that will arise in rare cases wehre one of the other basis for denying relief is not engaged
    - Leading decision on this so far is the SCC decision in *Mining Watch Canada* (2010)
      * Court said that the power to refuse to grant relief should not be allowed to make in roads on the rule of law and must be exercised with the greatest care
* The first three grounds are concerned mostly with timeliness
* The next three grounds are concerned with the applicant’s (the party that is applying for judicial review) conduct

## The Reach of Administrative Law

### Amenability to Judicial Review

* Before you determine whether an adminsitrative decision engages procedural and/or substantive issues that can be challenged on an application for judicial review you need to determine whether the decision is even amenable to judicial review at all
* The question here of whether the decision is amenable to judicial review involves a determination of whether the decision is sufficiently public
* Historically, the main adminsitrative law remedies, certiorai and prohibition, were available in relation to anybody of persons having legal authority it determine a question
  + This entailed determining whether an ADM was sufficiently public. The inquiry into whether an ADM was sufficiently public was often determined by an examination of whether it was exercising a statutory power. In other words, it involved an examination into the nature of the power that it was exercising in making it’s decision. This classic approach swept in most decisions into the scope of admonitive law. Yet, for a time, this excluded judicial review of decisions made under the Royal Prerogative. It also sometimes led to applications for judicial review being rejected when broad against seemingly governmental or public bodies on the basis that they did not have a clear warrant for existence in a statute
  + Applications for judicial review were the subject of significant statutory reform, federally and provincially in the 1970’s
* Statutory reforms
  + Federal
    - Applications for judicial review are now governed by the *Federal Courts Act*
  + Provincial (Ontario)
    - Applications for judicial review are now governed by Ontario’s *Judicial Review Procedure Act*
  + These two statutes speak to the scope of judicial review federally and provincially in Ontario. As a result, determining whether judicial review is available in relation to an administrative decision now involves an interpretation of the relevant provisions of the applicable Act
* One caveat to whether a decision is amenable to judicial review turns in part on an interpretation of these statutes.
* *Federal Courts Act*
  + Federal Court has exclusive jurisdiction to hear judicial review 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)
  + Section 2 – definition
    - “… conferred by or under an Act of Parliament”
      * Includes subordinate federal legislation – e.g., regulations
      * Clearly includes decisions made under Acts of the federal Parliament and adminsitrative decisions made pursuant to authority granted by subordinate legislation
    - “… conferred by or under …. [the] Crown prerogative”
      * This sweeps in at least some decisions involving the Royal Prerogative, at least decisions that are subject to federal jurisdiction
    - Does not include corporations incorporated under federal legislation like the *Canada Business Corporations Act*
    - Therefore, they are not subject to judicial review under the *Federal Courts Act*
* *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*
      * These are the main remedies available classically under judicial review
      * This section does not use the language “exercise of a statutory power” whereas 2(1)(2) does use the language. Why the distinction?
        + The use of the term was not necessary in relation to the orders in this section because the law is clear that these are remedies that are only available in relation to public decisions. The use of the language would be redundant
        + But, was necessary in relations to declaration and injunctions (below) because these remedies are available at common law is related to private activities so it was necessary to include the language to preclude the provision from being use to trigger judicial review of private activity
        + This distinction is important because if you are relying on section 2(1)(1) to seek judicial review, you will mostly be looking to the common law to see if the decision is sufficiently public to allow for judicial review but if you are relying on s. 2(1)(2) you have to make sure the decision satisfies the definition of statutory power and in turn, statutory power of decision
    - *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*
      * Notice here that s. 2(1)(1) does not include the language of exercise of a statutory power but the next provision, the one relating to declarations and injunctions, is qualified by the reference to the exercise of a statutory power
        + So, what is the exercise of a statutory power?

“Statutory power” includes a “statutory power of decision” (see s.1)

“Statutory power of decision” is, in turn, 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 license, whether the person or party is legally entitled thereto or not, ….*

In essence, statutory power means any power conferred by provincial statute to determine legal rights, powers, immunities, duties or liabilities of any person or party

* How have the provisions of these acts relating to the availability of judicial review been interpreted?
  + An important preliminary point is that in many cases there is just no question that the terms of the provisions in the Acts are satisfied. If what is involved is a statutory delegation of authority to an ADM that somehow impacts an individuals, rights, privilege or interests, then judicial review of the decision will usually be available
  + Questions usually center around whether judicial review is allowed in two situations:
    - (1) where you have private actors that seem to be exercising public functions
    - (2) where you have public actors that seem to be engaged in private functions (namely business activities)
      * When public actors engage in the procuring of goods and services that they need in order to conduct the business of government, it is the normal principles of the private law of contract that will apply. However, in recent years, some courts have applied more rigorous standards holding government decision makers engaged in business activity suit to the principles of adminsitrative law

#### Air Canada v Toronto Port Authority [2011, Fed CA]

**Facts:** The Toronto Port Authority issued bulletins respecting the allocation of landing spots at Billy Bishop airport in Toronto. The bulletins grandparenting the existing landing sports of Porter airlines which displeased Air Canada.

**Issue:** Whether Toronto Port Authority’s “bulletins” were sufficiently public to attract judicial review under s. 18(1) of the *Federal Courts Act?*

**Held:** No, per Stratas JA

**Ratio:** This case sets out criteria to determine whether an activity is sufficiently public to trigger judicial review. Factors to consider:

* The character of the matter for which review is sought
  + The question here is is this a private commercial matter or does it have a broader importance to some or all of the public?
  + If it has a broader importance to some or all of the public, this weighs in favour of a finding that the matter is sufficiently public to attract judicial review
* The nature of the decision-maker and its responsibilities
  + Is the ADM public charged with public functions and is the matter related to these public functions
  + If so, this weights in favour of a finding that the matter is public
* The extent to which a decision is founded in and shaped by law vs. private discretion
  + If a particular decision is authorized or emanates directly from a public source of law (i.e. statute or regulation) this weighs in favour of a finding that a matte is public especially if the source supplies criteria for the making of the decision
  + However, if the power to act in the ADM is founded on something else (i..e general law of contract) this will weigh against a finding that the matter is sufficiently public to attract judicial review
* The body’s relationship to other statutory schemes or other parts of government
  + Question is “is this an ADM that is somehow woven into the network of fabric of government and is it exercising a power as part of that broader network?”
  + If so, actions are more likely to be seen as sufficiently public
* The extent to which a decision-maker is an agent of government or is directed, controlled, or significantly influenced by it
  + Is the ADM a private individual retained by the government to investigate misconduct by a public official?
  + A requirement that policies, bylaws or other matters be reviewed or approved by government may also be relevant
* The suitability of public law remedies
  + Is this a matter that could appropriately be dealt with on judicial review or does it seem like the sort of consideration that should not be dealt with on judicial review
* The existence of a compulsory power
  + The existence of an involuntary power of compulsion over all or part of the public weighs in favor of a finding that a decision is sufficiently public
  + Opposite is true where parties consensual submit to the power of the ADM like a private club
* Exceptional cases where the matter has attained a serious public dimension/effect
  + This contemplates decisions that would not be otherwise sufficiently public by virtue of the application of the other factors by by virtue of the nature of the decision that the decision has attained a sufficient public dimension
  + Refers to cases that have a serious effect on the rights or interests of a broad segment of the public

**Reasons:** Stratas notes that most of the cases interpreting the relevant provisions of the *FCA* Turn on whether there is a federal act or Crown Prerogative underlying the decision. However, he says there is much force in the Toronto’s Port Authority’s argument that this is not enough to engage judicial review, that the conduct or power exercised must also be of a sufficiently public character as well. It is not enough that a particular act is authorized by the federal Parliament or the crown Prerogative, there needs to be something more and this is that the decision will be of a sufficiently public character. Stratas says that a clear definition of the term “public” has proven elusive. Due to the elusive nature, Stratas then favors a factor-based approach. This factor-based approach involves setting out various factors to be considered and balanced in determining whether a decision qualifies as sufficiently public. None of the factors will be determinative, they all must be considered and weighed together. Application of the factors in this case led to the conclusion that the TPA’s bulletin was not sufficiently public:

* The TPA was not a Crown agent for this purpose based on an interpretation of the relevant provisions in the *Canada Marine Act*
* The TPA was private in nature
  + It was expected to be financially self-sufficient and in service of this goal, it was permitted to pursue private purposes such as revenue generation which is what it was doing in this situation in releasing the buildings in relation to landing spots
* The TPA was not woven into the network of government
* No statute contains the TPA’s discretion, supplies decision criteria here
* No evidence the TPA is controlled by the government in making these decisions, it makes the decisions on it’s own
* Not an exceptional case where matter has attained public dimension or where the matters described have or will cause serious public effects

#### Setia v Appleby College [2013, Ont CA]

**Held:** Appleby College’s disciplinary decisions not sufficiently public for purposes of s. 2(1)(1) of the *Judicial Review Procedure Act* (Ontario) because it lacked the sufficient element of publicness. Decision was not amenable to judicial review

**Reasons:** Cites and applies Stratas JA’s factors from *Air Canada*

* While the school was established by a private statute which gave the schools decisions something of a public flavor, the expulsion decision it was making was not regulated by statute
* The disciplinary decisions of Appleby College were not directed or otherwise controlled by the provincial government in any way
* The decision could affect only the students that chose to attend Appleby and did not have a broader import to members of the public
* The extent to which the expulsion decision was shaped by private and not public law. The criteria upon which the decision was made were provided by the private law of contract, not by statute

#### Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall [2018, SCC]

* This case had to do with the second category above where you have voluntarily private or religious organizations or clubs that exercise coercive powers in relation to their members. Matters become more complicated where these organizations are created by statute because you have private actors engaged in what looks like public activities.

**Facts:** This case involved a religious organization, the Jehovah’s Witnesses. Wall, a real estate agent in Calgary was a Jehovah’s witness. He was disfellowshipped by the Highwood Congregation in 2014. Many of his clients were fellow Jehovah’s Witnesses and because they were obliged under its religious doctrine to shun dis-fellowed members, his real estate business suffered badly. He sought judicial review of the disfellowship decision.

**Prior Proceedings:** The trial court and the ABCA both held that they had the jurisdiction to grant judicial review of the disfellowship decision.

**Issue:** Whether judicial review was even available at all of the disfellowship decision.

**Held:** Rowe J – Disfellowship decision of Congregation not subject to judicial review.

**Reasons:**

* “… [j]udicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character” (para 14)
  + Highwood Congregation was not exercising state authority.
* Criticized two lines of cases that held that voluntary associations could be subject to judicial review. One line of cases involved voluntary private organizations that were incorporated, created by statute. These cases involved private acts and they were not subject to judicial review because a private act, an act that relates to only one organization is not a law of general application and it’s effect can be limited. He criticizes these decisions that find organizations created by private acts to be sufficient to engage judicial review. Another line of cases he says are problematic, are cases that use the term “public” in a generic sense and not in the proper sense in which it is sued in the administrative law context. An organization was not sufficiently public just because its decisions could impact a broad segment of the public, more was needed.
  + Two important points:
    - The simple fact that an organization is created by a private act of the federal Parliament or provincial legislature is not enough to subject it to judicial review
    - The simple fact that a decision impacts a broad segment of the public is not enough to subject it to judicial review
* So, when is a decision sufficiently public to attract judicial review?
  + … judicial review primarily concerns the relationship between the adminsitrative state and the courts (para 13)
  + Judicial review is only available where there is an exercise of state authority and wehre 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)
  + Not only does the decision not provide clarity about when a decision is sufficiently public to attract judicial review but it also seems to muddy the waters because it casts doubts about whether we use the same factors. Can we use *Air Canada*’s factors?
    - Maybe not?: that case “dealt with “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)”
      * This suggests that the particular *Air Canada* factors do not really tell us whether a decision is of a sufficiently public character in a more general sense, it is only relevant to a statutory analysis in particular context, namely the interpretation of the *FCA* relating to federal boards, commission or tribunals
      * This calls into question whether courts should be using this case in other contexts outside of the federal courts context
      * However, if we look back to Strata’s decision in *Air Canada*  (para 60), we can see that he did not really limit the reasoning in this way but rather seemed to eb setting out factors to be applied more broadly in determining if a decision is sufficiently public

**Where are we now?**

* It seems that *Highwood Congregation* does not really call into question whether we can utilize the *Air Canada* factors when we are considering the judicial review jurisdiction of the federal court
  + Where you are dealing with a federal ADM, then it seems that *Highwood Congregation¸* leaves undisturbed our ability to look at those factors
* It seems like we still might be able to use the *Air Canada* factors in Ontario in considering the judicial review jurisdiction of the provincial courts under the *Judicial Review Procedure Act*
  + The reason for this is because of the ONCA decision in *Setia*. The important qualification to this statement is that *Setia* is a case that deals with s, 2(1)(1) of the *JRPA*. Where you are seeking one of the remedies outlined in that provision in the context of administrative decision making, it seems that you can still refer to the *Air Canada* factors.
  + Where *Highwood* would question our ability to resort to the factors is in only in relation to the second part of the *JRPA* which is in relation to declarations and injunctions. There, you must look to the definition of “statutory power of decision” and the cases interpreting that
* It now seems clear, by virtue of *Highwood*, that voluntary private and religious organization, even those statutorily created, will not be amenable to judicial review absent something more like the authority to make coercive decisions in relation to their members conferred by statute

## Venue

* This deals with the division of responsibility between the federal and provincial courts on applications for judicial review
* Judicial review proceedings in Canada are initiated by way of an application for judicial review. Canada is a federal state and as a federal state it has a system of both federal and provincial courts. This points to another preliminary/threshold issue that you must consider before initiating judicial review proceedings – to which court should you seek judicial review?

### Venue: Federal or Provincial Courts

* General principles:
  + ADMs that are established by, and making decisions grounded in, federal statutes are supervised by the Federal Court
  + 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!

### Federal

* Federal court of Canada was established in the early 1970’s, before then there had been a federal Excheter Court which had a limited jurisdiction and it did not have the broader power over judicial review decisions over federal decision makers
* The federal court is not a court of inherent jurisdiction like the provincial superior courts. This means that the federal court only ahs the jurisdiction over federal decision makers to the extent that jurisdiction is actually conferred on it by a valid and applicable federal statute
* 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”
    - A federal statute
  + Catches bodies or persons exercising or purporting to exercise “powers conferred by or under … [the] Crown prerogative”
    - It would be the Royal Prerogative as it relates to falls within federal jurisdiction
  + Excludes:
    - Decisions of the Tax Court of Canada
    - Any body, person or persons constituted or established by provincial law, including those provincial ADMs exercising powers conferred by federal legislation (e.g., interprovincial marketing schemes)
    - Provincial superior court judges
* Because most powers are conferred by statute or the Royal Prerogative, this decision makes it clear that the federal court has adminsitrative jurisdiction in relation to judicial review over most federal adminsitrative decision making. This means that when you are faced with an adminsitrative law problem, you have to decide which order of government has established the administrative decision maker and given it the authority to make the decision. If it is the federal government that has done so, you have to bring your action for review in the federal court.
* Other exceptions than the ones explicitly mentioned in the *FCA*:
  + Any body, person or persons constituted or established by provincial law, including those provincial ADMs exercising powers conferred by federal legislation (e.g., interprovincial marketing schemes)
  + Constitutional claims
    - It is not constitutionally permissible to remove the jurisdiction of the provincial superior courts to consider constitutional challenges to the jurisdiction of federal laws (*Canda v Law Society of BC)*
    - It is not constitutionally permissible to remove the jurisdiction of the provincial superior courts to consider decisions of federal ADMs (*CLRB v Paul L’Anglais)*
    - Federal and provincial superior courts share jurisdiction (*Canada v Law Society of British Columbia* [1982, SCC] (laws); and *CLRB v Paul L’Anglais* [1982, SCC] (decisions)
      * As a result, both federal courts and provincial superior courts have the jurisdiction to consider constitutional challenges to both federal statutes and specific federal adminsitrative 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 and defer to the federal court: see, e.g. *Reza*
      * The court emphasized that the case involved immigration law and that Parliament has created a comprehensive scheme for the review of immigration matters, a scheme in which the federal court played a major role. Hence, it was the best, most effective and appropriate forum for the constitutional claim
  + Applications for judicial review for writ of *habeas corpus*
    - When a person is detained, held by an order of a federal ADM, an application for judicial review for a writ of *habeas corpus*, to have the detention order judicially reviewed may be made only to a provincial superior court because the *FCA*, in section 18, does not give the federal court jurisdiction to issue writs of this kind. This is an example where the federal court does not have the jurisdiction as it only has the jurisdiction granted to it by federal legislation and here, jurisdiction has not been granted by the *FCA* in relation to these writs.
  + Damages claims (e.g., breach of contract, tort)
    - Federal Court and provincial superior courts have concurrent jurisdiction to consider damages claim involving the federal Crown: s. 17, *Federal Courts Act*
    - Now clear that regular damages actions against the federal Crown can take place in a single proceeding, either in the federal court or in the relevant provincial, superior court.
* Note also s. 28, *Federal Courts Act*
  + Some things go straight to the Federal Court of Appeal on judicial review rather than the trial decision Federal Court
  + E.g.,
    - CRTC
    - Copyright Board
    - Canadian Transportation Agency
    - Competition Tribunal
    - National Energy Board
  + Argument offered for allowing these federal ADM’s to go directly to the federal CA is their importance.

### Provincial

* ADMs that are established by and making decisions grounded in provincial statutes are supervised by their respective provincial superior court
* Inherent jurisdiction to judicially review adminsitrative decisions (not statutory, like the FC/FCA)
  + Unless the *FCA*, has given the jurisdiction to consider an application for judicial review to the federal courts, it is the provincial superior courts that have the jurisdiction to consider an application for judicial review. They are the default
* Deal mostly with applications for judicial review involving provincial adminsitrative decision makers
* In a few cases, the provincial superior courts retain their authority in relation to federal adminsitrative decision makers such as applications of judicial review of federal ADM’s involving the writ of *habeas corpus* or constitutional challenges to federal laws
* Since the early 1970’s applications for judicial review that involve matters that have been left to the provincial superior courts have been given to the divisional court
* In Ontario, the Divisional Court
  + Special division of the Superior Court of Justice (Ontario)
  + Generally sits on applications for judicial review in three-judge panels
  + See *Judicial Review Procedure Act*, s. 6(1) – confers the authority on the Divisional court to hear these applications

## Remedies

* Final step in an administrative law analysis
* Most common outcomes on judicial review:
  + The decision is upheld or restored
    - If a court on judicial review decides that there are no procedural or substantive issues with the decision it will just upheld or restore the decision
  + The decision is quashed
    - If problems are found by a court on judicial review in procedural or substantive grounds, decision might be quashed
  + The decision is quashed and explicitly referred back to the decision-maker for reconsideration
* Remedies by adminsitrative decision makers
  + Flow from statute, never the common law
  + ADMs have no inherent authority to make decisions and this applies equally to remedies
  + If you are seeking a remedy from an ADM, you have to look to the statutory scheme establishing and regulating the decision maker to determine whether it has the authority to grant the particular remedy and if so, when it has that authority
* Remedies on judicial review
  + “Prerogative writs”
  + Roots in “inherent jurisdiction” of the “superior courts”
  + But, may be authorized, codified, and partly limited, by statute
* Possible remedies on judicial review (these are the prerogative writs) (see OWL handout summarizing this information)
  + Certiorari (most common remedy)
  + Prohibition
  + Mandamus
  + Habeas Corpus
  + Declaration
* All of these remedies are available from the provincial superior courts but one of these, habeas corpus, is not available from the federal courts in relation to federal ADMs.

### Certiorari (most common remedy on judicial review)

* Historically was a special proceeding by which a superior court required some inferior court or decision maker to provide it with a record of tis proceedings for review for excess of jurisdiction
* Remedy used to quash or invalidate an ADM’s decision
* Importantly an *expost facto* remedy – it can only be used in relation to an adminsitrative decision that has already been made
* Generally, a court will not substitute it’s decision for the decision of the ADM because the court does not have the statutory authority to make the decision which was, by statute, allocated to the ADM
* Where an entire decision or proceeding is quashed, the ADM must typically start on reconsideration from scratch
* However, if only part of a decision or proceeding is quashed, upon taking the step quashed without the error that resulted in the decision being quashed then the ADM may be able to continue the proceeding and it does not have to start from scratch ignoring everything that went before
* An order for certiorari, a quashing order, is often combined with a mandatory order, an order in the nature of mandamus which will order an ADM to reconsider an issue with directions (i.e. by observing a fair process in a particular way)
  + These mandatory directions cannot require a specific decision on the merits

### Prohibition

* Much less common remedy on judicial review
* Used to prevent an ADM from exceeding it’s jurisdiction or from exercising a power
* It is, unlike certiorari, a kind of remedy used to prevent an unlawful assumption of jurisdiction. Unlike certiorari which prohibits relief after a decision is made, prohibition is used to obtain relief preemptively. It is used to prevent an ADM from doing something it is not permitted to do before it actually does so
* Since courts are reluctant to interfere on judicial review applications before a final adminsitrative decision is made, prohibition is rare. It is used only in those rare cases where the courts exercise their discretion to intervene preemptively
  + I.e. where there is a serious concern about a reasonable apprehension of bias and a hearing is likely to take considerable time, a prohibition order may be granted in order to deal with the concern about reasonable apprehension of bias before the final decision is made

### Mandamus

* Much less common that certiorari
* It is the writ that is used to compel an ADM to perform a legal duty that it is obligated to perform
* In practice, it is combined with an application for a writ of certiorari. Certiorari is used to quash an adminsitrative decision (i.e. for lack of procedural fairness) and then an order in the nature of mandamus is used to force the particular ADM to reconsider the manner in a procedurally fair way
* A variation on mandamus gives the courts the ability to send a matter back to the ADM for reconsideration with directions. Superior courts have the inherent power to order reconsideration with directions, although this power is now often granted by statute. These sorts of directions may only protect against unfair procedures or excess of power and cannot tell an ADM how it much decide the particular matter
  + i.e. Mandamus cannot be used to compel the exercise of discretion in a particular way to reach a particular substantive outcome

### Habeas Corbus

* Once commonly used, it is now rare
* It means “produce the body”
* It is a writ used to bring a person before a court on judicial review most frequently to ensure that the persons imprisonment or detention is not illegal
* Now, habeas corpus applications are brough mostly by prisoners detained in correctional institutions and by police, immigration and mental health detainees to challenge their detention in whole or in part
* **NOT AVAILABLE TO FEDERAL ADMS**

### Declaration

* This is a judgement of a court that determines and states the legal position of the parties or the law that applies to them
* Two kinds of declarations:
  + Public law kind
    - Used to speak to the legal validity of public decision making
    - Primary concern of adminsitrative law
  + Private law kind
    - Used to clarify the law or declare a private parties rights under a statute
* They are not enforceable in the sense that they cannot require anyone to take or refrain from taking any action. They are really just a declaration of the legal position of the parties.
* However, the non-coercive nature of the remedy has not been a significant problem because court declarations against ADM’s tend to be respected subsequently by those ADMs

### Statutory Reform in the 1970’s

* Over time, each of the prerogative writs came to be characterized by technical and complex legal rules. Applications were often dismissed either because the applicant had petitioned for the wrong writ or because their claim was barred by some technical limitation on it’s availability
  + There was a push for a reform
* Ontario: *Judicial Review Procedure Act*
* Federal: *Federal Courts Act*
* Both create a single ‘application for judicial review
* Incorporate the old prerogative writs, but reduce complexity and the risks involved in choosing the appropriate remedy
  + Now, sufficient to indicate grounds on which relief is sought (e.g. breach of procedural fairness) and the relief sought (e.g. an order quashing the decision)
  + You don’t have to specify in any detail under which particular writ you might have traditionally proceeded
  + As a result, claims are much less commonly dismissed due to technicalities around the prerogative writs

**What we should know about Remedies for the Exam**

* Don’t get too wrapped up in the intricacies of the remedies, the statutory reforms have made these technicalities less important
* Indicate that you understand which remedy would be the most important or most appropriate on the particular facts – all we have to do!
  + Don’t have to get into the details or complexities of the law relating to the particular remedies themselves