

INTRODUCTION TO JUDICIAL REVIEW & THE RULE OF LAW

INTRODUCTION

Origins of JR

- English Royal Courts held supervisory power as part of inherent jurisdiction
- Continued by the **S.96** superior courts in Canada
- Appointed by the King so they have unlimited power

Constitutional Foundations

- **S.96** superior courts hold inherent jurisdiction, including the power of reviewing inferior bodies
- Only limit is that they cannot limit a future parliament
- Privative Clauses are a sign to limit JR

Crevier v Quebec (AG) →

Quebec attempts to create a tribunal that was effectively a **S.96** court, as it could not be judicially reviewed → NOT allowed.

Re: Residential Tenancies →

Test for whether a body is masquerading as a **S.96** court, look to: Historical inquiry; Judicial v. Legislation or Admin; Contemporary Character → look like a court

MacMillan Bloedel Ltd →

→ JR is constitutional protected, supports the rule of law

What is it now?

Procedural Fairness: Did the admin DM use the proper procedures in reaching a decision?

Substantive review: Did the admin DM make an error of magnitude that the court is willing to intervene

Remedies: If there are procedural or substantive defects in the decision should the court intervene and how?

TENSION BETWEEN THE JUDICIARY AND THE EXECUTIVE

Red Light Theory (Wade and Forsyth)

- Judges are useful and important to decision makers (Judge friendly theory)
- It promotes good governance, controls the boundaries
- Prevailing theory amongst legal scholars

Green Light Theory (Griffiths)

- They have their own political views and opinions and they end up blocking what the legislatures do, what can be progressive and good
- Judges quash the decisions and end up stopping progress
- Should be more confidence in the political process
- Rights are collective and there are going to be winners and losers which should be done by elected officials

RULE OF LAW IN THEORY

Formalism: Dicey

- One law for all, law as a restraint (prevent arbitrary exercises of power)
- Law is pure/ good; Politics is dirty/ arbitrary
- External checks on the executive power
- Shouldn't give deference to admin tribunals

Proceduralist: Fuller and Raz

- Raz**
- "Law must be capable of guiding the behavior of its subjects" and instrumental approach
 - Role of the judge is to bring legislation in line with these legal doctrines
 - RoL is an instrument to achieve democratic values; law has autonomy from politics

Fuller

- 8 principles of legality: Must not be retroactive, must be clear, can't be ambiguous, has to be general (Can't target an individual), needs to be consistent, needs to be stable (Can change but must be done publicly and according to proper procedures), has to be capable of being obeyed, must be rules constraining discretion of public officers
 - Admin bodies are good but they should have some protection but ensure it's not abused
- Substantive: Dworkin**
- Getting into the content of law
 - Legality premised on respect for rights
 - Takes rights seriously; individual demands enforcement of rights in court
 - A less rigid separation of powers – all branches have a role in upholding the Rule of Law
 - Judges are ultimately charged with guarding the moral integrity of political order
 - Deference as respect



PROCEDURAL FAIRNESS FRAMEWORK

The Concept of Natural Justice

- **Audi alteram partem** – You must hear the other side;
- **Nemo judex in sua causa** – You cannot be a Judge in your own case (Bias)
- **Ridge v. Baldwin H.L.** Impact Oriented approach to Natural Justice
- **Nicholson v. Hadimand-Norfolk (Regional) Police Commissioner (1979)**: There is a **GENERAL DUTY OF FAIRNESS** in administrative decision-making, involving "something less than procedural protection of traditional natural justice".

STEP 1: Is the body sufficiently "public" to attract P.F.?

- The source of the board's power
- The function and duties of the body
- Whether the govt action has created the body
- Gov't control of the body
- Power over the Public at large, or only those persons who consensually submit to jurisdiction

STEP 2: Is there a DUTY OF FAIRNESS owed? (Trigger question)

- Public authority
- Making an administrative decision
- Which affects the "rights, privileges or interests of an individual" (**Cardinal v. Kent Institution**)
- The fact that a decision is administrative and affects "the rights privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness – **Dunsmuir**

STEP 3: Are there requirements of P.F. for the Decision Maker? (Source)

Statutory

- When the Legislation clearly defines/ excludes further procedures the legislation is FINAL
- "To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument"

Administrative Tribunal Act SBC 58-59

- Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - Only applies if it is incorporated in to the enabling act
- **Canadian Bill of Rights s. 2(e)**
 - No law of Canada shall be construed or applied so as to: deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

Common Law

- Rule of Law: Presumed Parliament intends PF requirements
 - It can be modified or ousted by legislation

Cardinal v. Kent Institution 1985

affects the "rights, privileges or interest of an individual" then it is sufficient to trigger the common law duty of fairness. The duty of fairness is a stand alone ground of review.

Constitutional

- Applies only where there is a potential deprivation of life, liberty or the security of a person
 - SCC has never justified S.7 breach under S.1 **S.7 of the Charter**

Step 4: Is the decision exempt from P.F.? What are the limits?

Preliminary or Advisory Processes

- Investigations or advisory decisions
- NOT final decisions
- But if there is significant adverse consequences at the preliminary stage then maybe...

Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission) 2012 SCC

Judicial intervention is not justified at this preliminary stage of the Commission's work

The Legislative Process

- Legislative decisions or functions are not subject to PF → except Constitutional issues
- JR is about patrolling delegated authority → **NOT** primary authority
- They have their own procedural requirements
- Remedy is at the Ballot Box
- Exception: If it's aimed at a particular person/ group PF is due

Reference RE: Canada Assistance Plan (C.C.)

The **DUTY OF FAIRNESS** does **NOT** apply to a body exercising **LEGISLATIVE decisions or functions**.

Wells v. Nfld 1999

No duty of PF for legislation; abolishing the position is valid

Authorson v. Canada (2003)

The only procedure due to a citizen is that proposed legislation is read three times in the Senate and House of Commons and then receives Royal Assent

Canada v. Friends of the Canadian Wheat Board (2012)

Despite earlier legislation, no parliament is bound to another and can make rules that abolish PF in boards

Cabinet and Ministerial

Canada (AG) v. Inuit Tapiriit Kanatami 1980 SCC: If the executive branch has assigned a function that the

Decisions	executive branch would normally perform, and the subject matter they are deciding on isn't individual or unique to the appellant, then procedural fairness will likely not apply to the decision-making process.
Subordinate Legislation	<ul style="list-style-type: none"> Subordinate Legislation will be exempt from PF if it is legislative in nature and that it has a general and not specific (person) application Honex Realty and Development Co. v Wyoming Village If a bylaw is aimed at a specific entity/ person than a duty of PF is imposed
Public office holders working under contract	<ul style="list-style-type: none"> Administrative bodies may be exempt from Duty of PF if their decisions are legislative in nature "policy" esque. Knight v. Indian School Division No. 19 (1990) Duty of PF applies when a decision is administrative and specific
Emergency Situations	<ul style="list-style-type: none"> Exemption from duty of PF if emergency circumstance necessitate an urgent decision
Express Statutory Limits	<ul style="list-style-type: none"> Cardinal v. tent with respect to the prison context and the initial segregation order – duty still applies Statute may limit or exclude the common law duty of PF, either expressly, or implicitly where the statute provides its own procedural requirements and "occupies the field" Always pay attention to the enabling Act! <ul style="list-style-type: none"> Scope of power: broad/ narrow PF provided for

STEP 5 : Where does PF Fall on the Spectrum? (Baker 5)

Nature of the Decision made and the process	<ul style="list-style-type: none"> What sort of powers does the board have? Do you act like a court? Baker → Great Protections in adjudicative decisions Honex → if the decision is legislative in nature but aimed at a person then greater PF
Nature of the statutory scheme	<ul style="list-style-type: none"> How much discretion is given to the courts? More = more deference Is an appeal possible? If not you receive more PF (Baker) Is it a Final Decision? (Singh)
Importance of the decision to the individual	<ul style="list-style-type: none"> How important is this decision? <ul style="list-style-type: none"> Baker immigration and children, deserved a lot due to the potential of the outcome Cardinal, prison – impact to privileges and interests How significant is it to your life and career? <ul style="list-style-type: none"> Blencowe, reputation and employment Surech & Singh, security of the person
Legitimate expectations	<ul style="list-style-type: none"> Mari → "Clear, unambiguous, unqualified" Was the person made to believe they get a particular set amount of PF? Representation contained in pamphlets, policy documents or resolutions Can look to past practices: Agrairav. Canada 2013 SCC procedures were published and detailed, they were clear and procedural in nature and did not conflict with the decision maker's statutory duty Contractual Promise made by the Ministry <ul style="list-style-type: none"> Mount Sinai Hospital v. Quebec 2001, seeking a permit, minister promised if the hospital was relocated to Montreal, relocated and no permit given Does not have to show detrimental reliance Even if you don't know about the expectations at the time of the decision and you find out after you can claim PF → Mari Limitations: The court can only provide procedural remedies → i.e. if you were promised the school won't close for 2 years, and it closed without any PF the issue can be retried but the court will not supplant a sub. opinion What procedure do they have? Do they have the power to make rules? If yes more deference (Baker)
Choice of procedure made by the agency	<ul style="list-style-type: none"> Administrative Tribunals Act S. 11 - 14 (<i>This must be incorporated into the enabling act</i>) → The tribunal has the power to choose its own procedures (subject to home statute) Knight – the aim is not to create procedural protection, but to achieve balance between the need for fairness, efficiency and predictability of outcome

MAXIMUM (criminal trial)

- notice
- decision made w/in reasonable time
- Disclosure
- Right to Counsel
- Call for Evidence & Cross-examination
- Written Reasons



MINIMUM (informal decision)

- prison example
- don't implement on all decisions
- does the procedure have to be fair?
- legislation can overrule CL requirement
- PF is not a "right" in civil cases **Imperial Tobacco**

STEP 6 : Where on the spectrum does the PF sit?

Conclude whether a high, medium, or low level of PF is required.

Step 7 : What is the person entitled to?

Canada v. Mavil: "The requirements of the duty are in the particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this central notion of the just exercise of power should not be obscured by jurisprudential lists developed to be helpful, but not exhaustive"

Step 7.5 : Constitutional Dimension, applicable only if it says:

Is a person's life liberty, or security of person implicated by the decision?

Is the decision in accordance with principles of fundamental justice?

Insite: Decision was arbitrary as it undermined the purpose of the legislation and grossly disproportionate as it would negatively impacts public health

- **Ex Parte Hearings: Charkaoi v Canada**: Secrecy of scheme denies person to know case against them and undermines judge's ability to decide based on all relevant facts and law. This fails to assure fair hearing that s. 7 requires before state deprives person of "life, liberty or security of person"

- **Suresh**: Disclosure – claimant had a right to the disclosure of information on which the Minister would make the decision. And a right to reply to claims set out in the evidence.

- **Singh**: Oral hearing was required because of the serious interest at stake and issues of credibility (is this person a refugee or not → need conclusive evidence)

- **Canada v Khadr**: S.7 was infringed but remedies are limited because it is part of the prerogative power.

- **New Brunswick (MHS) v G.J. 1999**: Fundamental justice required state funded legal counsel due to the complexity of hearings, seriousness of decision, limited capacities of the individual

Cross-examination may be required if there is a credibility issue (**Singh**)

- **Blenroe**: Allegations are the most important part, and will experience stress, stigma and anxiety but it did not rise to interfering with his security of person

- **Suresh**: Procedural protections req'd by S.7 in this case do not extend to requiring oral hearing or complete judicial process, but require more than procedure required by Act – none! Person facing deportation to torture

Notice

- Enables participation in the process
- Must provide a reasonable opportunity to present arguments and respond to the case
- Sufficient information

Disclosure

- Less than what is required in the criminal
- Information about the decision
- Must be sufficient for parties to challenge it
- **Srisikand arjoh v USA**: You don't always get full disclosure (especially in alleged Terrorists)
- **Knight**: required disclosure for termination

Oral Hearings

- Often not required as they will slow down the process
- But can be appropriate where witness credibility is important **Singh v. Ministry of Employment and Immigration**
- Written hearings are often more suitable **Baker**

Right to Counsel

- No general right but counsel often used in practice (though limits may be imposed)
- No right outside of criminal hearings or **s.7 or s. 10(b)** Charter engaged **Christie**
- Written submission can be written by a lawyer, but not always allowed in an oral hearing

Cross Examination

Cross-examination may be required if there is a credibility issue (**Singh**)

Timeliness and Delay

- Usual time requirements for a similar matter
- Within or outside the norm of the delay?
- Cause of the delay
- Impact of the delay – How significant is it for the person affected by it?

Reasons (Probably the most important menu item)

- Not required in all cases
- Sometimes it is too onerous on admin tribunals to provide written reasons
- Necessary where decision has important significance for an individual or where there is a statutory appeal process
- **Lafontaine 2004**: They gave reasons the first time, but failed to the second time. Reasons were required to fulfill their duty of procedural fairness
- **Canada v Mai 2011**: Reasons were not required but the legitimate expectation was that notice is to be given to enable a response. Sponsors understand the consequence – it's part of the application.
- **NF Nurses**: The arbitrator gave reasons and was within the range of reasonable outcomes, assessing whether those reasons were inadequate is a matter of substantive review.

STEP 8 : Determine if the Duty has been met?

- What were they given?
- What did they deserve?
- The denial of a right to a fair hearing must always render a decision invalid (does not matter if tribunal would likely come to the same result)

Summary of Cases

PF - Decision Quashed

- Cardinal
- Homex
- Lafontaine
- Suresh
- Singh
- Charkaoui

PF - But was Given

- Knight
- Baker
- Sriskandarajah
- Blencoe
- Mavi
- NF Nurses

No P.F.

- Halifax v. Nova Scotia (HRC)
- RE Canada Assistance Plan (BC)
- Wells v Newfoundland
- Authorson
- Friends of the CAN Wheat Board
- Inuit Tapirsat
- Agraira

Singh v Canada (1985)

Held: Refugees entitled to hearing before adjudicated on their asylum case

Decision: ordered IAB to grant applicant full oral hearings

~~Knight~~

Canada v Mavi (2011)

- gov owes duty of P.F. to sponsor of immigrants to Canada under the family class in deciding that they must pay for any social assistance given to the sponsored immigrant
Albeit fairly minimal - allowing for sponsor to be heard, their issues considered eg notifying last known address, consider relevant circumstances = in Mavi P.F. given, rejected argument for more elaborate process in decision making

* good authority for moderate P.F.

After P.F established, next issue is if Claimant was ~~entitled~~ ^{available} with an impartial

BIAS FRAMEWORK

Decision Maker?

legal maxim

Nemo judex in causa sua: cannot judge your own cause

"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?"

Process

- Step 1: Allegations of bias should be raised first with the decision-maker who may recuse him/ herself if this doesn't work...
- Step 2: Judicial Review

Keep in mind that an allegation of bias is SERIOUS – and therefore, attracts a high threshold. Mere suspicion is not enough.

PERSONAL BIAS

Direct Pecuniary Interest

Dimes v Grand Junction Canal Co

F: Chancellor making a decision about a canal permit. He held shares in the company applying for the permit and they would increase substantially = DPI

R: Any DPI in the outcome is not permitted. This rule is applied strictly, no matter how small the interest

Indirect Pecuniary Interest

Energy Probe v Canada (AECL)

F: Decision about renewing license for a nuclear plant in Ontario. Member of the board was a former shareholder, director and president to a company that supplied materials to the plants.

R: If one member of a board is biased, the entire decision fails but... the interest is too indirect

Other Material Interest

Obichon v Heart Lake First Nation No. 176 1998 FTD

F: A decision of a band council to evict someone from their house. The issue was that one of the councilors who made the decision had family members who were waiting to move in.

R: Non-pecuniary, but a "material interest" can quash a decision under bias

Personal Relationships with Parties

Committee for Justice and Liberty v National Energy Board 1987, SCC

F: Chair of the Board had been involved in the pipeline previously in discussions around their application and not on the board that approves it.

R: The participation of the Chair in this decision would be seen by the RP as bias → so he was disqualified from sitting on the panel.

RE Pinochet 1999 UKHL

F: Pinochet arrested in London. Chile wanted his extradited. 3/2 decisions. Lord Hoffman was on the panel but he worked for amnesty who was seeking his deportation.

R: Lead to RAB, so the decision was quashed and new trial ordered

Imperial Oil Ltd. v Quebec 2003 SCC

F: Land contaminated that was used by IO for 50 years. Water was contaminated. Ministry sued IO for failing to clean up. IO said they had an interest because then they wouldn't have to pay for clean up.

R: No bias, minister was acting in the public interest.

Prior Knowledge of the Dispute

Wewaykum Indian Band v Canada

F: Binnie, years before, had participated in a meeting for a land dispute between two first nation groups. Dispute ultimately came up to the SCC and was resolved 9-0. Losing band challenged decision because of Binnie.

R: Even if there was a slight RAB, a RP with knowledge of the S's process would know one judge could not taint a unanimous panel of 9

Attitudinal Predisposition
"Bad Attitude"

Turoczi v The Minister of Citizenship and Immigration, 2012 FCTD

F: No person from Hungary had ever been accepted by this adjudicator (but they had a really low acceptance rate over all)

R: Test is "what would an informed person, viewing the matter realistically and practically conclude", RP would have demanded more from the stats.

Elected Officials Cases

*Different test, because elected official are elected based on their platforms. Not the RP test but the, "closed mind test" a relaxed standard.

Party alleging disqualifying bias MUST establish that there is prejudgment of matter to extent that any representation at variance with view, which has been adopted, would be futile.

Old St. Boniface Residents Assn v. Winnipeg 1990 SCC

F: Councilor supported a development project. Moved it through the finance committee and then in the Community committee.

R: An elected official can only be disqualified if you are incapable of being persuaded and future representations are futile

Save Richmond Farmlands v. Richmond 1990 SCC

F: C. favours economic development than farmland. Made a statement that he would not change his mind, but he would listen to contrary view → he was elected on this basis.

Chretien v Canada 2008 FCRD

F: Judge made comments in media about the honesty of Chretien, and other officials.

R: Report was quashed.

CLOSED MIND

CASE

INSTITUTIONAL BIAS

reasonable apprehension of bias

Canadian Pacific Ltd v. Matsqui Indian Band, 1995: Will there be a RAB in the mind of a fully informed person in a substantial number of cases decided by the institution?

Policy Making

Geza v. Canada (Minister of Citizenship and Immigration) 2005 FCA

F: Increase in Roma applications from Hungary. They established a non-binding "lead-case" on Roma refugee claims. Got advice from ministry and a Roma lawyer, applicants agreed to participate in this "lead case" and their claims were rejected. The lead case initiative was designed to reduce the successful applications.

R: Yes, biased. A RAB can arise from the totality of evidence as opposed to single determinative facts

Thamatharem v Canada

F: Guideline 7: Witnesses were cross-adjudicated and these hearings were totally different than the normal procedure. Allowed the chair to initiate the question. It was alleged that this would have a bias and it should be a lawyer asking questions not a tribunal member.

R: Just because lawyers think this is not ok doesn't mean that it is going to cause problems of bias, promotes consistent practice and has an expedited process. No bias.

Overlapping Functions

Ocean Port Hotel LTD v. BC, 2001 SCC

R: It is always open to the legislature to authorize overlapping functions that would otherwise contravene the rule against bias → CL is ousted

Overlap in a single agency is often necessary

Sam Levy & Associates Inc. v. Mayrand, 2005 FCA

F: Superintendent with both investigatory and adjudicatory powers could not be said to have a reasonable apprehension of bias as he had delegated adjudicatory functions.

Currie v. Edmonton Remand Centre, 2006 ABQB

F: Prisoners can be charged with various offences in the system → charge included prison guards as the adjudicators

R: Institutional overlap created a RAB.

TRIBUNAL INDEPENDENCE

Comes from Judicial Independence, the key two elements are: **Tenure** and **Salary Rights**. There is tension b/w independence and accountability.

Valente: suggested that the guarantees for JI could also be applied to admin tribunals. Since then litigants have pushed for tribunals to be held to a high standard

Judicial independence

Tribunals do not require the same independence as Courts

TEST (Matsqui): Whether a reasonable, well-informed person having thought the matter through would conclude that an administrative decision-maker is sufficiently free of factors that could interfere with his or her ability to make impartial judgments. Must be applied in light of the functions being performed. The requisite level of institutional independence will depend on:

- The nature of the tribunal
- The interest at stake, and
- Other indices of independence such as oaths of office.

S.93 (1) Interpretation Act Canada → appointments at pleasure unless otherwise specified

S. 20 (1) Interpretation Act BC → appointments at pleasure unless otherwise specified

S.2-10 Admin Tribunals Act → Guidelines for chair and members

Canadian Pacific LTD v.

Matsqui Indian Band, 1995

SCC

F: M designed a tax regime for CP, they disagreed but skipped 2 admin appeal stages and went straight to FC for JR arguing no adequate remedy bc bias and independence → Non-FN members lacked security of tenure, uncertain remuneration thus may be concerned about decision adverse to band.

R: This was a very close call in the end it was decided that they did not have institutional independence, bc no financial security or tenure and appointment issues.

F: OPH lost liquor license for 2 days. Argued the Liquor Appeal Board was not independent enough.

R: Tribunal are NOT courts and there is NO general constitutional guarantee of tribunal independence

F: JPs exercise judicial functions directly related to the enforcement of law in the court system, though not judges the principle of judicial independence should extend to JPs

R: Test is whether a reasonable and informed person viewing the relevant statutory provisions in their full historical context would conclude that the court is independent

R: Constitutional principle of judicial independence should apply to the RTB as its jurisdiction was carved out of the jurisdiction of the ordinary court. If you move it to administrative tribunals, constitutional protection of judicial independence will go with it.

F: K was president of Nuclear Safety Commission and wanted to close plant during isotope crises. Minister said no because of concern around medical isotopes. M said K would be removed if she didn't follow the directive. Act said NSC member held office "during good behavior".

R: Position was held "at pleasure" and satisfied the PF for the appointment. Gov't is NOT legally prevented from removing appointees "at pleasure" for decisions they make

McKenzie v Minister of Public Safety and AG, 2006

BCSC

Keen v. Canada (AG)

SUBSTANTIVE REVIEW FRAMEWORK

INTRODUCTION TO SUBSTANTIVE REVIEW

How closely will judges scrutinize the outcome?

How likely will judges interfere if they perceive that something was wrongly decided?

2 standards:

- **Reasonableness:** deferential, if the decision of the DM is reasonable that it is justified and will stand. Doesn't have to be what the judge would have done but HAS to be reasonable
- **Correctness:** Not deferential, DM would have to make the exact same decision the judge would have done

SELECTING THE STANDARD (Dunsmuir Test)

Step 1: Prior Jurisprudence	Courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question (<i>Dunsmuir</i>)
Step 2: Standard of Review Analysis	<ul style="list-style-type: none"> • Deference and the application of the reasonableness standard will be the default, unless the question falls into a category where the correctness standard continues to apply • No longer a balancing test.... Ish (<i>Dunsmuir</i>)
Presumptively Correctness	<ul style="list-style-type: none"> • Constitutional questions (i.e. division of powers). • "True" question of jurisdiction (tribunal had statutory authority to make inquiry) <ul style="list-style-type: none"> ◦ <i>New Brunswick Liquor Co (1979)</i> – statutory interpretation ◦ <i>AB Teachers 2011</i>: Interpretation of the home statute = Reasonableness... UNLESS it falls into a category that Correctness applies... a question about time is not of central importance and is specific to that tribunal ◦ <i>Rogers Communication v SOCAN (2012)</i> Legislation had shared jurisdiction between the board and the court – Abella's dissent: Standard is reasonableness because of interpretation of home s. • Questions of law of "central importance" outside expertise of admin decision-maker (<i>Toronto v CUPE</i>) <ul style="list-style-type: none"> ◦ Precedential value requires uniform and consistent answers ◦ <i>Dunsmuir (2008); Pushpanathan (1988)</i> – Human Rights Context ◦ <i>Mossop (1993)</i>; Same-sex (Question of statutory interpretation) ◦ <i>Barrie Utilities</i>: correctness (pure statutory interpretation) • Questions regarding jurisdictional lines between tribunals • Note: correctness standard also applies to review for procedural fairness
Reasonableness will usually apply to	<ul style="list-style-type: none"> • Privative clause (i.e. statutory direction from Parliament or legislature indicating need for deference). • Discrete/ special administrative regime in which DM has special expertise (i.e. specific statutory contexts). • Nature of question (i.e. fact, discretion or policy ALSO mixed fact and law) <ul style="list-style-type: none"> ◦ <i>Canada (Director of Investigation and Research) v. Southam Inc. (1997)</i> • Tribunal interpreting its own statute <ul style="list-style-type: none"> ◦ <i>Telus Communication Company v. CRTC (2010)</i>
Step 3: If it doesn't fall into a category	Where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. Analysis MUST be contextual, dependent on a number of relevant factors: <i>Pushpanathan (1998)</i> <ul style="list-style-type: none"> • Presence or Absence of privative clause <ul style="list-style-type: none"> ◦ <i>Khosa</i> – Rothstein says no privative cause = default correctness (concurring opinion) ◦ Strong privative clause = greater deference ◦ Indication of legislative intent to defer to administrative actor's expertise • Purpose of the tribunal as determined by enabling legislation <ul style="list-style-type: none"> ◦ Do statute and particular decision at issue present "polycentric" purposes (balancing interests) ◦ How does the specific provision fit within the legislative scheme? ◦ Where "polycentric" purposes = greater deference ◦ Bi-polar (Opposition) between 2 discreet parties = less deference • Nature of question at issue, and; <ul style="list-style-type: none"> ◦ Greater precedential impact = greater assessment of expertise tilts towards the courts ◦ Factual question = greater deference ◦ Legal questions = less deference • Expertise of the tribunal <ul style="list-style-type: none"> ◦ May derive from: (1) specialized knowledge of topic; (2) Specialized procedures, or; (3) Non-judicial means of implementation ◦ Three steps to analyzing expertise: (1) Determine specialized knowledge of the decision maker; (2) Consider own expertise relative to tribunal; (3) Identify nature of the issue relative to expertise of decision maker
Step 4: Conclude	Is the standard Correctness or Reasonableness?

Applying the Standard - Reasonableness

1) Process	Concerned with justification, transparency and intelligibility of the decision making process
2) Outcomes	<ul style="list-style-type: none">• Whether the outcome falls within a range of possible, acceptable outcomes defensible with respect to facts/ law• Look to past jurisprudence on similar issues• It recognizes legislative intent to confer decision-making powers on an administrative
A) Reasons:	Reasons should justify the decision and show that the DM has considered: <ul style="list-style-type: none">o Relevant facts and lawo Applied legal principles and tests correctlyo Able to explain the decision so the individual and court can understando Must be transparent and show the basis for the outcome <p>NFLD Nurses – the adequacy of reasons is not a standalone basis for quashing a decision, must fall within the range of reasonable outcomes</p> <p>AB Teachers – the standard should be applied, as it was a question of law relating to the home statute<ul style="list-style-type: none">o No reasons given in this case but the issue of timelines was not raised before the DMo In some cases the court may send the matter back to the tribunal for reasons before finding that the decision was unreasonable</p> <p>Nor-Man Regional – Reasons are reasonable and sufficient – arbitrator explained why the remedy was given</p> <p>Catalyst Paper – Municipal By-Laws are given broad deference given legislative nature. In this case the council considered a broad range of both objective and social factors and was within the range of reasonable outcomes</p>
B) Municipal Bylaws	
C) Reasonable Outcomes:	<p>McLean v BC - In some cases, there may be only one reasonable outcome, in which case it must be the one adopted by the decision-maker.</p> <ul style="list-style-type: none">o But if there is more than one reasonable option: Decision maker can adopt any of them, then the Burden is on the JR challenger to show that the decision was unreasonableo How is this different than correctness? <p>Celgene Corp: Took into consideration consumer protection, but this was the most important part of the act (policy) Reasonableness because the board was interpreting their home statute and took into consideration the purpose and policy behind it.</p> <p>Agraira: 1) Was the interpretation of "national interest" reasonable? 2) Was the application of the interpretation to deny the relief requested reasonable?<ul style="list-style-type: none">o Courts cannot engage in a new weighing process of the factorso The reason, though brief, were justiciable, transparent and intelligible and showed all evidence was consideredo Decision is within a range of possible acceptable outcomes defensible in the facts and the law</p>
D) Charter issues	<p>Dore – Fundamental values, including those of the Charter, infuse the inquiry of an administrative decision-maker.</p> <ul style="list-style-type: none">o Reviewing applications of Charter values by decision makers must align with the Dunsmuir focus on deferenceo Reviewing court should not apply S.1 analysis to see whether tribunal decisions can be justified.o Unless, the court is considering the constitutionality of a law, in which case it will be reviewed for correctness.o Instead, the reviewing court should apply the contextual reasonableness standard, as the tribunal has to balance the Charter with its statutory objectives

Applying the Standard - Correctness

If we choose Correctness what does this mean? (Dunsmuir)	<ul style="list-style-type: none">• Courts will not show deference to the DM's reasoning process• Courts will undertake their own analysis and apply the judicially determined outcome over the decision• Presumes there is only one legally correct answer. Judges don't always agree.• Promotes consistency in the law
Pre Dunsmuir: Statutory Interpretation	<ul style="list-style-type: none">• Canada v. Massop (1993)<ul style="list-style-type: none">o Same-Sex Marriage issue → Question of statutory interpretation and therefore a question of lawo Decision will have a direct influence on society and relates to basic social values• Barrie's Public Utilities v. Canadian Cable TV (2003)<ul style="list-style-type: none">o CRTC's interpretation was incurred as it used policy of the leg. to ignore clear leg intento Bastarache (Dissent) Reasonable simplicity should be applied. Substituting the court's interpretation of statutory language eliminates the decision-maker's autonomy and expertise and their decision was a plausible construction of the leg.
Post-D - Statutory Interpretation Shared Jurisdiction	<ul style="list-style-type: none">• Telus Communication Company v CRTC<ul style="list-style-type: none">o Reasonableness applied in relation to question of statutory interpretation of the home statute• Northrup Grumman Overseas Service Corp v. Canada AG<ul style="list-style-type: none">o Correctness standard applied after considering past jurisprudence on the decisions of the Tribunal with respect to its jurisdiction under the enabling statuteo Tribunal's interpretation was incorrect and it could not hear claims by non-Canadian corporations• Rogers v. SOCAN - Shared jurisdiction with the Copyright Board led to a correctness standard<ul style="list-style-type: none">o Rebutts the presumption of reasonableness for an interpretation of the home statute

Substantive Review and the Charter

"An administrative decision is not a law that can be justified as a reasonable limit of Charter right under S.1" Dore 2012, expands on Slaight 1989

Step 1: Does the law infringe the Charter on its face? = Ordinary constitutional case

Step 2: Does an Administrative decision implicate a Charter right or value?

Step 3: Challenge the statute if it expressly or by necessary implication authorizes the infringement of the Charter

- Burden of proof on the agency or government defending the law
- Reviewed on a correctness standard - S.1 analysis... Slaight
- Constitutionally invalid law is of no force and effect: makes all decisions made under it invalid since there is no legal authorization
- If the law is upheld you can still challenge the decision itself

Step 4: Challenge the decision that implicated Charter rights or values (Dore)

Statute upheld under S.1 is constitutionally compliant, but Admin decision infringes Charter

- Each decision is a *prima facie* infringement of the Charter
- Post Dore: Each decision must be upheld on a reasonableness Review
- Burden of proof on the claimant to show why the decision is unreasonable
- Court should apply contextual reasonableness to see if a tribunal has balanced the Charter with its statutory objectives
 - Not reviewing the constitutionality of a law
 - Challenging the decision
 - Has the admin tribunal taken sufficient account of Charter values?

Statute does not authorize Charter Infringements

- But the admin decision has engaged Charter rights or values
- *Multani* - leg did not implicate a Charter infringement
- Decision did and was subject to constitutional scrutiny - Majority applied full Charter analysis here
- *Nova Scotia (WCB) v Martin* - provision said you have 4 week program to overcome chronic pain → infringed S.15 rights, board struck it down as unconstitutional. Canadians should be able to assert their rights and freedoms in the most accessible forum. The board has the best sense of how the constitution fits into their legislation, as long as they can decide questions of law
 - Is this explicit? In their statute
 - Implicit? Consider the statute as a whole and see whether deciding questions of law is necessary to fulfill its mandate; Whether the tribunal is adjudicative in nature;
- *Administrative Tribunals Act*: Opt in legislation
 - S.43 Discretion to refer question of law to court, including Charter challenges
 - S.44 Tribunal without jurisdiction over constitutional questions
 - S.45 Tribunal without jurisdiction over Charter issues
 - S.1 defines "constitutional question", meaning as when notice is required under s.8 of the *Constitutional Question Act*
- *Rio Tinto Inc. v. Carrier Sekani* - S.44 gave constitutional jurisdiction to the tribunal but could not allow to consider the adequacy of the duty to consult
- *Sechelt Indian Band v. BC* - Would give effect to the ousting of constitutional jurisdiction by virtue of S.44 ATA

Step 6: Can S.24(1) Charter remedies be applied to the tribunal

- Does a tribunal have the jurisdiction to grant Charter remedies generally as a "court of competent jurisdiction"?
- Test is the same as Martin
- As long as the tribunal can decide questions of law through their statute, implicitly or explicitly
- If the tribunal is a "court of competent jurisdiction" then consider whether it has the authority to grant the remedy that is sought
 - Look at the legislative intent in the statute
 - The board's structure
 - And its function

Statutory Standards of Review - Patent Unreasonableness

Administrative Tribunals Act S.58-59

- A complete code for the standard of review where they apply to the tribunal
- S.58 makes question of law subject to the privative clause attracts the standard of patent unreasonableness
- *Khosla*
 - Standard lives on due to legislation but its content must evolve according to devp in admin. law
- *Lavender Cooperative Housing*
 - Look to the legislation first before applying common law standard of review analysis

Lives on in Ontario too!

- *Shaw v. Phipps, 2010 Ont Div. Ct.*
 - Statutory standard should be what the legislature knowing the CL applicable at the time enacted

VAVILOV

Canada (Minister of Citizenship and Immigration) v Vavilov: The Supreme Court of Canada Gifts Administrative Law a New Standard of Review Analysis

BY REBECCA ROSSI · DECEMBER 26, 2019

<https://www.thecourt.ca/canada-minister-of-citizenship-and-immigration-v-vavilov-the-supreme-court-of-canada-gifts-administrative-law-a-new-standard-of-review/>

The much-anticipated Bell-NFL-Vavilov trilogy of administrative law appeals was released on December 19, 2019, providing answers to lawyers and legal scholars who have long speculated the fate of the standard of review to be applied in administrative decisions in Canada. The appeals, heard together in the Supreme Court of Canada (the “Court”) in December 2018, were intended to “provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (Application for Leave, 2018) [Dunsmuir].”

In giving judgement just over a year later, a majority of the Court used the decision in the third appeal, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], to do exactly that and articulate a new approach to determine the applicable standard of review.

Background Information

Mr. Vavilov was born in Canada. His parents were foreign nationals working on assignment for the Russian foreign intelligence service, posing as Canadians under assumed names. Vavilov was unaware of his parents’ secret until 2010, when they were arrested in the United States and charged with espionage.

Following his parents’ arrest, Vavilov attempted to renew his Canadian passport. His efforts proved unsuccessful until 2013, when he was issued a certificate of Canadian citizenship. In 2014, the Canadian Registrar of Citizenship cancelled his certificate. Under section 3(2)(a) of the *Citizenship Act*, children of a “diplomatic or consular officer or other representative or employee in Canada of a foreign government” are exempt from the general rule that individuals born in Canada acquire Canadian citizenship by birth. According to the Registrar’s interpretation of the Act, since Vavilov’s parents were “employees” or “representatives” of Russia at the time of his birth, he was exempt from the general rule. Vavilov applied for judicial review of the Registrar’s decision. According to the Supreme Court of Canada, the Registrar’s interpretation of the *Citizenship Act* was unreasonable, the decision was quashed, and the Court directed that Vavilov is a Canadian citizen (*Vavilov*, para 194-196).

SCC Majority Decision

While the facts are intriguing, it is the majority decision in *Vavilov* that has attained considerable interest, in that it has delivered clarity on the applicable standard of review analysis to be applied in administrative decisions. In what follows, I will provide an overview of the *Vavilov* standard of review analysis.

Step 1: Presumption of Reasonableness

The starting point of the majority’s “revised framework” for determining the standard of review a court should apply where the merits of an administrative decision are challenged is a “presumption of reasonableness,” which applies to all matters under judicial review (*Vavilov*, para 16). This is not much of a change from existing jurisprudence, given the entrenchment of deference in pre-*Vavilov* cases. However, what is new are the circumstances in which this presumption of reasonableness may be rebutted.

Step 2: Rebutting the Presumption of Reasonableness

The presumption of reasonableness review can be rebutted in two situations:

1. Where there is a clear indication of legislative intent that the reasonableness standard does not apply.

According to the majority, where the legislature explicitly prescribes through statute what standard courts should apply when reviewing decisions of a particular decision maker, the presumption of reasonableness may be rebutted (*Vavilov*, para 33). It follows that where a legislature has indicated that courts are to apply the standard of correctness, that standard must be applied (*Vavilov*, para 35).

The presumption of reasonableness may also be rebutted where the legislature has provided a statutory appeal mechanism from an administrative decision to a court. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, the majority held that a court hearing such an appeal is to apply appellate standards of review to that decision (*Vavilov*, para 37). For example, if the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (*Vavilov*, para 37).

This emphasis on statutory appeal rights departs from the Court’s jurisprudence, where the case law had not previously placed any weight on such rights. However, the Court commented that this shift is necessary to bring coherence and balance to the standard

applies to all matters under JR. This presumption can then be rebutted under two situations

- ① Where legislation explicitly prescribes through statute that the courts are to apply the standard of correctness and ② Where the Rule of Law requires the S.o.C. be applied - i.e. for certain types of legal questions, the SCC in *Vavilov* held S.o.C. will apply

In the recent and highly anticipated Bell-NFL-Vavilov (2019) SCC trilogy, the SCC articulated a new approach to determine the applicable S.o.R. Per *Vavilov*, ~~the~~ when an administrative decision is challenged, the court should apply a “presumption of reasonableness” which

of review analysis, where statutory appeal mechanisms are a clear signal of legislative intent with respect to the applicable standard of review (*Vavilov*, paras 38, 49).

2. Where the rule of law requires that the standard of correctness be applied.

The majority in *Vavilov* held that the rule of law requires courts to apply the standard of correctness for certain types of legal questions. When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or substitute its own view (*Vavilov*, para 54).

The majority provides a non-exhaustive list of the types of questions where a correctness standard is required:

1. **Constitutional questions:** questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under section 35 of the Constitution Act, 1982, and other constitutional matters require a "final and determinate answer" from the courts (*Vavilov*, para 55). On such matters, the standard of correctness must be applied.
2. **General questions of law of importance to the legal system as a whole:** these questions require a "single determinate answer." A correctness standard provides a greater degree of legal certainty than reasonableness review allows and hence, must be applied to these questions. The Court's jurisprudence provides examples of questions of law that have been held to be of central importance to the legal system as a whole, including: the appropriateness of limits on solicitor-client privilege or when an administrative proceeding will be barred by the doctrines of res judicata and abuse of process (*Vavilov*, para 60). Interestingly, the majority clarifies that the expertise of an administrative decision maker is no longer a consideration in identifying such questions. The majority also stressed that merely because a question is "of wider public concern" it may not amount to a question of central importance (*Vavilov*, para 61).
3. **Questions regarding the jurisdictional boundaries between two or more administrative bodies:** while administrative decisions are rarely contested on this basis, the majority held that the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another (*Vavilov*, para 64).

What is notable about the majority decision in *Vavilov* is that it eliminated two circumstances where the courts could previously rebut the presumption of

The SCC went on to provide a non-exhaustive type of questions where S.O.C is required : 1 - 3 . Apply facts to 1-3 , Y or N ?

Vavilov further provided the way to determine a reasonable review : ① + ②

Apply facts Y or N .

reasonableness: where an administrative decision raised a "true question of jurisdiction" and where a "contextual inquiry" determines that a correctness standard of review should apply (*Vavilov*, paras 65, 69).

Performing Reasonableness Review

The majority explains that the focus of reasonableness review must take into account both the decision maker's reasoning process for a decision, as well as the outcome that was reached (*Vavilov*, para 83). To determine whether a decision is "reasonable," a reviewing court must ask whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov*, para 99).

The burden is on the party challenging the decision to show that it is unreasonable. The reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov*, para 100).

The majority outlined two ways in which an administrative decision can be unreasonable:

1. An unreasonable decision is based on internally incoherent reasoning.

To be reasonable, a decision must be based on reasoning that is both rational and logical. According to the majority, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis (*Vavilov*, para 103). Decisions may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas or unfounded generalizations (*Vavilov*, para 104). Ultimately, a reviewing court must be satisfied that the decision maker's reasoning "adds up" (*Vavilov*, para 104).

2. A decision can be unreasonable in light of the legal and factual constraints that bear on the decision.

To be reasonable, a decision must be justified in relation to the law and facts that are relevant to the decision and operate as constraints on the decision maker in the exercise of its delegated powers. The majority highlights some elements that are relevant in evaluating whether a given decision is reasonable, including (*Vavilov*, para 106):

- the governing statutory scheme;

conclude

- other statutory or common law constraints on a decision maker;
- principles of statutory interpretation;
- the evidentiary record;
- submissions of the parties;
- an administrative body's past practices and past decisions; and
- the impact of the decision on an affected party.

If a decision fails to adhere to the preceding elements of reasonableness, a reviewing court may find the decision unreasonable.

While in many cases, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons for a decision be given at all, where the duty of procedural fairness or the legislative scheme mandates that reasons be given to an affected party but none have been given, that failure will generally require the decision to be set aside and the matter remitted to the decision maker (*Vavilov*, para 136).

Analysis

↑ Remedy for no reason given

The Supreme Court of Canada's decision in *Vavilov* ought to be praised for providing clarity to the substantive review analysis in administrative law. Since *Dunsmuir*, there has been widespread frustration and confusion about the standard of review analysis. Lawyers and legal scholars have spent considerable time debating when a particular administrative decision should be entitled deference and, if so, how to apply the reasonableness standard of review. Thanks to the Court's decision in *Vavilov*, we now have some answers.

What is notable about the *Vavilov* decision is the emphasis placed on the rule of law, which now plays a more prominent role in standard of review analyses. As well, the majority's guidance on how the reasonableness standard is to be applied – a standard that has long frustrated many in the legal community – deserves recognition.

The legal community has welcomed the decision in *Vavilov* with praise. Some lawyers have commented that the clarity provided by *Vavilov* will help both practitioners and clients, noting that in advising clients on the merits of a judicial review or appeal, lawyers will be able to give a stronger opinion as to what standard of review the court is likely to apply [1]. Others in the legal community have commended the Court's efforts in providing clarity on the role of statutory appeal mechanisms, which have not been given appropriate weight in previous jurisprudence.

Despite its praise, there is criticism of the majority decision in *Vavilov*. The concurring decision of Justices Abella and Karakatsanis in *Vavilov* notes that the majority's approach to the standard of review analysis "will be a roadblock to its promise of

simplicity" (*Vavilov*, para 252). Among their concerns with the majority's decision include its disregard for precedent and stare decisis, its invitation for courts to apply correctness review to legal questions where the administrative scheme includes a right of appeal and that it unjustifiably ignores the specialized expertise of decision makers, (*Vavilov*, paras 230, 245, and 254). With regard to the concurrence's latter issue, I find Justices Abella and Karakatsanis' opinion unconvincing. There are a number of compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular decision maker other than expertise, including a decision maker's ability to render decisions promptly and efficiently (*Vavilov*, para 29). The previous presumption of deference to a decision maker based on expertise is therefore overbroad.

Only time will tell whether *Vavilov* has succeeded in clarifying and simplifying the judicial review of administrative decisions.

[1] <https://nationalmagazine.ca/en-ca/articles/law/rule-of-law/2019/presumption-of-reasonableness>

① Eligible for J.R.? start w/
A pg. 2

- public body making a decision
- right to appeal - statutory
OR - JR
- which court? see C
- discretion to deny JR?

Conclude Y/N, what remedy
is X seeking - mention

② Determine Duty of Fairness Nicholson

(a) Is fairness required @ B-Step 5
trigger/ threshold (Knight) (Baker)
Y or N Decide level of PF
owed, B Step 6

(b) What is the content see B+A
of fairness Step 7, Step 7.5 (if
apply)

Exceptions = When duty not owed, Y or N
(See also B P.F. exemptions, B Step 4)

(c) Determine if X had See B
an unbiased decision-maker bias

- individual
- institutional
- tribunal

Conclude answers to (a)(b) 4

(c) Y or N Y factual, has duty
been met < given
deserve

(d) Remedies A - general

Discuss potential remedy and
cases. (no fairness = invalid decision)

⑤ Substantive review

(a) Standard of review

analyze R or C?
= previously Dzunmir follow B Substantive

= recent Varilov see Varilov Pg. 1

Decide which SoR applies.

(b) Decide if the
Decision was for C. Varilov
aka apply the standard

→ Reasons - justifiable?
→ Outcome - reasonable?

Dzunmir

Varilov: ① irrational reasoning = X R
② in light of factual/legal constraints = X R

Revisit remedies - B - specific
In conclusion

⑥ Charter issue (if applicable)
Substantive, see B Charter Substantive

Issue Roles Application Conclusion