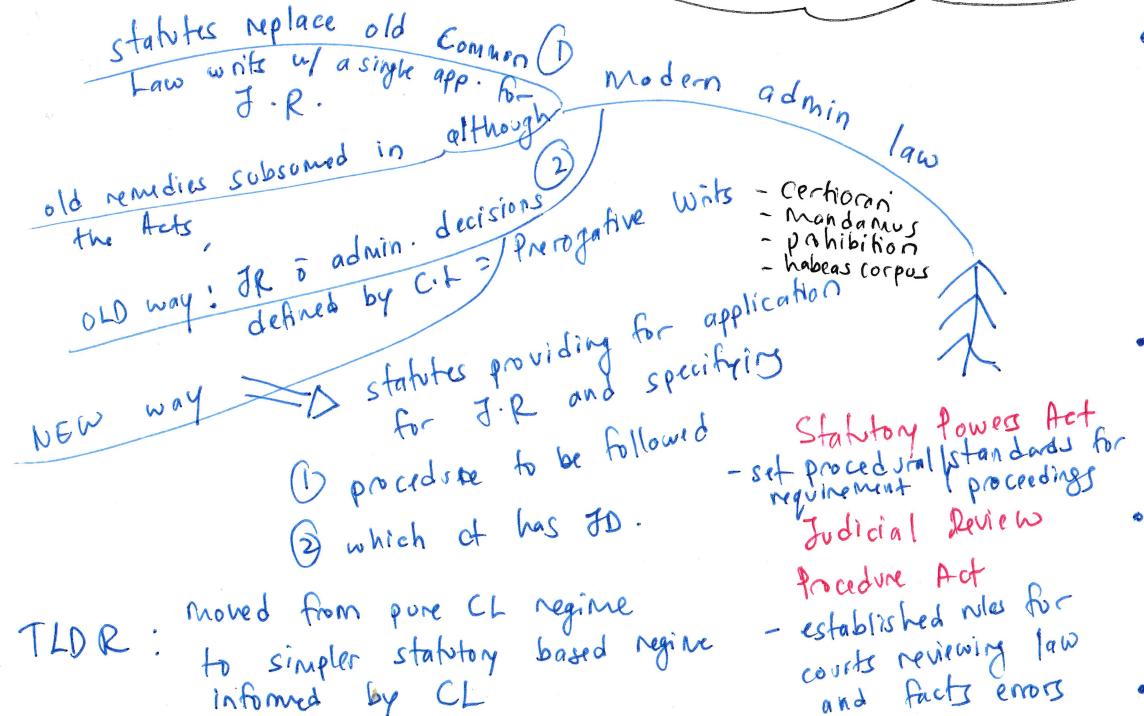
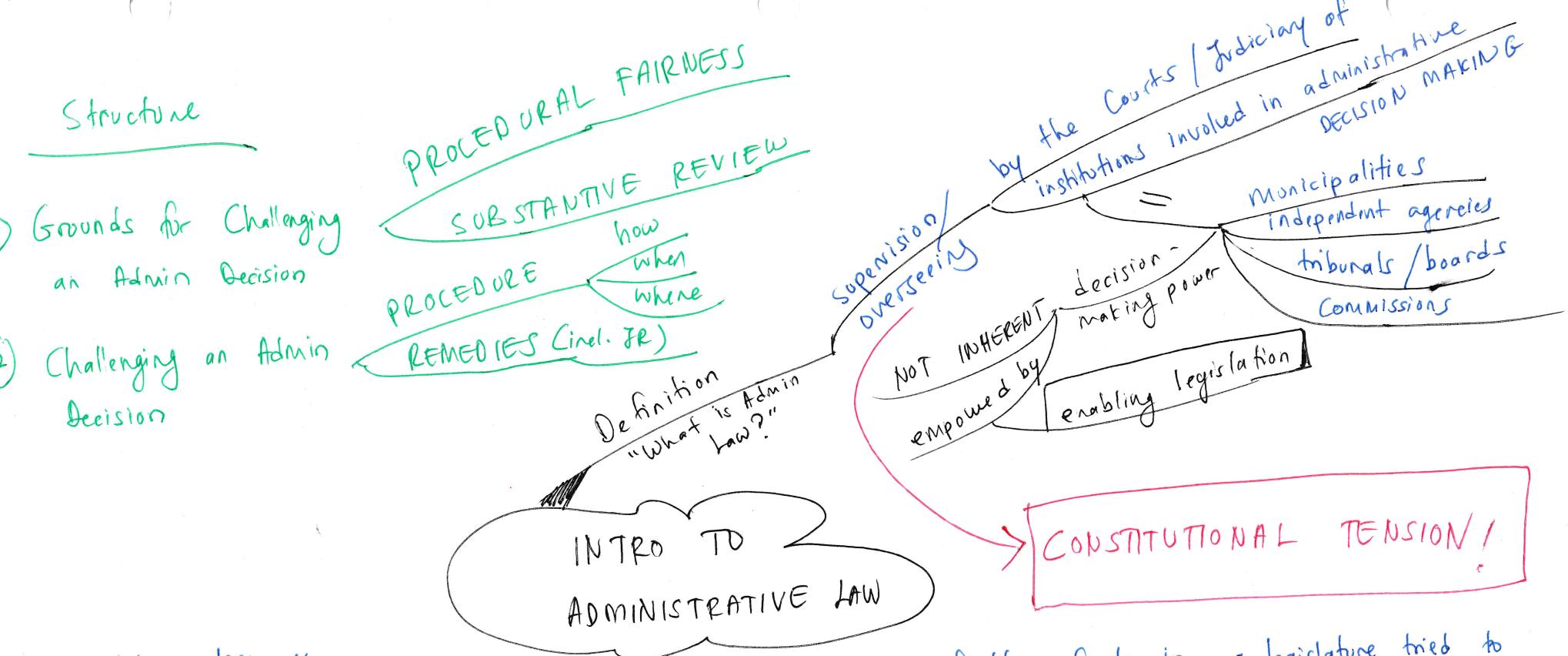


## Structure

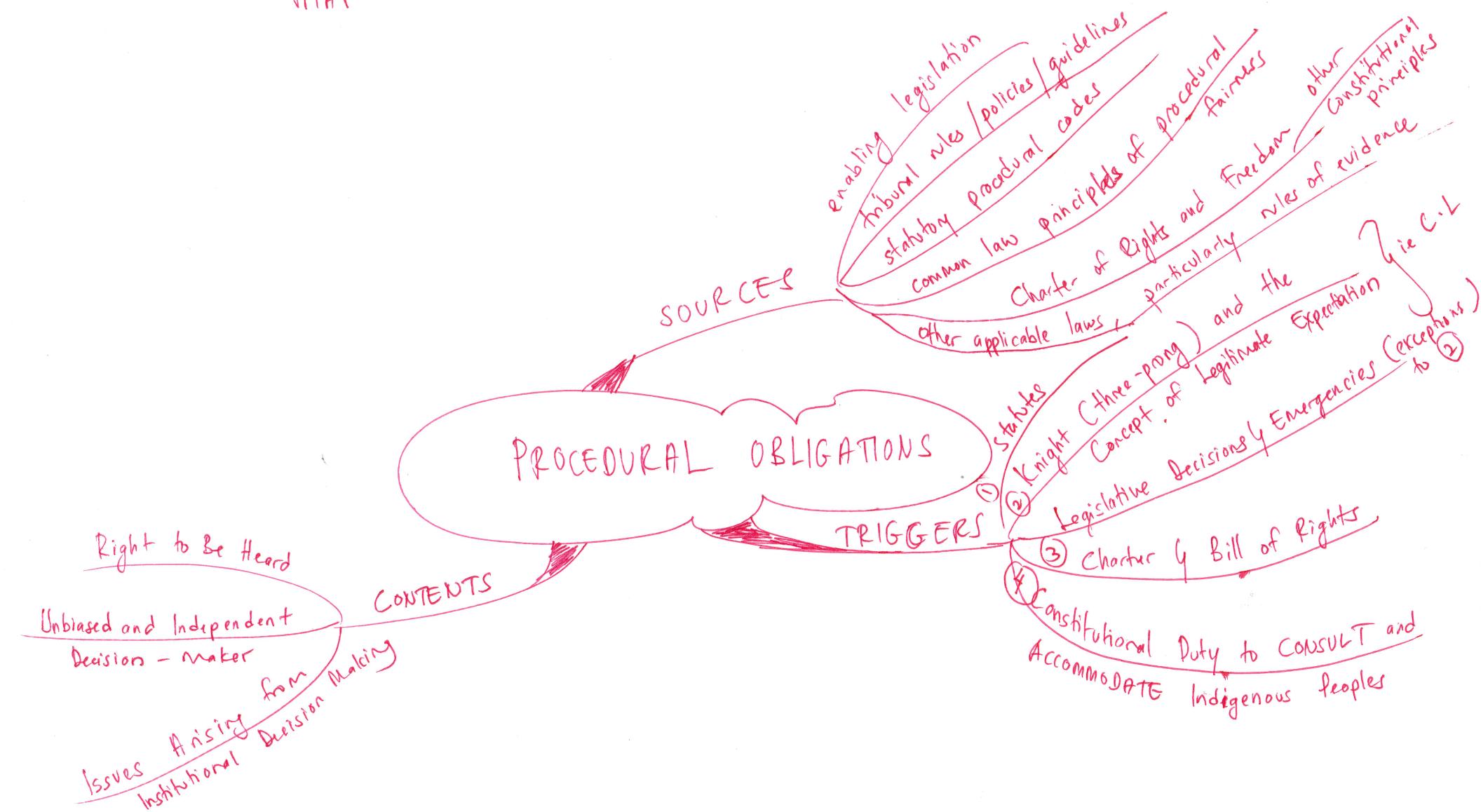
- ① Grounds for Challenging an Admin Decision
- ② Challenging an Admin Decision



- role of the Court in Admin. Law to ensure decision makers act w/in their legally - empowered boundary
- administrative decisions can be easily challenged "ultra vires"
- in 1960s & 1970s codification of procedures for administrative tribunals stated in Ontario
- nearly all provinces followed suit
- Legislature tried to distribute decision-making process
  - expediency
  - expert / technical
  - volume of decision
- "privative clauses" was introduced, trying to be IGNORED to judicial review
- largely ignored by the judiciary; the Constitution s. 96 (Crevier)
- Superior Courts have a constitutional role and inherent jurisdiction to review admin. decisions

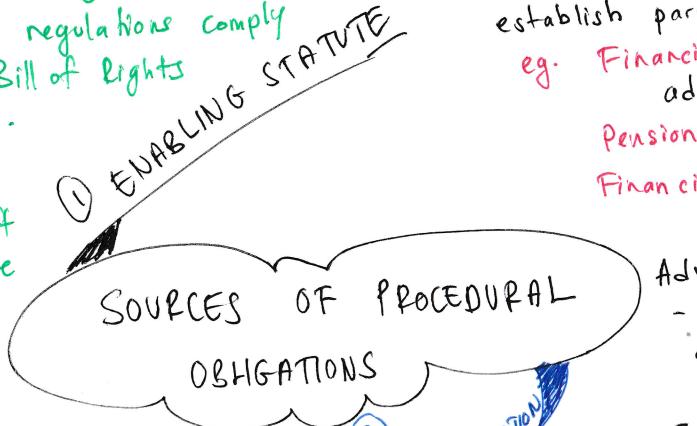
MAP

1.



## MECHANISMS OF ACCOUNTABILITY / SCRUTINY

- ① Many jurisdictions enacted laws that provides legislative Scrutiny of subordinate legislation ("stand permanently referred")
  - all new legislation laid before the legislature, with power to direct the executive to repeal or amend eg Manitoba's Regulations Act
- ② At the Federal Level, the ministry of justice is statutorily required to verify that statutes and regulations comply with rights and freedoms set out in Bill of Rights and Charter of Rights and Freedom.
- ③ Public Consultation = requirement to provide the public with notice of draft regulations for comment especially those particularly affected. see Ontario's Human Rights Code
- ④ Judicial Review =
  - a) Validity of regulations/rules may be challenged where statutorily prescribed mandatory steps for their effective enactment were not followed. Immeubles Port Louis Inc
  - b) Substantive challenge, eg. comply w/ Charter and other constitutional requirements.
  - c) JR due to ultra vires = must be within scope and limit conferred by the delegating act.
  - d) Strong presumption that the authorizing powers require the subordinate legislator to comply with the common law principle of PROCEDURAL FAIRNESS.



- An administrative decision maker first reference
- See if an affected individual is required by law to be afforded procedures, and if so, what they are.
- MAY set out a detailed list of procedural requirements

*Singh v Canada (MEI)*

- may also have to refer to a different statute that establish particular procedural requirements
- eg. Financial Services Tribunal  
Administrative pension proceedings  
Pension Benefits Act
- Financial Services Commission of Ontario Act  
enabling act of the Tribunal

### Advocacy Tip:

- being familiar w/ the enabling act is useful as decision makers must act w/in their statutory mandate
- understanding the objective/purpose of the statute will provide an advocate a 'theme' by which he/she can use to ensure their approach resonates w/ the decision-maker
- identify what is the normative policy choice of a particular statute, eg. providing income to injured workers, stability of capital markets, protecting the public, encouraging competition etc

- This delegation of rule-making powers to the executive raises a risk that those making the rules are not following the wishes and expectation of those who delegated the power.
- To minimize the risk, this "delegated legislation" is subject to various mechanisms of accountability.

Manitoba's Regulation Act  
Manitoba's Labour Relations Act

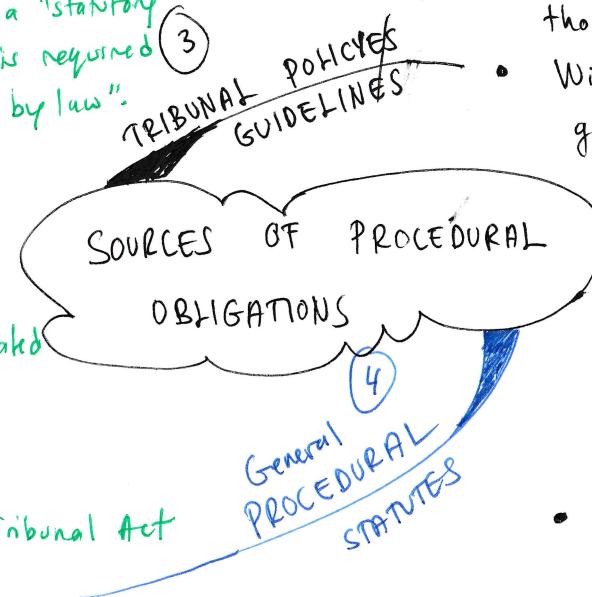
## Examples of Provincial Statutory Procedural Codes

### ONTARIO SPPA - Statutory Powers and Procedures Act

- conflict w/ enabling statute, SPPA prevails unless it is expressly provided in the other statute that it prevails SPPA
- recognized different tribunals require different approach
  - SPPA will apply to the exercise of a "statutory power of decision" where a hearing is required by or under a statute or "otherwise by law".

### ALBERTA APJA - Administrative Procedure and Jurisdiction Act

- no provision for general applicability
- tribunals will be subject to APJA designated by regulation
- provisions are not comprehensive



### BRITISH COLUMBIA ATA - Administrative Tribunal Act

- empowers Tribunals to make their own rules
- few procedural requirements
- must refer to enabling statutes to ascertain which ATA provisions apply, if at all

- Some provinces have statutory procedural codes
- Prescribe procedural standards for decision-makers falling within the ambit.
- Scope / applicability may be limited or modified by an authority's ENABLING st. and DELEGATED legislation, have to be read together

### QUEBEC AJA - Administrative Justice Act

- more detailed
- different procedural requirements for "adjudicative" and "administrative" tribunals

- Public authorities frequently issue guidelines and policies, including procedural aspects of decision making
- NOT LEGALLY BINDING aka "soft laws"
- Sometimes the power to enact these soft laws is provided for in the enabling statute, though not necessary.
- Will become legally binding if subject to governor in council approval and tabling in Parliament.

- Often plays a dominant role in a decision maker's decision making - it is observed that front-line decision makers rely almost exclusively on these guidelines, rarely referring to their enabling statutes

- **Baker** = Supreme Court relied on ministerial guidelines as a "useful indicator" in determining a reasonable interpretation of the minister's power

- **Bezaire** = judicial reliance on soft law to determine procedural issues; ON court relied on ministerial procedural guideline on school closings and on the school board procedural policy as evidence of what procedures were required by common law procedural fairness.

- Many tribunals now have jurisdiction over Charter and Constitutional questions

R v Conway

Nova Scotia (WCB) v Martin

- Tribunal's statute may address if it can hear Charter issues.

Charter of Rights and Freedom  
and  
Constitutional law

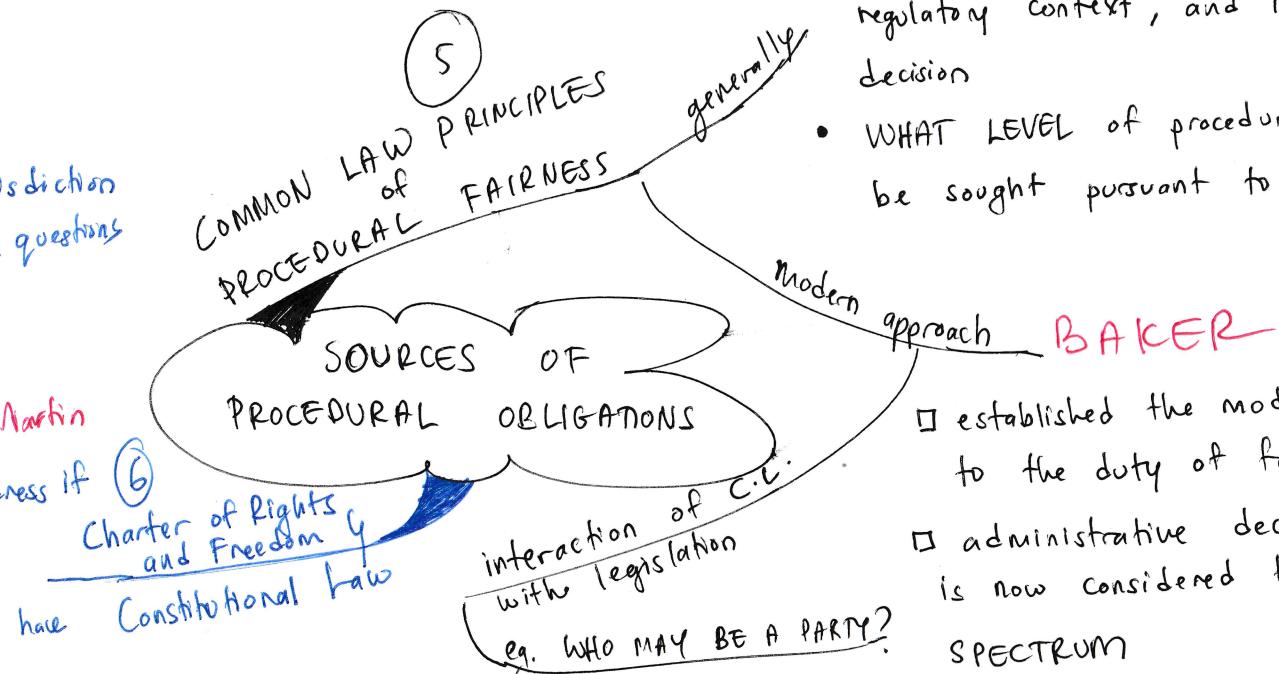
- If both Tribunal and Court have JD, Tribunal is obliged to exercise that JD.

However:-

- remedy sought must be within Tribunal's jurisdiction

(Courts retain JD over certain remedies)

- If Constitutional validity of applicability of an Act is raised in an administrative hearing, notice must be given to the appropriate Attorney General.



2. Clear legislative restriction will overrule procedural protections provided by C.L.

3. Only Charter or Constitutional rights can override legislative restrictions.

OCEAN PORT HOTEL

- Admin Law - procedural protection varies greatly depending on the context
- Context = type of interest at stake, regulatory context, and impact of the decision
- WHAT LEVEL of procedural fairness can be sought pursuant to "C.L.P.P.F"

BAKER

- established the modern CL approach to the duty of fairness
- administrative decision-making is now considered to be ON A SPECTRUM
- once an individual's "rights, interests, or privileges" are at stake, duty of fairness applies, the question then becomes one of degree.
- attempts to balance between
  - give effect to legislature's intention in crafting administrative processes (accessibility, efficiency, cost etc.)
  - protect affected individual's interest
- the 5 Baker principles gives basis of procedural protections

## ELABORATIONS OF THE MODERN DOCTRINE

[1990] KNIGHT v INDIAN HEAD SCHOOL DIVISION No. 19

- further rejection of the rigid categories or need to distinguish between judicial, quasi-judicial or administrative decisions
- expanded duty of fairness beyond office-holders dismissible only for cause
- set out THREE-PRONG factors as the THRESHOLD
  - Nature of the decision to be made
  - Relationship between the individual and the body
  - Effect of the decision on that individual's rights
- Embraced the concept that procedural fairness is a free-standing CL right, eschewing the need to find it express or implied on a decision-maker enabling statute (NOTE: 3/7 judges dissented and insisted it must be statutory and if not, then no duty)



**WARNING**

"Fairness" in Admin Law will always refer to the PROCEDURAL FAIRNESS that the authority act fairly in the course of making the decisions ≠ fairness of the actual decisions made. See DUNSMUIR (2008)

- Modern approach to CL duty of fairness evolves to be a question of DEGREE. See Baker.

Only if the body is deemed as exercising a JUDICIAL or QUASI JUDICIAL function initially there will be a right to NATURAL JUSTICE  
THEN any administrative or legislative decisions there will be NO RIGHT

- ① difficulty defining "judicial or "quasi-judicial"
- ② the "all or nothing" approach where successful = full protection and unsuccessful = no protection at all

1964 English House of Lords case of Ridge v Baldwin

1979

Canadian Supreme Court Nicholson v HNR

- Per Laskin CJ: "in the sphere of judicial or quasi-judicial = natural justice, in the sphere of executive or administrative, there is a GENERAL DUTY OF FAIRNESS"
- Subsequent cases "duty of fairness" came to replace natural justice as organizing principle in Admin Law, thus removing the need to differentiate whether judicial or quasi-judicial.

Most importantly, Knight also made a distinction between

① legislative and general decisions  
vs

② administrative and specific decisions

i.e. not all administrative bodies are saddled with the duty to act fairly

*Canada (AG) v Inuit Tapiriit of Canada (1980)*

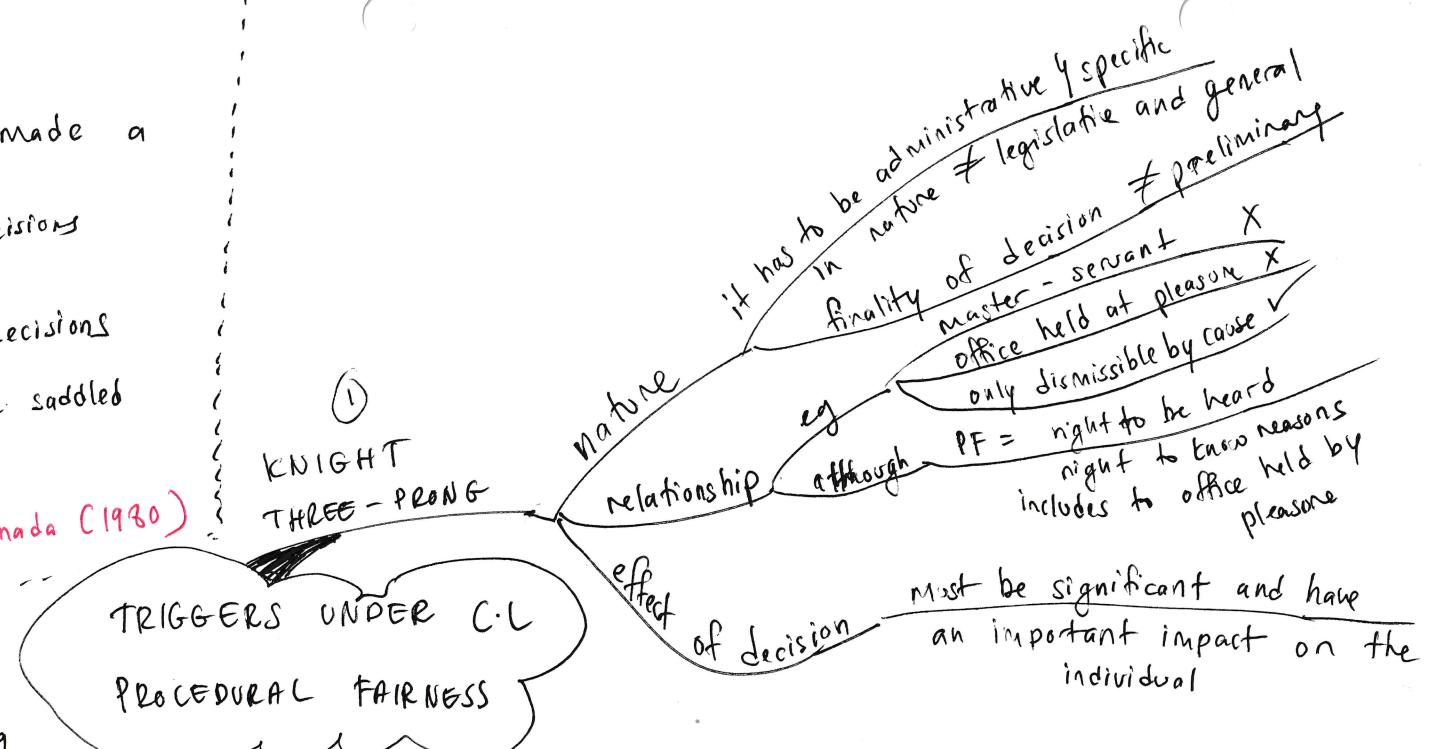
### Historically

- Started as a means of expressing the notion that an applicant's state in the outcome required procedural fairness
- also sometimes used to describe the nature of substantive interest for which PF protection is being sought

see WEBB and HUTFIELD

1972 Lord Denning in *R v LIVERPOOL* granted an entitlement to PF protection based on particular factual circumstances and laid the foundation (though not specifically mentioning the exact term)

### CANADIAN MODERN DOCTRINE



■ GP : an expectation of a hearing arising out

- ① express representation;
- ② a practice of holding such hearings; or
- ③ combination of both

■ S.C. of Canada have acknowledged this doctrine in

5 cases, although decided negatively in all of them; precise application of doctrine in Canada still unclear

- Reference re Canada Assistance Plan [1991]
- Old St. Boniface Residents Assn. Inc. v. Winnipeg (City) [1990]
- Canadian Union of Public Employees v. Service Employees Int'l. Union v. ON (Ministry of Labour) [2003]
- Sunshine Coast Parents for French v. Sunshine Coast (School) [1990]
- Mount Sinai Hospital v. Quebec (Ministry of Health & Social Services) [2001]

1966 R v Randolph

1985 Cardinal v Kent Institution

GP: see Canada v Inuit Tapirisat

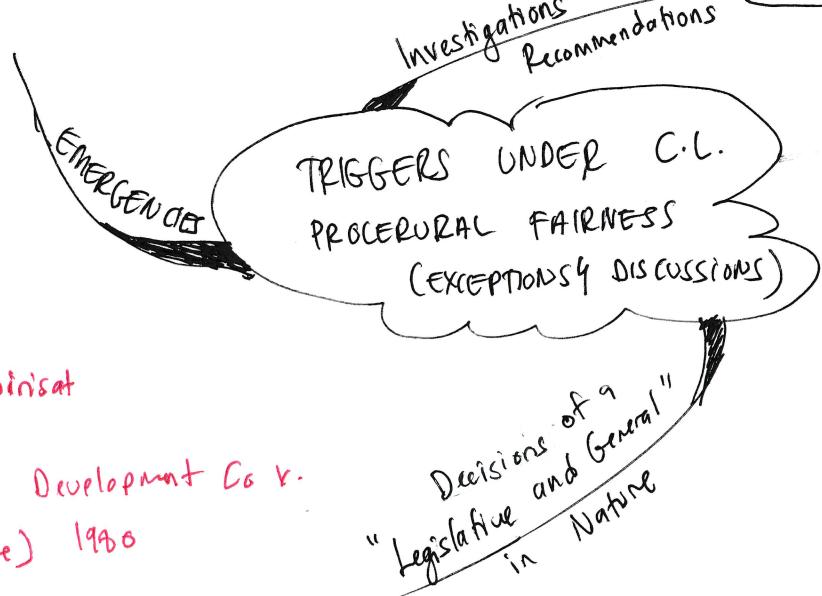
Homy Realty and Development Co v.  
Wyoming (Village) 1980

Canadian Association of Regulated  
Importers v Canada (AG) 1993

Issue of Individualized Decision Making  
Based on Exercise of Broad Discretionary Power

Idziak v Canada (Ministry of Justice) 1992

Suresh v Canada (M. & Citizenship & Immigration) 2002



English  
In re Pergamon Press (197)

Re Abel and Advisory Review  
Board (1979) Ontario CA

Dairy Producers Co-op Ltd v.  
Sask CHRights Commission (1994)  
(QB)

Hawish v Cundall (Sask QB)  
(1989)

Decisions Affecting Rights, Privileges or Interest

Webb v Ontario Housing Corp.  
Hutfield v. Board of SK GH District  
Court

## Authorson v Canada (AB) 2003

- Parliament enacted S.8-1(4) of the Department of Veterans Act to limit Crown's liability for interest

- Class action suit by veterans receiving benefits, claiming law imperable = deprived of enjoyment of property except by due process S.1(a) and right to fair hearing for determination of one's rights and obligations S.2(e)

SC held: federal legislation that conflicts with protectors of Bill is imperable UNLESS said legislation expressly declares it operates notwithstanding Bill of Rights

= Pl. has right to expropriate property, even w/out compensation, if its intention clear and in this case that intention was clear and unambiguous

BILL OF RIGHTS See: Reasoning

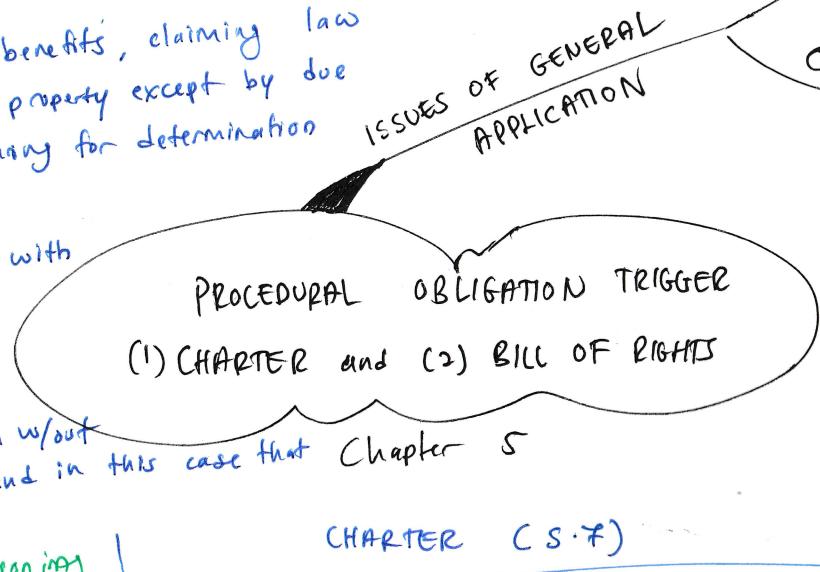
- The terms "individual" and "person"

**Central Cottage**: FCA S.2(e) of the Bill applicable to Corporations

- S.1(a) included the protection of the "enjoyment of property"

- The attachment in S.2(e) of procedural guarantees to the "determination of rights and obligations"
  - initially courts narrowly interpreted this to acts taking away "strict legal rights"

**Singh v Canada**: 3 members of the SC held the immigration authorities came w/in S.2(e) when deciding a convention refugee claim; "Determining" whether claimant had a statutory "RIGHT" to remain in Canada > expansive criteria than the "life, liberty, security of the person" basis



- The term "everyone"

**Irwin Toy v Quebec**: held S.7 protections attributable to natural persons only, hence "everyone" does not include corporations

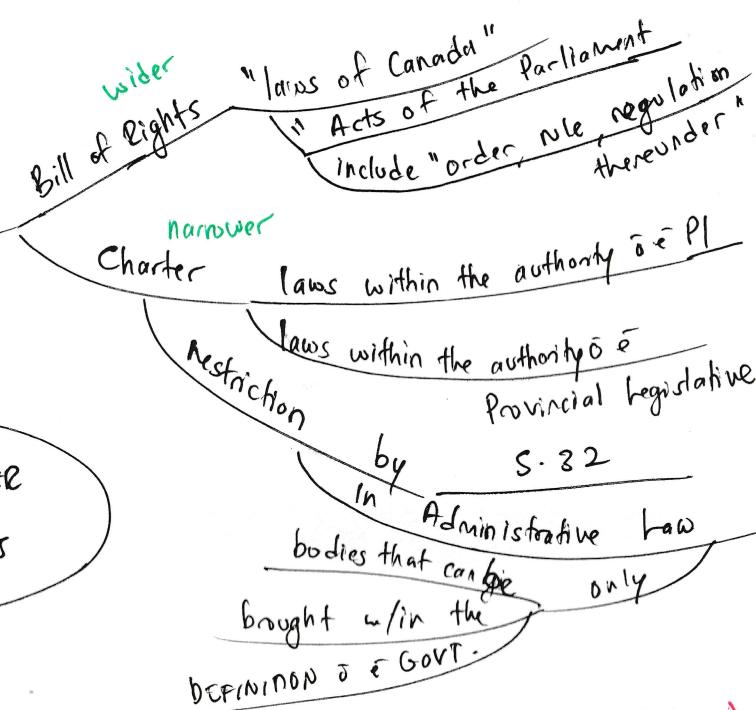
- Deliberately did not include 'property rights'

**785672 Ontario Inc v Canada (Minister of Revenue)**

↳ 3

- S.1 = subject to reasonable limits prescribed by law
- Bill does not have an equivalent provision, but

**Air Canada v Canada**: QB CA held: determining the demands of the principles of fundamental justice for the purpose of the Bill S.2(e), the Court should engage in a Charter S.1-style of balancing process akin to that set out in **R v Oakes**



## McKinney v Univ. of Guelph (1990)

Held: Universities were not government therefore not generally amenable to the Charter

## REASONING for Authorization

- ① Bill of Rights does not protect against the expropriation of property by passage of unambiguous legislation
- ② The only due process due to any citizen of Canada is the proposed legislation receive 3 readings in the Senate and House of Commons and receive the Royal Assent.
- ③ s.1(c) guaranteed a degree of procedural due process in the application of the law in an individualized, adjudicative setting, absent here
- ④ s.2(e) does not impose duty on Parliament to provide hearing before enactment of any legislation

**Singh c. Minister of Employment and Immigration , [1985] 1 SCR 177**

**Facts :** The appellants did not have the right to an investigation to determine their refugee status. The Immigration Appeal Board refused to review their records pursuant to s. 71 (1) of the *Immigration Act, 1976*. The Federal Court dismissed the subsequent applications for judicial review .

**Issues in dispute:** Does the procedure established by the Minister of Employment and Immigration to determine the status of a refugee is inconsistent with Article 7 of the *Charter* ? Is such a procedure a denial of fundamental justice? Does section 2 of the *Canadian Bill of Rights* apply?

**Court Discussion :** Under the procedure set out in section 45 of the *1976 Immigration Act*, an inquiry into whether a person is a refugee is necessary. This procedure was denied to the appellants and was a violation of the fundamental principles of justice. The court arrived at this determination by analyzing whether section 7 of the *Charter* applied to the appellants. Wilson J. states in paragraph 34 that immigration is a power of Parliament under s. 91 (25) of the *Constitution Act, 1867* and that the *Charter* applies. Counsel for the Minister admitted that the word "everyone" was broad enough to include the appellants. He also submitted that the rights found in section 7 form only a right as in the appeal *The Queen v. Operation Dismantle Inc.* , [1983] 1. FC 745. This right relates to the issues of death, arrest or physical liberty or incarceration. He says that this right does not protect those who are in violation of the principles of fundamental justice.

Counsel for the appellant maintained that if a refugee's right to remain in Canada is denied, his right to life, liberty and security of the person is impaired. In addition, the law allows immigration officers to deprive the appellants of their liberty in Canada, which is in direct violation of section 7 of the *Charter*. The appellants have also argued that denying these rights found in section 7 risks exposing the appellants to the danger of punishment or death in their country of origin. At paragraph 47, Wilson J. states that "the denial of such a right can only amount to an impairment of the person's security within the meaning of section 7".

**Conclusion :** The application and protection of the *Charter* does not just apply to Canadians and those with legal status, but to all people in Canada. The rights to life, liberty, and security apply to the appellants. The by. 71 (1) of the *1976 Immigration Act* is found to be inconsistent with the requirements of section 7 of the *Charter*. The appeal is allowed with costs. The seven appellants are referred to the Immigration Appeal Board for determination.

# CREVIER

Crevier v. A.G. (Quebec) et al

[1981]

- QB legislation created a Professions Tribunal to hear appeals from the disciplinary committees of most statutory professional bodies in the province.
- The Act included a privative clause that states in effect, the Tribunal's decisions were final, even those about the reach of the Tribunal's own jurisdiction.
- The Supreme Court asked:  
Was the Quebec Professions Tribunal acting like a s. 96 court?

s. 96 of the Constitution Act

- appt. of Superior Court judges is the sole responsibility of the Federal Gov.
- Supreme Courts have the inherent JD to review administrative decision-making
- Supreme Courts are immune from JR, cannot review other superior courts, only review inferior administrative tribunals

- Laskin C.J.:

① A provincial gov. may include a privative clause, if it allowed superior courts to review questions of JD, even if there was limited judicial review of all other kinds of decisions from the tribunal.

② BUT, if the wording of the privative clause purport to oust review by the superior courts over even strict JD 'I' questions, then the clause is  
NOT CONSTITUTIONALLY VALID.

## TLDR :

- Superior Courts have a constitutional role and inherent jurisdiction to judicially review administrative decision making, at least with respect to questions of JD.
- Privative clauses aiming to completely exclude JD of administrative tribunals is UNCONSTITUTIONAL as it attempts to create a DE FACTO SUPERIOR CT.
- A superior court is always constitutionally entitled to check the JD of an administrative tribunal, regardless how strongly a privative clause is worded

**CREVIER** - landmark

followed by

### BILBEAULT

D.E.S. Local 298 v. Bilbeault [1988]

### MacMILLAN BLOEDEL

MacMillan Bloedel Ltd v. Simpson [1995]

"the role of the Superior Courts in maintaining the rule of law is so important that it is given constitutional protection"

"The Superior Courts have a core or inherent JD which is integral to their operations. The JD, which forms this core, cannot be removed from the superior courts by either level of the government, without amending the Constitution"